NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 37

20 JUNE 1978

—

29 AUGUST 1978

RALEIGH
1979

CITE THIS VOLUME

37 N.C. App.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CRYSTAL POTTER v. NORTH CAROLINA SCHOOL OF THE ARTS

No. 7710IC743

(Filed 20 June 1978)

State § 8.2 — explosion of fog machine at School of the Arts — contributory negligence

In a tort claim action to recover for injuries suffered by plaintiff when a fog machine being used for a stage production at the School of the Arts exploded, the evidence supported the Industrial Commission's determination that defendant's employees were actionably negligent where it tended to show that plaintiff, a seventeen year old student at the school, was assistant stage manager for the production; the fog machine consisted of a large drum containing water heated by an element in the drum and into which a basket of dry ice could be lowered; when it was discovered that no dry ice was available, the machine was tested by using the contents of a fire extinguisher in place of the dry ice; the machine had no thermostat in violation of the city heating code; during the performance some two hours later, the theatre supervisor began to empty another fire extinguisher into the drum while plaintiff directed the fog onto the stage with a hose; the machine exploded; and the use of a sandbag to hold the lid in place on the machine indicated that school personnel were aware of the danger of pressure building up in the machine. Furthermore, plaintiff was not contributorily negligent where she did not take part in the test, and there was no evidence that plaintiff was responsible for turning the machine on or off or that she had any knowledge of how long it had been heating.

APPEAL by defendant from the North Carolina Industrial Commission. Order entered 21 April 1977 by the Full Commission. Heard in the Court of Appeals 2 June 1978.

This proceeding was brought under the Tort Claims Act, G.S. 143-291 *et seq.* Plaintiff alleged that she was severely burned when a fog machine being used backstage at defendant's Dome Theatre

exploded on 5 December 1974. Plaintiff was a boarding student at defendant school at the time of the incident. She was seventeen years old. At a hearing before a member of the Industrial Commission, plaintiff offered evidence tending to show that on 5 December 1974, she was an assistant stage manager for a production put on by her school. She had worked on the same production before. A faculty member and the theatre supervisor were present and responsible for the overall production. The stage manager was also an employee of defendant, although the work with this production was not part of her regular duties.

The fog machine consisted of a large drum containing water into which a basket of dry ice could be lowered. The lid on the drum was secured by placing a sandbag upon it. When the water was sufficiently heated using an electrical element in the drum, the addition of the dry ice produced fog which was directed onto the stage by a hose. The electrical element was not controlled by a thermostat. Normal operation of the machine involved one person to handle the dry ice and another to direct the fog to the proper place using the hose.

On the night of the performance, the stage crew discovered that there was no dry ice. When a substitute machine of a different design malfunctioned, someone suggested using an alternative form of CO_2 in the original machine. At approximately 8:00 p.m. the machine was tested by emptying the contents of a fire extinguisher into it. The results were satisfactory. The machine was left plugged in. During the performance some two hours later, on the cue for fog, the supervisor of the theatre began to empty another fire extinguisher into the drum. Plaintiff, with her back to the machine, directed the fog onto the stage. When the drum exploded, it blew scalding water onto her body causing first and second degree burns. She was treated at North Carolina Baptist Hospital for several weeks. She has permanent scars on her right arm, her back and her leg.

The hearing commissioner found that employees of the State, acting within the scope of their employment, were negligent in allowing the heat to build up in the machine between the time it was tested and the time it was used, in using the machine with no thermostat, and in using the machine without duplicating the conditions of the successful test. He found that plaintiff was not con-

tributorily negligent and awarded $25,000 in damages. Upon appeal to the Full Commission, the findings of fact and conclusions of law of the hearing commissioner were adopted, and his decision was affirmed.

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

William G. Pfefferkorn and Jim D. Cooley, for plaintiff appellee.

VAUGHN, Judge.

Defendant states in its brief that "[i]t is not our position that the acts specified by the Industrial Commission did not occur, but that these acts were not negligent acts in the circumstances of this case and that the evidence does not support such a finding." Thus the only questions presented to us concern the sufficiency of the Commission's findings of fact to support its conclusions concerning negligence and contributory negligence. *See Bailey v. N.C. Dept. of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28 (1968); *Tanner v. Dept. of Correction*, 19 N.C. App. 689, 200 S.E. 2d 350 (1973).

Defendant correctly points out that it should be held liable only for injuries which were reasonably foreseeable from use of the machine under these conditions. *Bennett v. Southern Ry. Co.*, 245 N.C. 261, 96 S.E. 2d 31, 62 A.L.R. 2d 785 (1957), *cert. den.*, 353 U.S. 958, 1 L.Ed. 2d 909, 77 S.Ct. 865. It then contends that since the machine worked under test conditions at 8:00 p.m., the defendant's employees had no reason to anticipate any danger of explosion later in the evening just because the water had continued to heat in a machine without any thermostat controls. The evidence showed that the machine did not conform to the Winston-Salem Heating Code which required it to have a thermostat. In some circumstances, violation of a safety ordinance is negligence per se. *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711 (1967). Even were this not so, proof of violation of a safety ordinance is evidence of negligence. In either event the Industrial Commission had ample evidence before it to find that defendant's employees violated their duty of care to plaintiff. Thus if the facts as found by the Commission show that an explosion was a foreseeable risk from the use of the machine under the conditions

found during the performance, then the conclusion that defendant's employees were negligent has been fully supported.

It is an elementary concept of science that the pressure inside a closed container increases as the temperature of the liquid or gas contained in it increases. It is also a matter of common knowledge that the longer one applies heat to a liquid or gas, the hotter that liquid or gas will grow. Just as the lid will begin to rattle when a covered pot is left too long on the stove, the top of the fog machine was bound to become insecure if too much heat was allowed to build up inside the drum. Thus it was foreseeable that an explosion could occur if the heat of the contents was not controlled. The Commission found that sandbags were normally used to hold the lid in place. This indicates an awareness by the school personnel of the danger of pressure buildup in the machine. If defendant's employees were on notice of the danger and continued to heat the water so as to increase it, then these facts support a finding of actionable negligence on their part.

The defendant next contends that if these actions constituted negligence on the part of its employees, then they must also constitute negligence on plaintiff's part in that she had knowledge, capacity and duties similar to those of the negligent employees. We point out, however, that the Commission found from competent evidence that plaintiff did not take part in the test of the machine. Moreover, Susan Summers, the stage manager, testified that plaintiff "was a student helping out . . . . Her job was to do what I or Mary Wayne told her to do." At the time of the explosion she was going about her assigned duties as Mary Wayne, the supervisor of the Dome Theatre, tended to the machine. No evidence showed that she was at any time responsible for turning it on or off, or that she had any knowledge of how long it had been heating. In *Moody v. Kersey*, 270 N.C. 614, 155 S.E. 2d 215 (1967), the Court held that where a plaintiff engaged in his own work stayed on the job even after he overheard his supervisor report a condition which later proved to be unsafe, he was not contributorily negligent as a matter of law. The Court pointed out that he had no reason to believe that his supervisor would expose him to danger from an unsafe condition. *See also Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966). A seventeen-year-old girl should equally be able to rely on the employees of her school not to expose her to danger and in the absence of evidence that she

was aware of all the facts which made up negligence on their behalf, she should not be held contributorily negligent as a matter of law. Since the Industrial Commission's findings of fact do not compel the conclusion that plaintiff failed to exercise due care for her own safety, the conclusion that there was no contributory negligence on her part is without error.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. B. B. PASSMORE

No. 788SC127

(Filed 20 June 1978)

1. Criminal Law §§ 80, 81— photostatic copy of business record

A photostatic copy of a computerized bank report was admissible pursuant to G.S. 8-45.1, if the original report was admissible, where a bank officer identified the exhibit as a photostatic copy of an unpostable report and testified that he made a copy after getting someone to produce the original through using the computer.

2. Criminal Law § 80.1— computerized business records

In a prosecution for the intentional issuance of two worthless checks, a proper foundation was laid for the admission of a computerized bank report showing that two checks drawn on defendant's account were returned for insufficient funds and a computerized monthly statement of defendant's account where a bank officer identified the report as an unpostable report, testified that he was familiar with unpostable reports and that such reports are generated daily, and interpreted the report for the court, and where the officer identified the statement of defendant's account and related its contents.

3. Attorneys at Law § 4— testimony by attorney

An attorney was not barred by the Disciplinary Rules of the Code of Professional Conduct from testifying in a prosecution for the issuance of two worthless checks where the attorney represented the prosecuting witness in attempting to procure payment by defendant of the debts for which the checks were given, and the trial court stated that the attorney was conferring with the district attorney during the trial but the attorney had no official responsibility in the conduct of defendant's criminal trial. Disciplinary Rules 5-101, 5-102.

4. Criminal Law § 34.6— issuance of another worthless check—competency to show knowledge

In a prosecution for the issuance of two worthless checks in October 1976, testimony by the prosecuting witness that in September 1976 defendant issued a check to his business which was returned for insufficient funds was admissible to show the status of defendant's account and defendant's knowledge thereof immediately before he wrote the checks at issue in the present case.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 13 September 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 31 May 1978.

Defendant was charged with the issuance of two checks with knowledge that he did not have sufficient funds in his account to pay said checks upon presentation. The defendant pled not guilty to each charge whereupon the State offered evidence tending to show the following:

The defendant is a used car dealer doing business as P & S Auto Sales in Carolina Beach, North Carolina. On 7 October 1976 the defendant purchased two automobiles from Eastern Auto Auction in Goldsboro, North Carolina. In payment for the automobiles the defendant issued two checks payable in the amounts of $1,095 and $2,280 and drawn on account number 0401713701 of the Bank of North Carolina, N.A., at Carolina Beach. The defendant signed each check as agent for P & S Auto Sales. On the same day the checks were deposited by Russell Vernon Lynch, the operator of Eastern Auto Auction, in the company account at Wachovia Bank & Trust Company. Ten to twelve days later, the checks were returned for insufficient funds. Lynch immediately notified the defendant that the checks had been returned and sent his attorney, Roland C. Braswell, to collect the debts. When Braswell confronted the defendant with the worthless checks, the defendant explained that he wrote the checks knowing that he had insufficient funds in his account from which to pay them, but intending to deposit funds to cover the checks before presentation.

As of 1 October 1976 the account of P & S Auto Sales reflected a balance of $136.11. On 6 October 1976 the balance had decreased to $71.11. A statement recording all transactions regarding the account in September of 1976 was mailed to the defendant in the latter part of that month.

The defendant offered evidence tending to show that on 7 October 1976 when he issued the two checks herein concerned he thought he had $4,700 to $4,900 on deposit in the account of P & S Auto Sales.

The jury found the defendant guilty of both charges of issuing worthless checks. From judgments imposing 6 months imprisonment for each conviction, suspended upon payment to Eastern Auto Auction of the amounts of $2,280 and $1,095, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill and Assistant Attorney General William B. Ray, for the State.

Hulse & Hulse, by Herbert B. Hulse, for the defendant appellant.

HEDRICK, Judge.

The defendant first assigns as error the admission of State Exhibits 4 and 5. State Exhibit 4 was a photstatic copy of a computerized report from the operations center of the Bank of North Carolina. The report disclosed two checks drawn on account number 0401713701 for $1,095 and $2,280 which were returned for insufficient funds. State Exhibit 5 was a monthly statement of the account of P & S Auto Sales for the month 30 September through 29 October 1976 which reflected a balance on 6 October 1976, the day before the defendant issued the checks, of $71.11. The defendant contends that the State failed to establish a proper foundation prior to the introduction of these exhibits.

[1] According to G.S. 8-45.1 a photostatic copy of a business record, "when satisfactorily identified, is as admissible in evidence as the original itself in any judicial . . . proceeding." *See State v. Shumaker*, 251 N.C. 678, 111 S.E. 2d 878 (1960). State Exhibit 4 was identified by Walter W. Vatcher, an Assistant Operations Officer with the Bank of North Carolina, as a photostatic copy of an unpostable report. Vatcher testified that he "made a copy at the center after getting someone to produce the original through using the computer." We think this testimony brought the copy within the terms of G.S. 8-45.1. Consequently, if the original computerized report would be admissible in evidence, then State Exhibit 4 was properly admitted.

[2] In *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973), our Supreme Court confronted the question of whether computer printout sheets of business records stored in electronic computers are admissible under an exception to the hearsay rule. Justice Huskins, speaking for the Court, wrote the following:

> We therefore hold that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

283 N.C. at 636, 197 S.E. 2d at 536. *See also State v. Stapleton*, 29 N.C. App. 363, 224 S.E. 2d 204, *appeal dismissed*, 290 N.C. 554, 226 S.E. 2d 513 (1976); 1 Stansbury's N.C. Evidence, § 155 (Brandis Rev. Supp. 1976).

Prior to the admission of State Exhibit 4 into evidence, Walter W. Vatcher testified that he was the Assistant Operations Officer with the Bank of North Carolina; that he had worked for the bank for 13 years; that he was familiar with unpostable reports; and that such reports are generated daily. Vatcher then interpreted Exhibit 4 for the court. Vatcher also identified State Exhibit 5 as a monthly statement of the account of P & S Auto Sales and related its contents. In our opinion Vatcher's testimony provided an adequate foundation under the standards set forth in *Springer* for the admission of each exhibit.

[3] The defendant next assigns as error the trial court's denial of his several motions regarding a State witness, Roland C. Braswell. The defendant contends that since Braswell represented the prosecuting witness, Russell Lynch, in his dealing with the defendant and assisted the district attorney in the presentation of the State's case, he was barred from testifying by the Disciplinary Rules of the Code of Professional Conduct. Disciplinary Rule 5-101, which the defendant contends was violated by Braswell's appearance as a witness in this case, ad-

monishes an attorney against accepting employment when he knows that it will be necessary for him to testify on behalf of his client. Disciplinary Rule 5-102 prescribes that an attorney who after accepting employment is confronted with the necessity of appearing as a witness for his client should withdraw from his representation. Braswell's only connection with the present case was his representation of Lynch in attempting to procure payment of the defendant's obligations to Eastern Auto Auction. While the trial judge stated that Braswell was "conferring with the District Attorney" at one point during the trial, Braswell had no official responsibility in the conduct of the trial of the defendant on criminal charges. Thus, the terms of the Disciplinary Rules are clearly inapplicable and *Town of Mebane v. Insurance Co.*, 28 N.C. App. 27, 220 S.E. 2d 623 (1975), cited by the defendant, is distinguishable.

[4] Finally, the defendant contends that the trial court erred in admitting evidence of another offense committed by the defendant. The exceptions upon which this assignment is based refer to the testimony of Russell Lynch that in September of 1976 the defendant issued a check to him for $2,020.00 which was returned for insufficient funds. The law applicable to this assignment of error is stated in 1 Stansbury's N.C. Evidence, § 91 at 289-90 (Brandis Rev. 1973):

> Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.

In the present case the defendant had testified that in September he had on deposit in his account "in the neighborhood of $19,000.00 or $20,000.00" and that he was unable to recall whether he wrote a check on 11 September 1976 to Eastern Auto Auction which was subsequently returned for insufficient funds. In our opinion, the evidence challenged by this assignment was not for the sole purpose of impeaching defendant's character but was admissible to show the status of defendant's account and defendant's knowledge thereof immediately before he wrote the checks at issue in this case. *State v. Cruse*, 253 N.C. 456, 117 S.E.

2d 49 (1960). The defendant has failed to show any prejudicial error in the trial court's rulings with respect to this assignment.

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

No error.

Judges PARKER and MITCHELL concur.

JOAN B. CARROLL v. McNEILL INDUSTRIES, INC.

No. 7727DC728

(Filed 20 June 1978)

1. Accounts § 2— account stated—defense of mistake

In an action by plaintiff to recover liquidating dividends where defendant claimed by way of set-off that plaintiff owed defendant $3000 on an open account loan, the trial court properly denied defendant's motions for summary judgment and directed verdict where defendant claimed that plaintiff's signature on an audit statement and the entry of $3000 in plaintiff's books as an account payable established as a matter of law the existence of an account stated between the parties, but plaintiff alleged that her signature on the audit slip was intended only to acknowledge her receipt of the $3000 from defendant and thus raised the defense of mistake.

2. Accounts § 2— account stated—admissibility of parol evidence

Where defendant claimed that plaintiff's signature on an audit statement and the entry of $3000 in plaintiff's books as an account payable established as a matter of law the existence of an account stated between the parties, but plaintiff contended that she signed the audit slip under the mistaken belief that it merely acknowledged her receipt of the $3000 from defendant, such testimony was sufficient evidence of mistake of fact to prevent the formation of the agreement requisite to the creation of an account stated, and parol evidence was therefore admissible and competent to attack the validity of the account stated.

APPEAL by defendant from *Phillips (J. Ralph), Judge*. Judgment entered 26 May 1977 in District Court, GASTON County. Heard in the Court of Appeals 31 May 1978.

Plaintiff instituted this action against defendant corporation to collect liquidating dividends on the 400 shares of stock she

owned in defendant. At the time of the filing of this action, her share of the liquidating dividends was $500.00. At the time of trial, this amount was $1,760.00.

Defendant answered, admitting plaintiff's entitlement to liquidating dividends, but claiming by way of set-off that plaintiff owed defendant $3,000.00 on an open account loan.

In reply, plaintiff denied that she owed defendant any amount of money.

Prior to trial, both parties duly filed motions for summary judgment. At the hearing on said motions, the parties stipulated, *inter alia*, that plaintiff owned and operated, as a sole proprietor, Joan's Kitchen; that Joan's Kitchen received from defendant $3,000.00 of which none has been repaid; that the books and records of Joan's Kitchen listed the $3,000.00 as payable to defendant; and that plaintiff signed an audit slip, mailed to her by defendant's accountants, which reads, in pertinent part, as follows:

> "According to our records, the balance receivable from you as of 12/29/74 was $3,000.00. If this agrees with your records, please sign this confirmation form in the space provided below; if it does not agree with your records, do not sign below but explain and sign on the reverse side."

In an earlier document filed by plaintiff in response to defendant's request for admissions, plaintiff stated that her signing of the audit slip was not the admission of a loan or any amount owed, but only that the records of McNeill Industries, Inc. show that $3,000.00 was outstanding. Both motions for summary judgment were denied.

At trial, plaintiff's evidence tended to show that she left her job with defendant to open Joan's Kitchen. During a three month period in 1974, Joan's Kitchen received $3,000.00 from defendant. Nothing was said about this money being a loan that must be repaid, and no note was signed. Defendant's bookkeeper, Ruth White, kept the books for Joan's Kitchen in her spare time. Plaintiff testified that she received the statement from the auditing firm, and after being told by defendant's vice-president that it merely stated that defendant had given plaintiff $3,000.00, plaintiff signed and returned the statement. Plaintiff further testified that, at the time she signed the audit slip, she did not feel that it

was an agreement that she owed defendant the money. She thought it was merely to show where the money had gone.

At the close of plaintiff's evidence, defendant moved for a directed verdict on the ground that the evidence established as a matter of law that there was an account stated between plaintiff and defendant as to the $3,000.00 by reason of the auditor's statement signed by plaintiff. The trial court denied the motion.

Defendant's evidence tended to show that defendant intended the $3,000.00 given to plaintiff to be a loan and that in the telephone conversation with defendant's vice-president, plaintiff had acknowledged that she owed the money to defendant.

The jury returned a verdict finding that there was no account stated between plaintiff and defendant, and that plaintiff did not owe defendant any money. The court denied defendant's motion for judgment n.o.v. and entered judgment awarding plaintiff $1,760.00 in liquidating dividends. Defendant appealed.

Harris and Bumgardner, by Don H. Bumgardner, for the plaintiff.

James, McElroy & Diehl, by James H. Abrams, Jr., for the defendant.

MARTIN, Judge.

[1] Defendant contends that the trial court erred in denying its motions for summary judgment and directed verdict for the reason that the signed audit statement and the entry of the $3,000.00 in plaintiff's books as an account payable established, as a matter of law, the existence of an *account stated* between plaintiff and defendant. We cannot agree.

On the subject of accounts stated, our courts have declared:

> "To constitute a stated account there must be a balance struck and agreed upon as correct after examination and adjustment of the account. However, express examination or assent need not be shown—it may be implied from the circumstances. (citation omitted.)
>
> "An account becomes stated and binding on both parties if after examination the parties sought to be charged unqualifiedly approves of it and expresses his intention to pay it. (citation omitted.) The same result obtains where one of

the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due. . . ." *Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503 (1941).

> " 'An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of one or the other. . . .' An account stated operates as a bar to any subsequent accounting except upon a specific allegation of facts constituting fraud or mistake." *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962).

Guided by these principles, we are of the opinion that the auditors' statement on its face was sufficient to create an account stated. However, at the time of the hearing on the summary judgment, the court also had before it plaintiff's response to defendant's request for admissions wherein plaintiff denied that her signature on the audit slip was intended to indicate her admission that she owed defendant the money. The purport of plaintiff's response was that plaintiff intended only to acknowledge her receipt of the $3,000.00 from defendant. This clearly raised the defense of mistake—a question of fact justifying the denial of defendant's motion for summary judgment.

[2] The propriety of the court's denial at trial of defendant's motion for a directed verdict is interwoven with defendant's further contention that plaintiff's testimony at trial relative to her conversation with defendant's vice-president should have been excluded. Defendant argues that this testimony tended to contradict the agreement established by the audit slip—the account stated—and thus, its admission violated the parol evidence rule. Without this testimony, it is defendant's contention that a directed verdict was proper.

The general rule is that in the absence of fraud or mistake or allegations thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing are incompetent. *See Neal v. Marrone*, 239 N.C. 73, 79 S.E. 2d 239 (1953).

However, as this statement intimates, parol evidence tending to show fraud or *mistake* is admissible to vary the writing so far as necessary to make it accord with the true intention and agreement of the parties. *See Archer v. McClure*, 166 N.C. 140, 81 S.E. 1081 (1914).

In the instant case, plaintiff's testimony indicated that she signed the audit slip under the mistaken belief that it merely acknowledged her receipt of the $3,000.00 from defendant. She did not intend thereby to admit that she owed the money or to agree to pay such amount to defendant. This was sufficient evidence of mistake of fact to prevent the formation of the agreement requisite to the creation of an account stated. Therefore, the challenged testimony was competent to attack the validity of the account stated, *see Morganton v. Millner*, 181 N.C. 364, 107 S.E. 209 (1921), and was sufficient to raise a question of mistake requiring jury determination. The denial of defendant's motion for directed verdict was proper.

The trial court's entry of judgment for plaintiff on the verdict returned is

Affirmed.

Judges MORRIS and VAUGHN concur.

BOARD OF TRANSPORTATION v. CARLTON KENTWOOD TURNER AND WIFE, NANCY FLOW TURNER; MARY FRANCES MCPHERSON MORRISETTE AND HUSBAND, LUCIEN F. MORRISETTE; J. M. DUFF, TRUSTEE; AND FIRST UNION NATIONAL BANK

No. 771SC591

(Filed 20 June 1978)

1. Deeds § 12— reservation in deed—no fee simple estate—leasehold

A deed which conveyed a tract of land and reserved to the grantors "the ownership of and right to bargain with and to sell to the North Carolina State Highway Commission a right-of-way parallel to the existing right-of-way of Ehringhaus Street up to and including twenty (20) feet, but no more, for a period of ten (10) years from the date of this deed" did not give the grantors a fee simple estate in the twenty foot right-of-way but gave them only a leasehold for a term of ten years.

2. Deeds § 14— reservation—proceeds from condemnation of right-of-way

A provision in a deed which reserved in the grantors the right to "any monies or benefits received from the North Carolina State Highway Commission for the sale of" a twenty foot right-of-way in the property conveyed did not constitute a void restraint on alienation and gave the grantors the right to all the proceeds resulting from a condemnation of the right-of-way by the State Board of Transportation.

APPEAL by defendants Morrisette from *Tillery, Judge*. Judgment entered 16 May 1977 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 7 April 1978.

This proceeding is a motion in the cause filed by defendants Morrisette and arising out of an action instituted by plaintiff seeking to determine just compensation for the taking of a fee simple title in certain property. The action was commenced in December 1975 and named all the defendants as persons with an interest in the condemned property by virtue of a deed from defendants Morrisette to defendants Turner. This deed was executed 22 October 1970 by the Morrisettes and conveyed to the Turners a fee simple interest in a tract of land including the condemned property, a twenty foot right-of-way, with the following exception:

> "Excepting however, this property is conveyed on the condition that the Grantors reserve the ownership of and the right to bargain with and to sell to the North Carolina State Highway Commission a right-of-way parallel to the existing right-of-way of Ehringhaus Street up to and including twenty (20) feet, but no more, for a period of ten (10) years from the date of this deed, and any monies or benefits received from the North Carolina State Highway Commission for the sale of this right-of-way is reserved to and to be the sole property or income of the Grantors."

A consent judgment was rendered on 29 March 1976 pursuant to which $3500.00 was delivered to the Clerk of Superior Court for disbursement to the named defendants. Upon the Clerk's attempted distribution, each group of defendants refused to accept partial disbursement. Thereafter, the Morrisettes filed a motion in the cause alleging that they were entitled to the entire $3500.00 by reason of the reservation in the deed to the Turners.

Following a hearing on the motion, the trial court ruled that the Morrisettes were not entitled to all the proceeds, but only to such amount as shall be adjudged to have been deposited as payment for the taking of the subject property. The remaining funds shall go to the Turners as compensation for damage to improvements and loss of business. Defendants Morrisette appealed.

Twiford, Trimpi and Thompson, by John G. Trimpi, for the appellants.

O. C. Abbott for the appellee.

MARTIN, Judge.

Defendants Morrisette assert basically two grounds in support of their contention that they are entitled to *all* the proceeds: first, they contend that they retained, by an express exception in the October 1970 deed to the Turners, a fee simple interest in the right-of-way for ten (10) years; and second, they contend that by express language in the same exception, they reserved the right to all proceeds resulting from a condemnation of the right-of-way. While we do not agree with the first position taken by defendants Morrisette, we find merit in their second contention.

The determination of the questions raised by the Morrisettes' appeal rests solely upon the language contained in the exception clause of the 1970 deed, and this Court's interpretation thereof.

[1] At the outset, we turn to the language of the exception clause pertinent to the Morrisettes' contention that they retained a fee simple interest in the twenty (20) foot "right-of-way." The October 1970 deed which conveyed to the Turners a fee simple in a tract of land, including the twenty (20) foot strip now at issue, also stated "that the Grantors [Morrisettes] reserve the *ownership of* and *right to bargain with* and *to sell* to the North Carolina State Highway Commission a right-of-way parallel to the existing right-of-way of Ehringhaus Street up to and including twenty (20) feet, but no more, for a period of ten (10) years from the date of this deed. . . ." In view of the above emphasized portions of the exception, the Morrisettes' purpose clearly seems to have been to reserve a fee simple interest and, in point of legal description, the language utilized was sufficiently definite to do so. *See Hughes v. Highway Commission*, 2 N.C. App. 1, 162 S.E. 2d 661 (1968).

However, the interest reserved was limited in duration to ten (10) years. This element alone prevents the interest reserved by the subject exception from rising to the dignity of a fee simple estate. A fee simple is a "freehold estate," and it is familiar learning that a freehold estate is "an interest in real property, the duration of which is not fixed by a specified or certain period of time, but must, or at least may, last during the lifetime of some person." 4 Thompson on Real Property, § 1850 (1961). Indeed, the true test of a freehold is its indeterminate tenure. *Id.* Thus, the effect of the subject exception, with regards to the respective interests of the parties defendant, was at most to reserve to the Morrisettes the use and enjoyment of the twenty (20) foot right-of-way for a term of ten (10) years. Such an interest can never rise above the dignity of a leasehold estate. Accordingly, the fee passed to the Turners by the 1970 deed. However, for the reasons indicated below, this determination does not entitle the Turners to the proceeds arising from the condemnation.

[2] In the remainder of the exception clause, the Morrisettes reserved the right to claim "any monies or benefits received from the North Carolina State Highway Commission for the sale of this right-of-way. . . ." Defendants Morrisette contend that this portion of the exception created a valid and enforceable reservation of the right to all proceeds resulting from the condemnation of the subject right-of-way. We must agree.

The most common attack on provisions similar to the above quoted reservation is that they constitute restraints on alienation and as such are void on the ground that they are repugnant to the estate granted. *See* Annot., 123 A.L.R. 1474. However, in the only authority which this Court can find on point, a distinction was drawn where the reservation pertained, as in the instant case, to the right to claim proceeds which resulted from condemnation, a *compulsory taking* of the fee, as opposed to a voluntary sale or conveyance. *Re Application of Mazzone*, 281 N.Y. 139, 22 N.E. 2d 315 (1939). That case held that unlike the reservation of proceeds from a voluntary sale, the reservation by a grantor of the right to claim proceeds resulting from a condemnation was not intended and did not have the effect of restricting the full and free conveyance of the property. An important factor in that court's decision, and one we believe equally important in the instant case, was that the possibility of future condemnation was

obvious to the bargaining parties and almost certainly taken into consideration by them and thus, must have made a material difference in the computation of the purchase price. Here, there was no reservation of any right in the property repugnant to the granting of a fee, only the reservation of a right to the proceeds of a forced sale if such should occur within the ten (10) year period. Based on the foregoing, we perceive of no reason why the Morrisettes should be deprived of the right which they expressly reserved to all the proceeds from the condemnation.

Reversed and remanded.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. BENNY STALEY

No. 7723SC1056

(Filed 20 June 1978)

1. **Criminal Law § 112.2— reasonable doubt—instructions proper**

The trial court's definition of reasonable doubt as "a substantial doubt," "not a vain, imaginary, or fanciful or mere possible doubt," and not "a doubt born of a merciful inclination" was substantially in accord with definitions approved by the Supreme Court and did not constitute error.

2. **Criminal Law § 118— contentions of the parties—jury instructions proper**

In instructing on the contentions of the parties, the trial court did not err in stating that "it is your duty to consider all legitimate contentions made by them and any other contentions that arise in your own respective minds," since the court was not required to set forth in its charge all the contentions of the parties.

3. **Criminal Law § 119— failure to give requested instruction—defendant not prejudiced**

Failure of the trial court to give defendant's requested instruction with regard to alibi evidence was not prejudicial to defendant, since the charge given afforded defendant the same benefits as would have resulted from the requested charge; moreover, defendant failed to show that, had the requested instruction been given, a different result would have likely ensued.

APPEAL by defendant from *Kivett, Judge.* Judgments entered 11 August 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 25 April 1978.

The defendant was indicted by separate bills for felonious larceny, safecracking and felonious breaking and entering. Upon his pleas of not guilty, the jury returned verdicts of guilty as charged in the bill of indictment in each case. The trial court entered judgments sentencing the defendant to imprisonment for a term of twelve years for safecracking, a term of ten years for felonious breaking and entering to run concurrently with the sentence for safecracking and a term of two years for felonious larceny to commence at the expiration of the sentence for breaking and entering but to run concurrent with the sentence for safecracking. From these judgments, the defendant appealed.

The State offered evidence tending to show that late on the evening of 26 July 1974 or very early the following morning, the defendant, Benny Staley, and others broke into a restaurant in North Wilkesboro, North Carolina. They removed a safe containing in excess of $5,000 in United States currency from the restaurant, placed it in the defendant's automobile and removed it to a more remote area outside North Wilkesboro. The State's evidence, presented through the testimony of other alleged participants in the crimes, tended to indicate the alleged criminal acts by the defendant and the others took place during a period beginning prior to 1:00 a.m. on 27 July 1974 and ending sometime after 2:00 a.m. on that date. Two of the State's witnesses, however, indicated they had seen the defendant in his automobile with another man at a car wash in North Wilkesboro at some time between 1:00 a.m. and 2:00 a.m. on the morning of 27 July 1974.

The defendant offered evidence tending to show that his automobile was locked in a fenced garage yard at all times in question. He also offered evidence of his good character.

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

Franklin Smith and McElwee, Hall & McElwee, by John E. Hall, for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error that portion of the trial court's charge to the jury defining and explaining the term

"reasonable doubt." In defining and explaining the term "reasonable doubt," the trial court stated:

> When I speak of a reasonable doubt, I mean a substantial doubt as opposed to some flimsy doubt, a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack of evidence as the case may be. It is not a vain, imaginary, or fanciful or mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt, nor is it a doubt suggested by the ingenuity of counsel, or by your ingenuity not legitimately warranted by the evidence, nor is it a doubt born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law or one prompted by sympathy for him or anyone connected with him. If, after weighing and considering all of the evidence, you are fully satisfied and entirely convinced of the defendant's guilt, then you would be satisfied beyond a reasonable doubt. On the other hand, if you do have any doubt based on reason and common sense, arising from the evidence in the case, or lack of evidence as to any facts necessary to constitute guilt and cannot say that you have an abiding faith to a moral certainty in the defendant's guilt, then you would indeed have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and to find him not guilty.

Unless specifically requested, a trial court is not required to define the term "reasonable doubt." However, when the trial court undertakes to define the term, the definition should be substantially in accord with the definitions approved by the Supreme Court of North Carolina. *State v. Maybery*, 283 N.C. 254, 195 S.E. 2d 304 (1973). We find the trial court's definition of reasonable doubt was substantially in accord with definitions approved by the Supreme Court and did not constitute error. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *modified as to death penalty*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3206 (1976) (doubt born of merciful inclination and doubt created by ingenuity of jurors); *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954) (vain, imaginary, or fanciful doubt); *State v. Steele*, 190 N.C. 506, 130 S.E. 308 (1925) (doubt suggested by ingenuity of counsel or jurors or born of merciful inclination or disposition to permit

defendant to escape penalty). This assignment of error is overruled.

[2] The defendant next assigns as error the trial court's statement with regard to the contentions of the parties that "it is your duty to consider all legitimate contentions made by them and any other contentions that arise in your own respective minds." The defendant contends this portion of the charge required the jury to go outside the evidence and engage in a voyage of speculation and conjecture with reference to the evidence and contentions of the parties. We do not agree.

The trial court is not required to set forth in its charge all of the contentions of the parties. Its only duty in this regard is to state the contentions as fairly for one side as for the other. *State v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84, *cert. denied sub nom.*, *Bell v. North Carolina*, 332 U.S. 764, 92 L.Ed. 349, 68 S.Ct. 69 (1947). Contentions arise upon the evidence and the reasonable inferences to be drawn therefrom. *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). We think it would work an intolerable burden upon trial courts to require that they attempt to state in their charges all legitimate inferences which could be drawn from evidence presented and contentions which could arise therefrom. To attempt to impose any such burden upon our trial courts would constantly place them in unnecessary danger of committing error by invading the province of the jury and expressing an opinion upon the evidence. No such holding is necessary, and this assignment of error is overruled.

[3] Finally, the defendant assigns as error the failure of the trial court to instruct the jury as to the legal principles applicable in its consideration of evidence introduced tending to be in the nature of alibi evidence. Where, as here, a defendant in apt time specifically requests an instruction on alibi evidence which has been introduced, he is entitled to such instruction. *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513, 72 A.L.R. 3d 537 (1973). A reading of the entire charge of the trial court to the jury in the case *sub judice*, clearly indicates, however, that the failure to charge with regard to alibi evidence was not prejudicial to the defendant. The trial court on more than one occasion made it quite clear that the burden was on the State to prove all essential elements of the crime charged and that the defendant did not have to prove

anything in order to be found not guilty. Although the requested alibi charge was not given, the charge afforded the defendant the same benefits as would have resulted from the requested charge. *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). In order to be awarded a new trial on appeal, the defendant must show positive and tangible error which was prejudicial to him and not merely theoretical. This defendant has failed to make any such showing.

It is additionally required that a defendant show that, absent the error of which he complains, a different result would have likely ensued. *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). Here, the overwhelming evidence, offered by the State and composed in large part of eyewitness testimony against the defendant by individuals participating in the crime, clearly indicates that the result would not have been different had the court given the requested charge. Such technical errors which could not have affected the result will not be found prejudicial. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). The assignment of error is overruled.

The defendant received a fair trial free from prejudicial error, and we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE D. CLONINGER

No. 7725SC1060

(Filed 20 June 1978)

1. Narcotics § 4.7— lesser offenses—failure to instruct—error

In a prosecution for possession with intent to sell marijuana and hashish, the trial court erred in failing to charge on the lesser offense of felony possession of marijuana in excess of one ounce, and the court also erred in instructing on possession of hashish with intent to sell, since the quantity involved was small, less than one gram, and there was no other evidence from which this intent could be inferred.

2. Searches and Seizures § 30— premises to be searched—adequacy of description

Description in a search warrant of the premises to be searched as the mobile home and premises owned and occupied by Willie Cloninger located at the end of a dirt road approximately 100 yards behind Linda's truck stop, together with the executing officer's testimony that he knew the trailer and had seen defendant about the premises on several occasions, adequately described the premises to be searched.

APPEAL by defendant from *Ferrell, Judge.* Judgments entered 11 August 1977 in Superior Court, CALDWELL County. Heard in the Court of Appeals 26 April 1978.

Defendant pled not guilty to charges of on 22 February 1977 (1) possession with intent to sell and deliver more than 0.10 ounce of hashish and (2) possession with intent to sell four pounds of marijuana, both charges in violation of G.S. 90-95(a)(1).

The State's evidence tended to show that Deputy Sheriff Colvard knew defendant, that defendant lived in a mobile home, and that he had seen defendant about the premises on several occasions. Colvard obtained a search warrant, went to defendant's home and searched it, finding a quantity of rolling paper and other marijuana smoking paraphernalia in a closet.

Deputy Colvard then searched the area and found eighteen blocks of marijuana, each weighing 2½ pounds in some tires located about 150 feet from the trailer. Defendant was seen working on junk cars several times near within 10 to 15 feet of where the marijuana was found. A remote television viewer camera attached to defendant's trailer pointed to the tires in which the marijuana was found. Nearby under an oil pan Colvard found a bottle containing a brown resin (hashish), less than one gram.

Defendant testified that he did not own and had no knowledge of the marijuana and the hashish, and that he purchased the cigarette paper and other smoking materials for resale by his father.

Defendant was found guilty as charged and appeals from judgments imposing imprisonment.

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

Michael P. Baumberger for defendant appellant.

CLARK, Judge.

[1] One issue raised by this appeal is whether the trial court erred in failing to charge on lesser included offenses of (1) possession of marijuana with intent to sell and (2) possession of hashish with intent to sell, both Schedule VI controlled substances, in violation of G.S. 90-95(a)(1), as charged in the bills of indictment.

The marijuana indictment charged possession with intent to sell of four pounds of marijuana. Possession of more than one ounce of marijuana is a felony under G.S. 90-95(d)(4), and punishable by imprisonment of not more than five years.

The hashish indictment charged possession with intent to sell in excess of 0.10 ounce of hashish. Possession of more than 0.10 ounce of hashish is a felony under G.S. 90-95(d)(4), and punishable by imprisonment of not more than five years.

All of the evidence tends to show that if defendant possessed these controlled substances, he possessed 5½ or 6 pounds of marijuana, and less than one gram (also less than one ounce) of hashish. Thus the evidence would have supported a verdict of possession of more than one ounce of marijuana, a felony under G.S. 90-95(d)(4), but would not have supported a verdict of felony possession of hashish in excess of 0.10 ounce. Absent the intent to sell, the defendant under this evidence could be guilty only of possession of hashish in violation of G.S. 90-95(a)(3), which is a misdemeanor under G.S. 90-95(d)(4).

The quantity of marijuana, 5½ or 6 pounds, found in the case *sub judice* was evidence of intent to sell. This court has held that the quantity of the drug seized is an indicator of intent to sell. *State v. Mitchell*, 27 N.C. App. 313, 219 S.E. 2d 295 (1975); *State v. Carriker*, 24 N.C. App. 91, 210 S.E. 2d 98 (1975), *rev'd on other grounds*, 287 N.C. 530, 215 S.E. 2d 134 (1975). However, this evidence of quantity and the other evidence in the case did not compel a verdict of possession with intent to sell. Defendant testified and denied possession of any quantity of illicit drugs. The evidence in this case is not so positive as to the element of intent to sell marijuana that there is no conflicting evidence, as in *State v. Carriker, supra.*

Possession of an illicit drug is an element of possession with intent to sell or deliver the drug, and the former is a lesser in-

cluded offense of the latter. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Stanley*, 24 N.C. App. 323, 210 S.E. 2d 496 (1974), *rev'd on other grounds*, 288 N.C. 19, 215 S.E. 2d 589 (1975).

Where there is evidence of defendant's guilt of a lesser degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury, even when there is no specific prayer for the instruction; and error in failing to do so is not cured by a verdict convicting the defendant of the offense charged, because in such case it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); 4 Strong's, N.C. Index 3d, Criminal Law, § 115.

As to the marijuana charge (77CRS1251) we conclude that under the evidence the trial court properly charged on possession of marijuana with intent to sell as charged, but the court erred in failing to charge on the lesser offense of felony possession of marijuana in excess of one ounce. The indictment alleged possession of four pounds of marijuana with intent to sell. Since all of the evidence was positive as to the quantity found (5½ or 6 pounds) the court was not required to charge on the lesser offense of misdemeanor possession of marijuana (less than one ounce).

As to the hashish charge (77CRS1249), there was no evidence of intent to sell because the quantity was small, less than one gram, and there was no other evidence from which this intent could be inferred. The trial court should not have charged on the crime of possession of hashish with intent to sell, but only on the crime of misdemeanor possession in violation of G.S. 90-95(d)(4), less than one gram.

[2] Defendant moved to suppress the smoking materials found in his trailer on the ground that the search warrant did not adequately describe the mobile home. There were two other trailers nearby. The search warrant description was as follows: "[T]he mobile home and premises owner [*sic*] and occupied by Willie Clonninger. [*sic*] Located at the end of a dirt road, approx 100 yds behind Lindas truck stop . . . ."

The search warrant must describe the premises with reasonable certainty. The description is somewhat similar to the

description of a mobile home in *State v. Woods*, 26 N.C. App. 584, 216 S.E. 2d 492 (1975), which held the description was adequate. Further, Officer Colvard testified that he knew the trailer and had seen defendant about the premises on several occasions. In *State v. Walsh*, 19 N.C. App. 420, 199 S.E. 2d 38 (1973), it was held that the executing officer's prior knowledge as to the place intended in the warrant is relevant. This assignment is without merit.

We do not treat the other assignments of error since they may not recur upon retrial.

In 77CRS1251 the judgment is reversed and the cause remanded for a new trial. The State may elect to proceed against the defendant on the charge of possession of marijuana with intent to sell in violation of G.S. 90-95(a)(1), or on the charge of felony possession of marijuana in excess of one ounce in violation of G.S. 90-95(a)(3) and G.S. 90-95(d)(4).

In 77CRS1249 the judgment is reversed and the cause is remanded for a new trial on the charge of simple possession of hashish, a misdemeanor in violation of G.S. 90-95(a)(3).

New trial.

Judges BRITT and ERWIN concur.

UNITED BUYING GROUP, INC. v. LAWRENCE H. COLEMAN AND MORTON COLEMAN

No. 7726SC647

(Filed 20 June 1978)

Constitutional Law § 24.7; Process § 9.1— nonresident defendants—notes guaranteeing contract—personal jurisdiction

G.S. 1-75.4(5) provided statutory authority for the exercise of personal jurisdiction by the courts of this State over nonresident defendants in an action to recover on promissory notes executed by defendants guaranteeing payment to plaintiff North Carolina corporation for the acceptance of orders from and the delivery of merchandise to a Virginia corporation. Furthermore, the notes guaranteeing a contract to be performed in this State furnished sufficient contacts with this State so that the assumption of personal jurisdiction over the defendants did not violate due process.

APPEAL by plaintiff and defendant Lawrence H. Coleman from *Griffin, Judge*. Judgment entered 24 May 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 May 1978.

By motions to dismiss for lack of jurisdiction over their persons, defendants challenge plaintiff's right to bring an action in North Carolina to collect amounts due by the terms of certain conditional promissory notes. The notes, each bearing the signature of one defendant, purport to guarantee payment to plaintiff for merchandise ordered on behalf of Coleman's. Coleman's, a Virginia corporation, is now insolvent.

Lawrence Coleman was the primary owner and president of Coleman's. He also owned stock in plaintiff Buying Group, a North Carolina corporation. Lawrence Coleman is a resident of Virginia. Morton Coleman, his brother, is a medical doctor and resident of New York. He was not involved directly with Coleman's.

The court considered affidavits and exhibits and concluded that the State of North Carolina could exercise jurisdiction over the person of Lawrence Coleman, finding that he had the necessary contacts with the state to satisfy the requirements of due process and that plaintiff had rendered him services in this State as contemplated by G.S. 1-75.4(5). The court further concluded that no services were performed by plaintiff with respect to defendant Morton Coleman so that G.S. 1-75.4(5) did not apply to him. Moreover, the court found that the State of North Carolina cannot exercise personal jurisdiction over Morton Coleman due to limitations imposed by the due process clause of the Constitution of the United States.

The cause of action against Morton Coleman was dismissed. The court denied Lawrence Coleman's motion for dismissal.

Richard N. Weintraub, for plaintiff appellant.

Fleming, Robinson & Bradshaw, by Michael A. Almond, for defendant appellees.

VAUGHN, Judge.

These appeals present the question of whether the courts of North Carolina can exercise personal jurisdiction over either of

the defendants. The question involves a two-part inquiry. Before the court may exercise jurisdiction over a nonresident defendant, it must have statutory authorization and its exercise of such jurisdiction must comport with the requirements of due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

This Court analyzed a similar set of facts in *First-Citizens Bank & Trust Co. v. McDaniel* and held that "[w]here the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over the defendant. 18 N.C. App. 644, 647, 197 S.E. 2d 556, 558 (1973). The defendant in *McDaniel* was sued as the endorser of a promissory note made as part of a loan agreement between the bank and a corporate debtor. The defendant was a citizen and resident of New Jersey. The court found that the bank's loan of money to the corporation was a service rendered in this State and that G.S. 1-75.4(5) was statutory authority for the exercise of jurisdiction over the endorser. The note signed by Morton Coleman recites as consideration "the acceptance of orders from and/or the delivery of merchandise to Coleman's, by United Buying Group." Although all the parties treat the note signed by Lawrence Coleman as if it read the same, we point out that by its terms Lawrence Coleman agrees to pay for the acceptance of orders from and the delivery of merchandise to himself. The value of these services to defendants must have been substantial in view of the fact that one note on its face obligates Lawrence Coleman to pay up to $36,718.75 and the other obligates Morton to pay up to $25,000 if the buyer, Coleman's, defaults. G.S. 1-75.4(5) certainly, therefore, provides statutory authority for the exercise of jurisdiction by this State over both these defendants.

The defendants contend, however, that they will be denied due process if forced to defend this suit in North Carolina since their contacts with the state are minimal. They argue that jurisdiction over a nonresident defendant should not be based on a single contract unless that contract has substantial consequences in the forum state. Assuming that this is an accurate statement of law, defendants' conscious election to buy services in North Carolina and to facilitate the business activities of Cole-

man's in this State establishes a substantial relationship with this State. The courts of North Carolina were open to enforce the underlying contract which these notes purport to guarantee. As we have pointed out, acceptance by plaintiff of this underlying contract was the consideration for the notes. In these circumstances, assumption of *in personam* jurisdiction over both defendants does not offend traditional notions of fair play and substantial justice as those concepts are embodied in the due process clause of the Fourteenth Amendment. *See Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974).

We also note that this Court is not alone in holding that due to its voluntary nature and foreseeable consequences a guaranty or an endorsement of an obligation is the type of contact with a state which supports jurisdiction in the courts of that state where there is statutory authority for such jurisdiction. *See e.g. O'Hare Int'l Bank v. Hampton*, 437 F. 2d 1173 (7th Cir. 1971); *Standard Life & Acc. Ins. Co. v. Western Finance, Inc.*, 436 F. Supp. 843 (W.D. Okla. 1977); *Federal Nat. Bank & Trust Co. v. Moon*, 412 F. Supp. 644 (W.D. Okla. 1976); *Einhorn v. Home State Savings Assn.*, 256 So. 2d 57 (Fla. 1971); *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.*, 77 N.M. 92, 419 P. 2d 465 (1966); *see contra D.E.B. Adjustment Co. v. Dillard*, 32 Colo. App. 184, 508 P. 2d 420 (1973).

The part of the judgment denying Lawrence Coleman's motion to dismiss is affirmed. The part of the judgment allowing Morton Coleman's motion to dismiss is reversed.

Affirmed in part; reversed in part.

Judges MORRIS and MARTIN concur.

INEZ H. WATKINS v. LAMBE-YOUNG, INC. AND SHUTT HARTMAN CONSTRUCTION CO., INC.

No. 7721DC628

(Filed 20 June 1978)

Dedication §§ 1.3, 5— public use of road—construction of water line proper

Where a statement of dedication signed by plaintiff manifested her intent to dedicate some portion of her property for public use, the metes and bounds description of the land transferred by plaintiff to a third person after the dedication reflected her awareness of the right-of-way and set its dimensions as the same as those shown on a plat of the area, and plaintiff never objected to State maintenance of the road for use by the public, such actions were inconsistent with any construction except her assent to public use of the road and its full right-of-way; thus, upon acceptance by the State, the dedication was irrevocable whether plaintiff's offer was express or implied, and defendants could properly install a water line within the right-of-way accepted by the State. G.S. 136-18(10).

APPEAL by plaintiff from *Alexander (Abner), Judge.* Judgment entered 11 May 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 27 April 1978.

Plaintiff seeks damages and equitable relief for injuries alleged to have grown out of an entry by defendants upon land owned by her. The defendants, acting in conformity with the policies of the Department of Transportation, installed a water main along the side of Greenbrook Drive where plaintiff's residence lies.

Defendants moved for summary judgment and introduced affidavits and exhibits tending to show that plaintiff joined in an offer of dedication in 1962 involving a tract of land known as the V. R. Woodford property. V. R. Woodford was her grantor, and the remainder of his property was subdivided in 1962 by reference to a plat registered under the name Greenbrook Forest. In 1964, Greenbrook Drive, the only roadway adjoining plaintiff's land, was accepted by the State which has since maintained it. In 1965, plaintiff conveyed a portion of her land adjoining Greenbrook Drive to one Douthit but did not attempt to convey any of the land which would be within the dedicated right-of-way. The lot was conveyed by reference to the recorded plat of Greenbrook Forest.

Plaintiff submitted her own affidavit tending to show irregularities in the offer of dedication pertaining to the V. R. Woodford property. By affidavit she contended that she had never expressly or impliedly consented to any use of her land by the public except as a roadway.

The court concluded that there was no genuine issue of fact to be resolved. Summary judgment was entered for defendants.

Hatfield and Allman, by C. Edwin Allman and Michael D. West, for plaintiff appellant.

Deal, Hutchins and Minor, by William K. Davis, for defendant appellees.

VAUGHN, Judge.

Defendants showed by affidavit and exhibit that they installed the water line within the 60′ right-of-way claimed by the State of North Carolina in Greenbrook Drive as it was accepted by the State in May, 1964. The offers of dedication thus accepted were made by a Statement of Dedication of Streets and Roads for Public Use executed by plaintiff in 1962. Plaintiff does not deny signing the offers of dedication. It is undisputed that the water line was installed within the 60′ right-of-way accepted by the State in 1964. Now, however, more than a decade after the dedication, plaintiff attempts to point out a variety of defects in the instrument which, she contends, serve to prevent it from functioning as a complete and valid dedication. We need not discuss plaintiff's arguments with reference to the alleged defects, although we do not concede that there is merit to them. A dedication of land to a public use may be made by express terms or it may be implied from the conduct of the landowner. *Tise v. Whitaker-Harvey Co.*, 146 N.C. 374, 59 S.E. 1012 (1907). Where the owner delivers land to a public use in such manner that his acts would fairly and reasonably lead an ordinarily prudent man to infer that he intended to dedicate the land to that use, acceptance of the land by some public body entitled to do so causes the dedication to become irrevocable. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E. 2d 748 (1954). The statement of dedication signed by plaintiff manifests her intent to dedicate some portion of her property for public use. The metes and bounds description of land transferred by her to Douthit in January, 1965, reflects her awareness of the

right-of-way and sets its dimensions as the same as those shown on the Greenbrook Forest plat. Plaintiff has never objected to State maintenance of the road for use by the public. These actions on her part are inconsistent with any construction except her assent to public use of Greenbrook Drive and its full right-of-way. *See State Hwy. Comm. v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967); *see also* 63 A.L.R. 667 for cases holding as a general rule that an invalid statutory dedication once accepted becomes a valid common law dedication. Thus, upon acceptance by the State, the dedication was irrevocable whether the offer was expressly or impliedly made.

The only remaining question concerns the extent of the dedication. Plaintiff contends that even if she made the dedication of the portion of her property on which the water line was installed, she retained an interest in it which was invaded by defendants. She relies on the cases of *Van Leuven v. Akers Motor Lines*, 261 N.C. 539, 135 S.E. 2d 640 (1964) and *Hildebrand v. Southern Bell Tel. & Tel. Co.*, 219 N.C. 402, 14 S.E. 2d 252 (1941). Her reliance on these cases is misplaced. Both concern the overburdening (or possibility of overburdening) an easement limited to a particular use. In the present case, plaintiff's offer of dedication was "for public use." Such a dedication must encompass all uses to which the Department of Transportation is authorized by law to subject the right-of-way. G.S. 136-18(10); *Hildebrand v. Southern Bell Tel. & Tel. Co.*, 221 N.C. 10, 18 S.E. 2d 827 (1942). Water lines are such a use. The court, therefore, did not err in granting defendants' motion for summary judgment. The judgment is affirmed.

Affirmed.

Judges PARKER and WEBB concur.

ROSS REALTY COMPANY v. FIRST CITIZENS BANK & TRUST COMPANY, AS TRUSTEE OF THE PROFIT-SHARING RETIREMENT PLAN AND TRUST OF THERMO INDUSTRIES, INC. AND AFFILIATED COMPANIES

No. 7726SC679

(Filed 20 June 1978)

Mortgages and Deeds of Trust § 32.1— purchase money deed of trust—statute prohibiting deficiency judgment—action on note

The statute prohibiting a deficiency judgment after the foreclosure of a purchase money deed of trust, G.S. 45-21.38, has no application to a suit on the underlying obligation where there has been no foreclosure.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 10 August 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 May 1978.

Civil action wherein plaintiff instituted suit to collect on an alleged indebtedness stemming from the sale of real property to defendant. The parties stipulated to the following facts:

By deed dated 25 March 1974, the plaintiff conveyed to the defendant a certain tract of land located in Charlotte, North Carolina. The defendant executed a note payable to the plaintiff for the purchase price of $126,000 and executed a purchase money deed of trust to secure the note. On 1 October 1976 the defendant defaulted in payment on the note. Soon thereafter the defendant tendered to the plaintiff its deed to the subject property to avoid foreclosure. However, the plaintiff refused to accept the deed and proceeded to institute this action. The defendant pleaded G.S. 45-21.38 in bar to the plaintiff's action on the note, whereupon the plaintiff moved for summary judgment.

On the basis of the stipulated facts, the trial court concluded "that the provisions of G.S. 45-21.38 are inapplicable to the subject matter of this action" and ordered "that the plaintiff have and recover of the defendant the sum of $106,601.86." From the entry of summary judgment for plaintiff, defendant appealed.

Miller, Johnston, Taylor & Allison, by John B. Taylor and James W. Allison, for the plaintiff appellee.

Ragsdale & Kirschbaum, by William L. Ragsdale, for the defendant appellant.

HEDRICK, Judge.

The sole question presented on this appeal is whether G.S. 45-21.38 bars an action on a purchase money note for the full purchase price of real property. The pertinent statute, G.S. 45-21.38, provides:

> *Deficiency judgments abolished where mortgage represents part of purchase price.*—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: . . . .

The defendant apparently recognizes that the proscription in the foregoing statute is by its terms applicable only to deficiency judgments attendant to the foreclosure of purchase-money mortgages or deeds of trust on real property. It argues, however, that in suing on the note for the full purchase price of the property, the plaintiff is accomplishing indirectly that which is forbidden by the statute and is thereby violating the spirit of the statute.

In *Gambill v. Bare*, 32 N.C. App. 597, 232 S.E. 2d 870 (1977), the very question raised by the defendant in this case was presented to this Court by a defendant under similar circumstances. However, determination of the question was deemed unnecessary when the Court found that neither the note nor the deed of trust executed by the parties indicated on its face that it represented the balance of the purchase price of the real property conveyed. Thus, in the 45 years since the enactment of G.S. 45-21.38 the question of whether the statute bars suit on the purchase money note for the full purchase price of the property has not been resolved by the courts of this state.

We think the resolution of the question is dictated by the literal terms of the statute. It is a common rule of statutory con-

struction that " '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Camp*, 286 N.C. 148, 152, 209 S.E. 2d 754, 756 (1974). The statute clearly limits its application to bar a deficiency judgment which is sought subsequent to the foreclosure of a purchase money mortgage or deed of trust on real property. Thus, even were we inclined to accept defendant's argument that the plaintiff's action on the note violates the spirit of G.S. 45-21.38, we would be powerless to expand the obvious scope of the statute.

Our Supreme Court seemed to foreshadow this result in *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940). In that case the court held that the holder of a purchase money note secured by a second mortgage could sue on the note subsequent to the sale of the property under the prior mortgage. More significant for our purpose was the court's reliance on a case decided by the Oregon Supreme Court, *Page v. Ford*, 65 Or. 450, 131 P. 1013 (1913). The Oregon court in a factual setting identical to that of the present case held that a statute substantially similar to our own was inapplicable to an action on the note for the full purchase price. *See also Banteir v. Harrison*, 259 Or. 182, 485 P. 2d 1073 (1971).

We hold that G.S. 45-21.38 which proscribes a deficiency judgment after the foreclosure of a purchase money deed of trust has no application to a suit on the underlying obligation where there has been no foreclosure.

We acknowledge that the statute creates an anomalous situation in that a creditor, who would be barred from a deficiency judgment if he elected to pursue his remedy of foreclosure, can in the alternative sue on the note for the full purchase price and perhaps issue execution to collect the judgment against the subject property of the defaulting purchaser. One writer suggests that the impact of this situation could be reduced by adopting the limitation imposed on creditors by the Oregon court which imputes a waiver of the creditor's right of foreclosure when he sues on the note. *See* Note, 35 N.C. L. Rev. 492 (1957). Without expressing any view on the Oregon limitation, we think that the

broad construction of the statute which the defendant urges would produce an intolerable result. To hold that the seller's remedy for breach of the sales contract is limited to foreclosure of the land conveyed would be tantamount to conferring on a purchaser of property who executes a purchase money deed of trust the right to unilaterally rescind his contract when he deems it advantageous to do so. Such a result could be no more clearly illustrated than by the present case in which the defendant at the time of its default attempted to return the deed to the property to the plaintiff. While our literal construction of G.S. 45-21.38 preserves an alternative remedy for a creditor seeking to recover the full purchase price, we think the defendant's construction would encourage sellers of real property to discontinue their use of purchase money deeds of trust altogether.

We hold that G.S. 45-21.38 is inapplicable to the facts of this case. Summary judgment for plaintiff is affirmed.

Affirmed.

Judges PARKER and MITCHELL concur.

JERRY DAN PIPKIN, ET UX, MAJORIE L. PIPKIN, EDWARD LASSITER, ET UX, FAYDEEN LASSITER, RANDOLPH LASSITER, ET UX, SHIRLEY LASSITER v. ELSIE LASSITER, ET VIR, PAUL LASSITER

No. 778SC609

(Filed 20 June 1978)

Rules of Civil Procedure § 12.1— questions of fact raised—judgment on the pleadings improper

In a declaratory judgment proceeding where plaintiffs sought a declaration of their rights in a right-of-way, the trial court erred in granting judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c), since defendants in their answer admitted only the citizenship of the parties and nothing else, thus raising material issues of fact, and since defendants' answer also contained a "third defense and counterclaim" with respect to the right-of-way which in no way tended to make the facts so well settled as to permit judgment on the pleadings.

APPEAL by defendants from *Smith (David I.), Judge*. Judgment entered 28 February 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 April 1978.

This action was instituted by the filing of a paper writing purporting on its face to be a "petition." This paper writing was filed by the plaintiffs, Jerry Dan Pipkin and his wife, Majorie L. Pipkin; Edward Lassiter and his wife, Faydeen Lassiter; and Randolph Lassiter and his wife, Shirley Lassiter, designating themselves as "petitioners." The defendants, Elsie Lassiter and her husband, Paul Lassiter, were designated as "respondents."

The paper writing by which the plaintiffs instituted this action alleges that they and the defendants are citizens of Wayne County and that each own certain lands pursuant to a special proceeding resulting in a division of the lands of the late Effie P. Lassiter by commissioners appointed by the Clerk of Superior Court of Wayne County. The plaintiffs allege that, as a part of this division, the commissioners provided for a twenty-foot right-of-way across the lands of the defendants to serve as a means of ingress and egress for the plaintiffs. Copies of recorded plats setting forth the alleged twenty-foot right-of-way and an old path which adjoined are attached and incorporated by reference as a part of the paper writing. The plaintiffs allege that the defendants have closed or attempted to close the right-of-way and seek to deny the plaintiffs access to their lands and the family burial ground. The plaintiffs pray that the defendants be enjoined from interfering with the plaintiffs' use of the right-of-way and that the trial court establish the plaintiffs' rights with regard to the right-of-way. On 18 June 1976 the defendants, designated in the original paper writing as "respondents," filed a motion for extension of time to file an "answer." The Clerk of Superior Court of Wayne County entered an order on 18 June 1976, purporting to act "under G.S. 1-398 of the Rules of Special Proceedings," and directing "that the defendants have through July 1, 1976, in which to file defensive pleadings."

The defendants filed a paper writing purporting on its face to be a "response" in which they admit their citizenship and that of the plaintiffs and deny all other allegations of the "petition." The defendants additionally set forth a "third defense and counterclaim" alleging that the will of Effie P. Lassiter made no

mention of any right-of-way, that the commissioners "in laying off a proposed 20-foot right-of-way" did not intend to disrupt the intent and will of Effie P. Lassiter and that the commissioners did not intend for the right-of-way to be a cause of controversy between the families. By their "third defense and counterclaim," the defendants raise other allegations not directly responsive to the allegations set forth by the plaintiffs.

The plaintiffs moved for summary judgment and judgment on the pleadings. They offered no affidavits or other documents in support of this motion. Having considered the pleadings, the trial court found that "the material allegations of fact which are raised by the petition are not controverted by the response of the defendants in the defendants' responsive pleadings." The trial court entered judgment for the plaintiffs on the pleadings and granted them the relief prayed. From this judgment, the defendants appeal.

Duke and Brown, by John E. Duke, for petitioner appellees.

Barnes, Braswell & Haithcock, by Michael A. Ellis, for respondent appellants.

MITCHELL, Judge.

Although this action is designated a special proceeding by the parties and was assigned a number in the trial court indicating it to be such, we perceive it to be a civil action in the nature of a declaratory judgment proceeding. The plaintiffs designate themselves as "petitioners" and seek a declaration of their rights in a right-of-way and injunctive relief pursuant to the terms of a judgment in a prior special proceeding (28SP22) in Wayne County. The defendants, designated as "respondents" at most pertinent points in the pleadings, assign as error the entry of judgment on the pleadings by the trial court. They contend that their answer, designated a "response" by them, raises material issues of fact and that the trial court erred in granting judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c). We agree.

A motion for judgment on the pleadings is properly allowed when all material allegations of fact are admitted in the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C.

130, 209 S.E. 2d 494 (1974). When a party moves for judgment on the pleadings, he admits the truth of all well-pleaded facts in the pleading of the opposing party and the untruth of his own allegations insofar as they are controverted by the pleadings of the opposing party. *Gammon v. Clark*, 25 N.C. App. 670, 214 S.E. 2d 250 (1975).

In the present case the defendants admit the citizenship of the parties and nothing else. Clearly the facts are not established by such pleadings.

The fact that the answer or "response" also contains a "third defense and counterclaim" which makes reference to "a proposed 20-foot right-of-way" which has been laid off somewhere by commissioners and also sets forth unrelated matters, in no way tends to make the facts so well settled as to permit judgment on the pleadings. Judgment on the pleadings pursuant to Rule 12(c) is not favored by the law, and the pleadings must be liberally construed in the light most favorable to the defendants as the non-moving parties. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). The mere fact that a party's case may be weak and the party unlikely to prevail on the merits will not make judgment on the pleadings appropriate. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976).

The pleadings of the parties, in their current state, raise material issues of fact. Rule 12(c) does not authorize a trial court's entry of judgment on such pleadings. *Cline v. Seagle*, 27 N.C. App. 200, 218 S.E. 2d 480 (1975). We find that the trial court erred in entering this judgment.

For the reasons previously set forth, the judgment of the trial court must be and is

Reversed and the cause remanded.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. RONALD BEAN

No. 7817SC111

(Filed 20 June 1978)

Forgery § 2.2— showing of false signature—insufficient evidence

The State's evidence was insufficient for the jury in a prosecution for forgery and uttering where it failed to show that the purported maker of the check in question was a fictitious person or that the maker's signature was placed on the check without authority.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 27 October 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 30 May 1978.

The defendant was charged in a proper bill of indictment with forgery and uttering a forged check in the amount of $650.00 drawn on one Benton Thompson.

Upon his plea of not guilty, the jury found defendant guilty on both counts, which were consolidated for the purpose of sentencing.

The State's evidence tended to show that: on 10 November 1976, Joyce Hooker, Randy Ryan, and defendant were sitting together in the car of Linda Monday; Joyce Hooker received a blank form check from defendant and filled it out by putting the date on it, the name of the payee (Randy L. Ryan), and the amount; the signature of Benton Thompson was already on it when Joyce Hooker received the blank check; however, she did write the name of Randy L. Ryan on the back of the check as his endorsement. The record reveals:

"Ronald told me (Joyce Hooker) that he got the check when he went to the bank on 601 and he had picked it up earlier that day. He was referring to Northwestern Bank . . . in Mount Airy."

Q. "And in fact you did not see anybody write that name Benton L. Thompson on that check did you?"

Ms. Hooker: "No, sir."

The three (defendant, Randy Ryan, and Joyce Hooker) all needed money. The proceeds of the check were supposed to be

divided among the three. Ryan went to the Northwestern Bank at the Mayberry Mall to get the check cashed, but failed. The three went to the Northwestern Bank on Highway 601 to try to get the check cashed. While standing in the second bank, Ryan was arrested; defendant and Joyce Hooker were waiting in the car.

Defendant did not choose to offer any evidence.

From judgment sentencing him to a term of two years with the Department of Correction, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Acie L. Ward, for the State.

Stephen G. Royster, for defendant appellant.

ERWIN, Judge.

Defendant assigns as error the trial court's denial of his motion for judgment of nonsuit made at the close of the State's evidence and renewed after the defendant announced that he would offer no evidence. We agree with defendant that the motion should have been allowed.

Upon motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 4 Strong, N.C. Index 3d, Criminal Law, § 106, p. 547.

Justice Moore, speaking for the Supreme Court in *State v. Phillips*, 256 N.C. 445, 447-448, 124 S.E. 2d 146, 148 (1962), stated:

> "Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. *State v. Dixon*, 185 N.C. 727, 117 S.E. 170.
>
> The State's evidence is sufficient to justify the inference that defendant aided and abetted Jarrett in the execution of the purported check. The check is sufficient in form to constitute a negotiable instrument payable 'to order.' G.S. 25-14.

But the State offered no evidence tending to show the falsity of the instrument, *i.e.*, that it was executed without authority.

If the name signed to a negotiable instrument, or other instrument requiring a signature, is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud—the instrument being sufficient in form to import legal liability—an indictable forgery is committed. However, if the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority. 'To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that a person who signed another's name did so without authority.' *State v. Dixon, supra.*"

See also State v. Martin, 30 N.C. App. 512, 227 S.E. 2d 172 (1976).

In the case *sub judice*, the State offered no evidence to show that Benton Thompson, the purported maker of the check in question, was a fictitious person. There was no evidence from an officer or employee of Northwestern Bank that Benton Thompson was known or unknown at the bank. The signature of Benton Thompson was "already on there" when Joyce Hooker received the check from defendant. None of the State's witnesses testified that they knew who signed the maker's name to the check, and the defendant did not offer any evidence. Benton Thompson, if such a person indeed existed, did not testify.

Officer Sellars read to the jury a statement made by Joyce Hooker after she had been given her *Miranda* warning. In part, the statement was as follows:

"Ronald told me that Linda had written Benton Thompson's name to the front of the check and later that day Linda told me herself that she had forged Benton Thompson's name on the check."

This, the State contends, was sufficient to show the falsity of the check and to submit the case to the jury. We do not agree. The trial court clearly instructed the jury that ". . . this is for the purpose of corroborating the testimony of Joyce Hooker, if you find that it does corroborate her testimony and for that purpose only." After defendant objected to and moved to strike the above portion of the statement, the trial court stated: "The instructions take care of that. Go ahead." Joyce Hooker's sworn testimony was that she had not seen anyone sign Thompson's name on the check and that the signature was on the check when she received it. In light of the judge's instruction, we feel the quoted portion of her statement was before the jury, if at all, only for corroborative purposes, although it does not appear even to serve that limited function.

Defendant's motion for judgment of nonsuit should have been allowed as to both counts. While under our statutes uttering is clearly a distinct offense from forgery, *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1968), *State v. Treadway*, 27 N.C. App. 78, 217 S.E. 2d 743 (1975), the uttering must still be of a forged instrument. Therefore, the State's failure to meet its burden under *Phillips, supra,* of showing that the check in question was a false instrument is fatal as to both the forgery charge and the uttering charge.

Reversed on both counts.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. FLOYD DOUGLAS BRAY

No. 7828SC15

(Filed 20 June 1978)

Criminal Law § 114.4— jury instructions—evidence that defendant confessed—expression of opinion

In a prosecution for second degree murder where defendant admitted firing the gun that killed decedent but contended that he was justified in acting in defense of himself and his place of habitation, the trial court expressed an opinion in violation of G.S. 1-180 when the court instructed that "there is

evidence which tends to show that the defendant confessed that he committed the crime charged in this case."

APPEAL by defendant from *Howell, Judge*. Judgment entered 10 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 April 1978.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of John Matt Rollins on 17 August 1976. Evidence presented by the State tended to show:

Around midnight on 16-17 August 1976, Jimmy Swink, deceased and two others went to a lounge in rural Buncombe County for the purpose of breaking into the place. Swink and deceased tried to enter the building at several places and eventually succeeded in prying open the front door. Their two accomplices served as lookouts.

As Swink and deceased entered the vestibule of the lounge, a gun was fired from inside the building and Swink ran. A second shot was fired and some five minutes later Swink returned to the building where he saw deceased lying just inside the lounge with blood on his shoulder. Deceased had no weapon.

Deputy Sheriff Wallen arrived at the lounge around 1:25 a.m. and saw deceased lying in the foyer area and defendant standing near him with a shotgun. After placing defendant in the police car, the officer examined deceased, found a wound in his back and no pulse. Defendant made the following statement to the officer: "I was in the back near the pool tables cleaning up, when I heard a noise at the front door. I went up there and these dudes were breaking in. I hollered and told the boys to freeze, and they started running. I told them again and fired a warning shot. They kept running, and I told them again, and I shot that one."

Defendant's evidence tended to show: He had been doing repair work at the lounge and had been allowed to spend the nights there because he did not have transportation to and from his home. Defendant was not staying in the lounge as a guard although there had been several recent break-ins. On the night in question he was about to go to bed when he heard noises like someone breaking in. He first heard noises at the back of the building, then on the side and finally at the front door. He became

frightened and went looking for a gun in the lounge office. Lighting in the lounge was extremely dim but he finally obtained the gun. As he heard the burglars enter the front door, he instinctively fired the gun twice without taking aim. He then telephoned the sheriff's office and asked for assistance.

The trial judge instructed the jury that they might return a verdict of second-degree murder, voluntary manslaughter, involuntary manslaughter, or not guilty. The jury returned a verdict of guilty of involuntary manslaughter and from judgment imposing a prison sentence of not less than three nor more than five years, defendant appealed.

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

J. Lawrence Smith for defendant appellant.

BRITT, Judge.

Defendant contends the trial court committed prejudicial error in giving the following instruction to the jury: "There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case." We think the contention has merit in view of the evidence in this case.

Defendant argues that while he admitted firing the gun that killed decedent, that he did not "confess" murdering or otherwise unlawfully taking the life of decedent. On the contrary he argues, among other things, that his conduct was justified in that he was acting in defense of himself and his place of habitation.

The State argues that the term "confession" has been defined by our Supreme Court as "[a]ny extra-judicial statement of an accused . . . if it admits defendant's guilt of an essential part of the offense charged"; *State v. Williford,* 275 N.C. 575, 582, 169 S.E. 2d 851 (1969); and that since defendant admitted firing the weapon that killed decedent, an essential part of the offense charged, the court did not err in referring to the admission as a confession.

We do not find this argument persuasive for the reason that the definition stated in *Williford* has to be considered in the context of that case. There the court was passing upon the admissibility of evidence relating to an incriminating statement

made by the defendant. The defendant contended that the statement was not knowingly and voluntarily made. The State contended that since the statement related only to a part of the alleged crime, it was not a confession. In that context the court stated the definition quoted above and held that absent proper findings that the incriminating statement was knowingly and voluntarily made by the defendant, evidence relating to it was inadmissible.

As authority for the definition, the court in *Williford* cited *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193 (1954). A review of *Hamer* reveals that the court in that case was addressing the question of admissibility of evidence relating to an incriminating statement.

After giving the challenged instruction in the case at hand, the court charged: "If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it." In this context, we think the terms "confess" and "confession" must be considered in their broader and more usually accepted sense rather than employing the definition used in *Williford* and *Hamer*. In Black's Law Dictionary, Fourth Edition, p. 368, one of the definitions given for confess is "[t]o admit the truth of a charge or accusation". Confession is defined as: "[a] voluntary statement made by a person charged with the commission of a crime or misdemeanor, communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it." *Ibid* at 369.

The instruction complained of was given in the early part of the charge as the court was instructing on various legal principles. While we are certain that the learned trial judge did not intend to express an opinion on the evidence, we think that by using the terms "confessed" and "confession" he inadvertently did so, in violation of G.S. 1-180. We think it is very likely that the jury received the impression that the court felt that the evidence showed that defendant had "confessed", that he had admitted the truth of a charge against him.

We hold that the error was sufficiently prejudicial to entitle defendant to a new trial. We refrain from discussing the other assignments of error argued in defendant's brief as they likely will not recur upon a retrial of the case.

New trial.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. MARLON LEE EDWARDS

No. 7729SC1055

(Filed 20 June 1978)

1. Criminal Law § 86.8— competency of witness—promise of aid by officer—use of drugs

An accomplice was not incompetent to testify against defendant because a police officer had promised to do whatever he could to help the accomplice in return for his testimony implicating defendant, since promises of assistance may affect the credibility of the witness but do not render the witness incompetent; nor was the witness incompetent to testify because he had used drugs on the day of the crimes where there was no evidence that he was under the influence of drugs at the time of testifying or that he was unable to see or remember the events to which he testified.

2. Criminal Law § 117.4— credibility of witness—drug use—failure to instruct

The trial court did not err in failing to recapitulate evidence that a State's witness had consumed drugs on the day of the events to which he testified or to instruct the jury to scrutinize the witness's testimony because of his drug use, since evidence relating to the credibility of a witness is a subordinate feature of the case, and defendant made no request for instructions regarding the credibility of the witness.

APPEAL by defendant from *Baley, Judge*. Judgments entered 12 August 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 25 April 1978.

Defendant pled not guilty to charges of felonious breaking and entering and armed robbery. The State presented evidence to show that Dean Burgess, owner of a store in Spindale, returned to his locked store building about 10:30 p.m. in response to notification from the police that the alarm system in the store had

gone off. On entering the darkened building, he heard someone say, "Don't move, I'll kill you." The person had a pistol and forced Burgess to lie on the floor, whereupon the person took Burgess's wallet containing $1200 in currency. The person then shot at Burgess before leaving the store, but the shot missed. After the intruder left, Burgess discovered that a gun rack was missing from his store and that entry to the building had been effected through a hole which had been broken in the building's cement block rear wall. Other testimony showed that the crimes were committed by defendant along with two accomplices.

Defendant presented evidence of an alibi.

The jury found defendant guilty of both offenses. Defendant appealed from judgments imposing prison sentences.

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

J. Nat Hamrick for defendant appellant.

PARKER, Judge.

All of the questions raised on this appeal relate to the testimony of Rodney Wiggins, an admitted accomplice. Wiggins was the principal witness who identified defendant as a perpetrator of the crimes. There was testimony that a police officer promised to do whatever he could to help Wiggins in return for Wiggins's testimony implicating defendant. The crimes occurred on the night of 31 January 1977, and Wiggins testified that he had taken drugs earlier that day. At approximately 6:00 a.m. that morning, he injected fifteen milligrams of Dilaudid into his arm. At 6:00 p.m. that evening, he injected another five milligrams of Dilaudid.

[1] By his first assignment of error, defendant contends that the court erred in denying his motion to strike the testimony of Wiggins. He argues that the testimony was incompetent because of the promises of assistance and because Wiggins was under the influence of drugs when the criminal acts occurred. We find no error. "The fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying." *State v. Jones*, 14 N.C. App. 558, 559, 188 S.E. 2d 676, 677 (1972). Promises of assistance may affect the credibility of the

witness; they do not render the witness incompetent. *See State v. Johnson*, 220 N.C. 252, 17 S.E. 2d 7 (1941).

Similarly, drug use does not per se render a witness incompetent to testify. Generally, evidence that the witness was using drugs, either when testifying or when the events to which he testified occurred, is properly admitted only for purposes of impeachment and only to the extent that such drug use may affect the ability of the witness to accurately observe or describe details of the events which he has seen. Annot., 65 A.L.R. 3d 705 (1975). In the present case, there was no evidence that Wiggins was under the influence of drugs at the time of testifying nor was there any showing that Wiggins was unable to see or remember the events to which he testified. Thus, the trial judge did not abuse his discretion in ruling that Wiggins was competent to testify. *See State v. Cloer*, 22 N.C. App. 57, 205 S.E. 2d 320 (1974); *State v. Fuller*, 2 N.C. App. 204, 162 S.E. 2d 517 (1968). Defendant's first assignment of error is overruled.

Defendant next assigns error to the judge's denial of his motions for nonsuit. In support of this assignment he again seeks to challenge the testimony of Wiggins on the grounds already noted. However, "[i]n considering a trial court's denial of a motion for judgment of nonsuit, the evidence for the State, considered in the light most favorable to it, is deemed to be true . . . ." *State v. Price*, 280 N.C. 154, 157, 184 S.E. 2d 866, 868 (1971). The credibility of that evidence was for the jury to determine and may not be challenged on a motion for nonsuit. This assignment of error is also overruled.

[2] In charging the jury, the trial judge did not mention in his recapitulation of the evidence that Rodney Wiggins had consumed drugs on the day of the events to which he testified, and neither did he instruct the jury to scrutinize Wiggins's testimony because of his drug use. Defendant contends that the judge erred in failing to give these instructions to the jury. However, the judge is not required to recapitulate all the evidence in his instructions to the jury. G.S. 1-180 requires the judge to state the evidence only "to the extent necessary to explain the application of the law thereto." "A party desiring further elaboration on a subordinate feature of the case must aptly tender request for further instructions." *State v. Guffey*, 265 N.C. 331, 332, 144 S.E. 2d 14, 16 (1965).

Evidence relating to the credibility of a witness is a subordinate, rather than a substantive, feature of the case. 4 Strong's N.C. Index 3d, Criminal Law, § 113.3. Defendant made no request for instructions regarding the credibility of Wiggins's testimony. Thus, the judge's failure to give the instructions was not error.

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

No error.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. KERMIT HONEYCUTT

No. 7812SC160

(Filed 20 June 1978)

Criminal Law §§ 35, 73— declaration against penal interest—exclusion as hearsay

In a prosecution for felonious assault in which defendant contended that the assault was committed by another, the trial court properly excluded as hearsay testimony by defendant's sister that, when defendant and a stranger came to her home shortly after the assault, she heard the stranger say to defendant, "Honeycutt, I got the son of a bitch, didn't I?" since this State does not recognize a statement against the penal interest of the declarant as a valid exception to the rule excluding hearsay evidence.

APPEAL by defendant from *Graham, Judge*. Judgment entered 20 September 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 June 1978.

Defendant was tried on his plea of not guilty to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The State presented the testimony of the victim of the assault and of two eyewitnesses. The victim testified that about midnight on 15 March 1976 he was standing on the parking lot of a lounge about two to three feet from defendant when he felt someone strike him on the back of the head. He turned and as he did so felt a stabbing sensation under his left eye. He turned back and saw defendant holding a long-bladed knife. Defendant made an upward thrust towards his mid-section, which he felt across his chest. At the same time that he saw defendant with the knife

striking him across the front, he felt someone striking him in the rear. That was all that he remembered.

One eyewitness testified that there were two men, one of whom was the defendant, standing near the victim at the time of the assault. One of the men had a knife, but she could not swear which one.

The other eyewitness testified that he came to the scene in response to the screams of the first eyewitness. When he arrived he observed the victim bent over in a crouching position and the defendant was "coming up on his chest like that . . . (indicating)." At that time there was no one else there besides the victim and the defendant, although there were other people in the immediate area. He did not observe any knife in defendant's hand, but he did observe some blood about defendant's right hand. The State also presented evidence as to various wounds on the victim's body received as a result of the assault.

Defendant did not testify but presented the testimony of his sister and of her two young daughters. Defendant's sister testified that in the early morning hours of 16 March 1976 defendant and another man, whom she did not know, came to her home. The other man had blood all over his shirt. She gave this man one of her husband's T-shirts, and he changed shirts in her home. After fifteen or twenty minutes he left, and she has not seen him since. She had never seen him before that date and does not know his name.

Defendant's two young nieces each testified that defendant and another person came to their home in the early morning hours of 16 March 1976. They observed blood on the front of the shirt of the other man but saw no blood on the person of the defendant.

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. From judgment imposing a prison sentence, defendant appeals.

Attorney General Edmisten by Associate Attorney Douglas A. Johnston for the State.

Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A., by E. Lynn Johnson for defendant appellant.

PARKER, Judge.

On direct examination of defendant's sister, the principal defense witness, defendant's counsel sought to ask her concerning a statement which she heard the stranger make to her brother while the two men were in her home shortly after the assault. The court sustained the State's objection. Had the witness been permitted to answer, she would have testified that she heard the stranger say to the defendant, "Honeycutt, I got the son of a bitch, didn't I?" The exclusion of this testimony is the subject of defendant's sole assignment of error. We find no error.

The proffered testimony was clearly hearsay, and this State does not recognize a statement against the penal interest of the declarant as a valid exception to the rule excluding hearsay evidence. *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. English*, 201 N.C. 295, 159 S.E. 318 (1931); *State v. May*, 15 N.C. 328 (1833); *State v. Vanderhall*, 30 N.C. App. 239, 226 S.E. 2d 402 (1976). Although this view has been the subject of much scholarly criticism, *see* 5 Wigmore, Evidence (3rd edition), §§ 1476, 1477; 1 Stansbury's N.C. Evidence (Brandis Rev.), § 147, pp. 495-96; note, 10 N.C. L. Rev. 84 (1931), it is still the view held by the majority of the courts in this country. Annot., 162 A.L.R. 446 (1946). In any event it is so deeply embedded in the case law of this jurisdiction that the decision to depart from it, if such a decision should be made, is more properly the function of our Supreme Court than of the trial courts or of this court. The trial court in this case correctly applied the rule as announced by our Supreme Court to this date.

We note that the record in the present case fails to furnish any substantial basis for argument that exclusion of the hearsay evidence in this case amounted to denial of due process. *See Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). In defendant's trial and in the judgment appealed from we find

No error.

Judges HEDRICK and MITCHELL concur.

STATE OF NORTH CAROLINA v. JUDITH ANN SANDERS

No. 7818SC58

(Filed 20 June 1978)

Prostitution § 1— occupying room for immoral purposes—statute vague and indefinite

That portion of G.S. 14-186 which states that it is a misdemeanor for persons of the opposite sex to occupy the same bedroom in any hotel or public boarding house for any immoral purpose is too vague and indefinite to comply with constitutional due process standards.

APPEAL by the State from *Albright, Judge.* Judgment entered 23 November 1977, in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 May 1978.

Defendant was charged with occupying a bedroom in a public inn with a member of the opposite sex for immoral purposes, a misdemeanor under G.S. 14-186. She filed a motion to dismiss on the grounds that the statute was void for vagueness and that it denied her constitutional rights of due process. The district court hearing the case first denied the motion but later reversed itself, found the statute unconstitutional, and dismissed the case. On appeal from district court the Superior Court affirmed the dismissal and held that

> "[T]he provisions of General Statute 14-186 wherein the occupying of a bedroom of a hotel, public inn, or boarding house by a man and woman is made criminal is too vague and indefinite, and therefore, fails to comply with the constitutional provisions of Due Process as contained in Article I, Section 18 [*Sic*] of the Constitution of the State of North Carolina and the provisions of the Fourteenth Amendment of the United States Constitution. That in so holding, this court has dealt only with the statute herein enumerated and brought into question and has not dealt with that provision of the statute dealing with false registration."

The State appealed.

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

Wallace C. Harrelson, Public Defender, for defendant appellee.

ARNOLD, Judge.

This case presents the sole question of whether a portion of G.S. 14-186 is, as the Superior Court judge found, too vague and indefinite to comport with the due process requirements of Article I, Section 19 of the North Carolina Constitution and of the Fourteenth Amendment to the United States Constitution. In pertinent part, G.S. 14-186 reads:

> "*Opposite Sexes occupying same bedroom at hotel for immoral purposes* . . . . Any man and woman found occupying the same bedroom in any hotel, public inn or boardinghouse for any immoral purpose . . . shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars . . . , imprisonment for not more than six months, or both."

We are mindful of the general rule that every presumption is to be indulged in favor of the constitutionality of a statute. *State v. Lueders*, 214 N.C. 558, 200 S.E. 22 (1938). Arguing from this basic premise the State contends that if an intelligent and valid interpretation can be ascertained a statute does not fail merely because the legislative body could have made the statute clearer and more precise. We agree. *United States v. Powell*, 423 U.S. 87, 46 L.Ed. 2d 228, 96 S.Ct. 316 (1975). We also agree that the statute in question must be viewed in terms of "the text of the statutes, and the subjects with which they deal . . . ." *Connally v. General Construction Co.*, 269 U.S. 385, 392, 70 L.Ed. 322, 328, 46 S.Ct. 126, 128 (1926).

We cannot, however, agree with the State in its argument that the term "any immoral purpose" in the context of G.S. 14-186 means illicit sexual intercourse. Article 26 of Chapter 14, wherein G.S. 14-186 is found, is entitled "Offenses against Public Morality and Decency" and includes such offenses as crime against nature, incest, bigamy, fornication and adultery, obscene literature, indecent exposure, dissemination of sexually oriented materials to minors, use of profane, indecent or threatening language to any person over telephone and use of profane or indecent language on public highways. We are unable to view these statutes and conclude, as the State argues, that "any immoral purpose" is limited by the context of Article 26 to illicit sexual conduct. The State argues that the immediately preceding statute, G.S. 14-185, which

prohibited inducing female persons into hotels for immoral purposes, sets the stage for G.S. 14-186 in that it defines, through the doctrine of *ejusdem generis*, immoral purposes as "for the purpose of prostitution or debauchery or for any other immoral purpose." We note, however, that the General Assembly repealed G.S. 14-185 in 1975.

A criminal statute or ordinance must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden. *See, e.g. State v. Furio*, 267 N.C. 353, 148 S.E. 2d 275 (1966). G.S. 14-186 fails to define with sufficient precision exactly what the term "any immoral purpose" may encompass. The word *immoral* is not equivalent to the word *illegal*; hence, enforcement of G.S. 14-186 may involve legal acts which, nevertheless, are immoral in the view of many citizens. One must necessarily speculate, therefore, as to what acts are immoral. If the legislative intent of G.S. 14-186 is to proscribe illicit sexual intercourse the statute could have specifically so provided.

> "[W]here the legislature declares an offense in language so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, citizens subject to the statute may not be required to guess at their peril as to its true meaning. Such a statute is too vague, and it fails to comply with constitutional due process standards of certainty." *State v. Graham*, 32 N.C. App. 601, 607, 233 S.E. 2d 615, 620 (1977).

We hold that the trial court correctly ruled that the portion of G.S. 14-186 quoted above is too vague and indefinite to comply with constitutional due process standards. Our opinion, it must be noted, does not apply to statutes which refer to "immoral purposes" but which also contain phrases which, by the doctrine of *ejusdem generis*, may be used to define "immoral purposes." The phrase "any immoral purposes" within G.S. 14-186 is not preceded by any phrases from which we could determine the meaning of "immoral purposes."

The judgment of the trial court is

Affirmed.

Judges BRITT and ERWIN concur.

HARNETT TRANSFER, INC. (FORMERLY SQUARE DEAL TRANSFER, INC.) v. WELDON AMMIE PETERSON

No. 7711DC700

(Filed 20 June 1978)

Contracts §§ 20.2, 21.1— instructions—justification for prevention of performance —repudiation as breach

In an action for breach of a contract to haul cargo for plaintiff in defendant's truck, the trial court erred in failing to instruct the jury on (1) justification for prevention of performance of a contract and (2) repudiation as breach of contract where there was evidence tending to show that defendant had been instructed to haul cargo to Florida but instead returned to Raleigh and parked his tractor-trailer on plaintiff's lot and disappeared; defendant never contacted or notified anyone connected with plaintiff concerning his intentions with respect to the contract or the tractor-trailer; defendant was personally indebted to plaintiff's president for the purchase price of the tractor-trailer; the day after defendant left the tractor-trailer on plaintiff's premises, plaintiff took it to a dealer to be serviced; and plaintiff later sold the tractor-trailer after having title transferred back into plaintiff's name.

APPEAL by plaintiff from *Pridgen, Judge.* Judgment entered 13 January 1977 in District Court, HARNETT County. Heard in the Court of Appeals 25 May 1978.

Plaintiff filed a complaint alleging breach of contract by defendant and seeking $2,326.97 in damages. In his answer defendant denied breaching the contract and alleged that plaintiff had prevented him from complying with the contract by breaching the contract itself.

At trial plaintiff's evidence tended to show that on 6 December 1971 plaintiff and defendant entered into a contract whereby defendant, as an independent contractor, was to haul cargo for plaintiff in defendant's truck in exchange for 70% of the freight proceeds collected by plaintiff for the trip; that plaintiff was to advance expenses to defendant which would then be deducted from defendant's 70% share of proceeds; that by the end of February 1972 defendant had been advanced $2,326.97 more than his share of the freight proceeds; that on 23 February 1972 defendant was instructed by plaintiff to drive a load of cotton seed hulls from South Carolina to Florida, but instead defendant returned to Raleigh, parked his truck and trailer on plaintiff's lot and disappeared; that plaintiff never heard from defendant

again and assumed he had abandoned the truck and the contract; that plaintiff had sold the truck to defendant on 6 December 1971 pursuant to a conditional sales contract; and that the day after defendant abandoned the truck, plaintiff took it to a dealer to be serviced and subsequently sold it in April 1972 after having title to it transferred back to plaintiff's name.

Defendant's evidence tended to show that under the terms of the contract with plaintiff he was to work for plaintiff until the promissory note and conditional sales contract executed by him for purchase of the truck were paid and satisfied in full; that on 23 February 1972 he returned to Raleigh from South Carolina instead of going to Florida in order to take care of some personal financial problems; that he had called the party in Florida who was expecting the shipment and informed him of the delay; that he was not required by plaintiff to follow certain routes or maintain certain timetables in his work; that defendant parked his truck and trailer on plaintiff's lot at approximately 11:00 p.m. on 23 February 1972 and spent the next day taking care of his personal business; that when he returned to the lot to get the truck at 7:00 p.m. on 24 February 1972, he found the truck missing; that he had left the truck locked because some of his personal belongings were in it; that he attempted to contact plaintiff and to locate the truck on numerous occasions thereafter and was unable to do so; and that he was unable to fulfill his contract with plaintiff as a result of plaintiff's taking the truck from him.

The jury found that plaintiff, rather than defendant, had breached the contract and awarded no damages to plaintiff. Plaintiff appeals.

Johnson and Johnson, by W. Glenn Johnson, for the plaintiff.

Stewart and Hayes, by Gerald W. Hayes, Jr., for the defendant.

MARTIN, Judge.

Plaintiff contends that the trial court erred in failing to instruct the jury relative to two substantive features of the case. Specifically, he argues that justification for prevention of performance of a contract and repudiation as breach of contract were material aspects of the case arising on the evidence which should have been brought to the jury's attention. We must agree.

It is familiar learning that the trial court has a duty to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the conflicting evidence. *Griffin v. Watkins*, 269 N.C. 650, 153 S.E. 2d 356 (1967). In the instant case, the evidence disclosed that plaintiff took possession of defendant's tractor trailer, while it was parked in plaintiff's lot in Raleigh, thereby preventing defendant's performance of the subject contract. The court instructed the jury to the effect that such conduct by plaintiff, without justification, would amount to plaintiff's breaching the contract. The evidence also disclosed that defendant's actions in bringing the tractor trailer back to Raleigh were contrary to his instructions to proceed to Florida; that once in Raleigh, defendant never contacted or notified anyone connected with plaintiff concerning his intentions with respect to the contract or the tractor trailer; and that defendant was personally indebted to George Hodges, president of plaintiff corporation, for the purchase price of the tractor trailer. We are of the opinion that this evidence was sufficient to raise a real question as to whether plaintiff's conduct was *justified*. The court's instruction on "prevention of performance" was insufficient on the question of justification, and its failure further to charge on justification was prejudicial error.

Moreover, we also agree with plaintiff's contention that evidence of defendant's bringing the tractor trailer back to Raleigh, apparently abandoning it there, and failing to notify plaintiff of his intentions regarding further performance of the contract was sufficient to require submission to the jury of an instruction explaining repudiation as a breach of contract.

Accordingly, the trial court's failure to charge on substantial features of the case constitutes error for which plaintiff is entitled to a new trial.

Although plaintiff's remaining assignments of error may have merit, we refrain from any discussion thereof as they may not arise again on a new trial.

New trial.

Judges MORRIS and VAUGHN concur.

ROBERT G. MATTHEWS, JR. AND LORETTA G. MATTHEWS v. AERO MAYFLOWER TRANSIT CO., INC. & SECURITY STORAGE CO., INC.

No. 773DC718

(Filed 20 June 1978)

Carriers § 12— moving household goods—correct charge not given—owner's liability for charge

Defendant shipper was entitled to retain possession of plaintiffs' household goods until plaintiffs paid $339.41 more than the contract price agreed upon by the parties for moving plaintiffs' goods across the country, even though defendant had miscalculated the weight and mileage resulting in the higher charge, since defendant was prohibited by I.C.C. regulations from relinquishing possession of any freight until all tariff charges had been paid and was prohibited from charging less for any service than the charge specified by the tariffs in effect.

APPEAL by plaintiffs from *Phillips (Herbert O.), Judge*. Judgment entered 19 April 1977 in District Court, PITT County. Heard in the Court of Appeals 31 May 1978.

Plaintiffs brought this action with reference to a contract made in 1969 for moving and storage of their household goods. They allege that an agent of defendant Mayflower advised them in Pullman, Washington, that their goods weighed 2,320 pounds and that the cost of shipment from Pullman to Greenville, North Carolina, computed as a distance of 2,482 miles, would be $461.91, plus $12.50 for insurance, $13.80 for warehouse handling, $13.80 for one month's storage, and $40.25 for delivery from storage in transit, or a total of $542.26. Plaintiffs agreed to these terms. They later extended the contract for storage for four months. After they arrived in North Carolina, plaintiffs were informed that defendant Mayflower had erred both in weighing the goods and in computing the mileage and that as a result the costs of shipping were more than $200.00 higher than previously invoiced. In addition, the monthly storage rates were higher due to the increased weight. Defendant, Security Storage, pursuant to orders from Mayflower, refused to release the goods until all charges, including a separate $141.10 delivery fee, were paid. This fee covered transportation to Greenville from the storage facility in Goldsboro. Plaintiffs prayed the court to award them possession of their goods upon the payment of $595.86, the amount of the contract made in Washington, plus the additional storage charges.

Defendants counterclaimed for the full amount they alleged was due under their various tariffs, a total amount of $930.02, less the partial payment already made.

On hearing of defendants' motion for summary judgment, the court reviewed pleadings and affidavits and concluded that the motion should be granted. Accordingly, plaintiffs' action was dismissed with prejudice, and defendant was granted judgment for the unpaid balance of freight and storage charges in the amount of $339.41. Plaintiffs appealed.

Willis A. Talton, for plaintiff appellants.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for defendant appellees.

VAUGHN, Judge.

We conclude that there were no genuine issues as to any material fact and that defendants were entitled to judgment as a matter of law. We, therefore, affirm the entry of summary judgment.

The affidavit of J. R. Bruckman, manager of the Credit and Collection Department of Aero Mayflower Transit Co., states that "the plaintiffs' goods were shipped in interstate commerce under the provisions of all applicable rules and regulations of the Interstate Commerce Act . . . ." Plaintiffs offered no evidence that this was not so. Indeed, they probably could not do so. The goods were shipped from Washington to North Carolina. U.S.C.A. 49 § 302(a) provides that Part II of the Interstate Commerce Act shall "apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce." The weight of plaintiffs' goods and the distance shipped were established by affidavit of the president of Security Storage, Inc. The defendants also offered into evidence copies of Tariff No. 126-A, MF—I.C.C. No. 142, certified by the Secretary of the Interstate Commerce Commission as having full force and effect in 1969 when plaintiffs shipped their goods. By this tariff, defendants were obligated to charge the full amount invoiced by them for cross-country transportation, notwithstanding the original mistake.

By U.S.C.A. 49 § 323 the carrier is prohibited from relinquishing possession of any freight until all tariff charges have

been paid. By U.S.C.A. 49 § 317(b), the carrier is prohibited from charging less for any service than the charge specified by the tariffs in effect. Together these provisions prevent any equitable considerations from justifying a retention by the shipper of any part of a lawful tariff charge. "In short, application of tariffs as published is required regardless of the intention of the parties and irrespective of the equities existing between carriers and shippers." *National Van Lines, Inc. v. United States*, 355 F. 2d 326, 331 (7th Cir. 1966); *see Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915).

From the above authority, it is clear that the defendants are governed by I.C.C. regulations and are required to collect the full amount owed them under the tariffs.

Affirmed.

Judges MORRIS and MARTIN concur.

J. EULAN JOHNSON AND WIFE, SANDRA JOHNSON v. THE TOWN OF LONGVIEW, NORTH CAROLINA, CALVIN C. MOORE, BUILDING INSPECTOR OF THE TOWN OF LONGVIEW, NORTH CAROLINA

No. 7725SC542

(Filed 20 June 1978)

1. **Municipal Corporations § 30.3— zoning ordinance—ordinance book**

   A town zoning ordinance was not unenforceable against plaintiffs on the ground that it had not been filed and indexed in an ordinance book in compliance with G.S. 160A-78 where, prior to plaintiffs' request for a building permit, the town codified a code of ordinances, and prior to the codification the town kept its zoning ordinance separate and apart from its minutes.

2. **Municipal Corporations § 30.20— amendment of zoning ordinance—public hearings before zoning board**

   Former G.S. 160-177 did not require a zoning board to conduct public hearings before making its recommendations to the town board for amendment of the town zoning ordinance.

APPEAL by plaintiffs from *Ferrell, Judge*. Judgment entered 20 May 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 31 March 1978.

Plaintiffs brought this action to compel the defendants to issue a building permit authorizing them to build an addition to their hosiery mill on a lot adjacent to an existing mill. Defendants answered that Chapter 20 of the Code of Laws of the Town of Longview zoned the land in question as "Residential B" and that the hosiery mill was not a use permitted under that zoning classification. On 23 July 1976, plaintiffs moved for summary judgment. Thereafter, over a period of several months, both parties submitted affidavits.

On 20 May 1977, the judge entered judgment in which he set out the undisputed facts and concluded as a matter of law that plaintiffs were not entitled to the relief prayed for in the complaint. The action was dismissed.

Thomas and Brantley, by Kenneth D. Thomas, for plaintiff appellants.

Joe P. Whitener, for defendant appellees.

VAUGHN, Judge.

Although the judgment from which plaintiffs appeal is described as a "summary judgment," it is perfectly clear that the attorneys and the judge treated the proceeding as a trial before the judge on an agreed statement of facts. On oral argument the attorneys agreed that all of the essential facts were stipulated and only questions of law were presented.

Plaintiffs, of course, had the burden of proof. It was, therefore, incumbent upon them to show that the building permit they sought was for a purpose authorized by the zoning ordinance of defendant. It is undisputed that defendant Longview adopted a comprehensive zoning ordinance in 1950. The validity of that ordinance is not questioned. The record is silent as to what it provided with reference to the subject property. The record is also silent as to whether the 1967 ordinance, now under attack, made any change in the 1950 comprehensive zoning ordinance as it relates to the property in question. We will, nevertheless, go directly to the question of whether plaintiffs have shown the 1967 ordinance to be invalid, as alleged. We conclude that they have not.

[1] Plaintiffs first contend that the ordinance cannot be enforced because it had not been "codified or filed and indexed in accordance with G.S. 160A-77 or 160A-78." *See* G.S. 160A-79(d). The argument must fail. The record discloses that defendant is a town of less than 5,000, and G.S. 160A-77, by its express terms, applies only to cities having a population of 5,000 or more. It appears that defendant, prior to the time plaintiffs requested their permit, did codify a code of ordinances. Even prior to that time the town kept its zoning ordinance separate and apart from the minute book. For purposes of their attack on the zoning ordinance, therefore, we hold that plaintiffs have failed to show that defendant was not substantially in compliance with G.S. 160A-78.

[2] Plaintiffs' other attack on the 1967 amendment to the zoning ordinance is by way of a contention that all public hearings were not conducted as required by law. At the time of the amendment to the ordinance, the applicable statutes were 160-172 to 178 (Repealed by Session Laws 1971, c. 698, effective January 1, 1972). It is undisputed that the ordinance was adopted only after proper notice and hearing before the Town Board as required by them. G.S. 160-176. The amendment to the zoning ordinance was adopted on recommendation of the zoning board. Plaintiffs argue that the zoning board had not conducted public hearings before making its recommendations to the Town Board as required by G.S. 160-177. The argument is without merit. That statute, G.S. 160-177, referred to public hearings on a final report on recommendations to the governing board for "the boundaries of the various original districts and appropriate regulations to be enforced therein." G.S. 160-177. The original zoning districts were established in 1950. The statute, G.S. 160-177, did not apply to subsequent changes in the ordinance in 1967. Compare G.S. 160A-387, the current version of former G.S. 160-177, which provides that public hearings "may" be held.

Plaintiffs have failed to show that the building permit they seek is for a use permitted by the zoning ordinance. Their action to compel the issuance of the permit was, therefore, properly dismissed.

Affirmed.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. MICHAEL LEE SMITH

No. 7717SC990

(Filed 20 June 1978)

Automobiles § 113.1— manslaughter—cause of death—sufficiency of evidence

In a prosecution for manslaughter, evidence that deceased died as a result of a collision with defendant's vehicle was sufficient to be submitted to the jury and expert testimony with respect to cause of death was unnecessary where the evidence tended to show that at 8:15 p.m. deceased was in excellent health; he was driving on a street where the speed limit was 35 mph; defendant came around a curve about 200 yards in front of deceased at a speed in excess of 90 mph; defendant had been drinking; his car struck deceased's vehicle and crushed it; and deceased was declared dead at the scene at 8:25 p.m.

APPEAL by defendant from *Lupton, Judge.* Judgment entered 14 July 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 31 March 1978.

Defendant was placed on trial for manslaughter as a result of the death of Charles Wampler. At the close of all the evidence, the judge announced that he would submit the case to the jury on a charge of causing the death of another by vehicle in violation of G.S. 20-141.4. The jury returned a verdict of guilty of that charge, and judgment imposing an 18 month sentence was entered.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Morrow, Fraser and Reavis, by Bruce C. Fraser, for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error all relate to the sufficiency of the evidence to take the case to the jury. He contends that the State failed to offer evidence that he caused the collision and that the State also failed to show that deceased died as a result of the collision. We conclude that the evidence, when considered in the light most favorable to the State, disclosed circumstances from which the jury could infer that defendant died as a result of the collision caused by defendant while defendant was operating his vehicle at a speed in excess of that permitted by law. That evidence was as follows.

Charles Wampler, the deceased, was 35 years old and in excellent health when he left his home at about 8:15 p.m. on 17 January 1977. He was driving a Ford Pinto automobile and was headed for church. After proceeding along North Main Street in Mount Airy, he stopped and then started to execute a left turn. Defendant approached him from the opposite direction driving a Chevrolet Camaro. The speed limit on that residential street was 35 miles per hour. Defendant had been drinking. He came around a curve about 200 yards in front of deceased at a speed of in excess of ninety miles an hour. His car struck deceased's Pinto broadside on the passenger side and knocked it for a considerable distance. It was damaged on both sides, the front and the rear. The body of the Pinto automobile was so crushed together that deceased's body touched both sides of the interior of the vehicle. The steering wheel was broken. Deceased's hands were stuck through the steering wheel, and his head was tilted to the left. A medical technician with the emergency squad arrived on the scene at 8:25 p.m. (about ten minutes after deceased had left home on his way to church) and determined that he was dead. A power tool was used to pry the car door away from deceased so that his body could be removed from the vehicle.

The evidence that defendant caused the accident while engaged in a violation of the speed law is direct and abundant. The evidence is also sufficient to permit the jury to find that Wampler was alive and well when he started to make a left turn and was dead just a few seconds later after being struck by defendant's vehicle. From these facts, we hold that the jury could reasonably infer that he was killed in the collision. It is not always necessary to have an expert testify as to the cause of death where, as here, all of the facts disclose a set of circumstances from which any person of average intelligence could be satisfied beyond a reasonable doubt that the fatality occurred in the collision. *See e.g. Branch v. Dempsey*, 265 N.C. 733, 145 S.E. 2d 395 (1965). We have not ignored the majority opinion in *State v. Cheek*, 19 N.C. App. 308, 198 S.E. 2d 460 (1973). We respectfully conclude, however, that the facts in the case now before us raise a jury question as to whether the death was the result of the collision.

No error.

Judges PARKER and WEBB concur.

STATE OF NORTH CAROLINA v. FLOYD LEE EFIRD

No. 7720SC875

(Filed 20 June 1978)

Assault and Battery § 15.1— intentional firing of gun—no accident or misadventure

The defendant in a felonious assault prosecution was not entitled to an instruction on accident or misadventure where all of the evidence indicated that defendant intended to fire and did fire the shots which resulted in injury to the victim, the defendant having contended that he did not intend to shoot the victim but intended only to scare him and that his wife was tussling with him and was holding his arm when he fired the shots.

APPEAL by defendant from *McConnell, Judge*. Judgment entered 28 July 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 27 February 1978.

Defendant was indicted and tried for assault with a deadly weapon with intent to kill inflicting serious bodily injury.

At trial, the State offered evidence which tended to show that on 14 May 1977, defendant and his wife, Katie Efird, were asleep in their house; that Jeffrey Allen Turner (Katie Efird's son and defendant's stepson), along with three others went to the house; that Jeffrey woke his mother to go with them to the fish camp and she woke defendant to ask him if he had her money; that defendant ordered Jeffrey out of the house, accompanied him outside, began to strike Jeffrey and Katie with his fists, and generally struggled with Jeffrey; that Jeffrey pushed defendant to the ground, whereupon defendant crawled to a nearby bush, secured a plastic bag containing a pistol from beneath the bush, removed the pistol from the bag, aimed it at Jeffrey's heart, and fired three or five times, striking Jeffrey once in the arm and twice in the hip or thigh area.

Defendant's testimony tended to show that on the day in question, defendant was awakened by Jeffrey Turner who was

kicking defendant in the stomach, and cursing and threatening him; that defendant ordered Jeffrey and his friends to leave, whereupon Jeffrey pulled a knife and chased defendant from the house; that outside, Jeffrey kicked and struck defendant karate-style, and stabbed him in the leg with the knife; that at the time of the stabbing, Katie was holding onto defendant; that when defendant was knocked to the ground he was kicked by Jeffrey and by one of the boys with Jeffrey; that he crawled to where the pistol was hidden, thinking that if he fired the gun, his assailants would leave; that he did not aim the gun; and that at the time he fired the gun, Katie was holding his arm.

From a verdict of guilty as charged, and judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten, by Associate Attorney George W. Lennon, for the State.

Coble, Morton, Grigg & Odom, by Ernest H. Morton, Jr., for defendant.

BROCK, Chief Judge.

Defendant assigns as error the failure of the trial court to instruct the jury on the law of shooting by accident or misadventure and the failure of the court to state defendant's evidence on shooting by accident or misadventure to the extent necessary to explain the application of the law thereto. This assignment has no merit.

Defendant contends, and his testimony tends to show, that he did not intend to shoot his stepson, that he did intend to scare his stepson by firing the gun, and that at the time he fired the gun, his wife was tussling with him and was holding his arm. Defendant does not deny that he fired the gun; he does not contend that the gun discharged accidentally. The evidence is uncontradicted that Jeffrey Allen Turner received not one, but three separate gunshot wounds.

In our opinion, based upon the evidence as noted, defendant was not entitled to an instruction on shooting by accident or misadventure. All of the cases which have come to our attention holding that such an instruction was required have involved evidence tending to show that the *discharge* of the firearm was

accidental; that it discharged during a struggle or when grabbed or struck by the victim while in the defendant's hands. *See State v. Floyd*, 241 N.C. 298, 84 S.E. 2d 915 (1954); *State v. Best*, 31 N.C. App. 389, 229 S.E. 2d 202 (1976); *State v. Wright*, 28 N.C. App. 481, 221 S.E. 2d 745 (1976); *State v. Moore*, 26 N.C. App. 193, 215 S.E. 2d 171, *cert. denied*, 288 N.C. 249 (1975); *State v. Douglas*, 16 N.C. App. 597, 192 S.E. 2d 643 (1972), *cert. denied*, 282 N.C. 583 (1973). Where, as in the instant case, all of the evidence indicates that defendant intended to fire and did fire the shot or shots which resulted in injury to the victim, defendant is not entitled to an instruction on shooting by accident or misadventure. This assignment of error is overruled.

By his next assignment of error, defendant contends that the trial court failed to state defendant's evidence tending to negate the element of intent to kill to the extent necessary to explain the application of the law thereto, as required by G.S. 1-180. Examining the charge as a whole, we are of the opinion that the court adequately summarized defendant's evidence; and the judge's application of the law to the evidence was adequate for the jury to understand the issues involved.

We have examined defendant's remaining assignments of error and have found in them no merit. In our opinion, defendant received a fair trial free of prejudicial error.

No error.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. EDDIE WILSON SEARCY AND CHARLES TEAGUE

No. 7829SC136

(Filed 20 June 1978)

1. Burglary and Unlawful Breakings § 10.3— possession of burglary tools—insufficiency of evidence

In a prosecution for possession of burglary tools, one defendant's motion for nonsuit should have been allowed where the only evidence linking defendant to the contraband was that he was a passenger in the vehicle in which contraband was found.

2. **Burglary and Unlawful Breakings § 10.3— possession of burglary tools—contraband found in car—defendant as driver—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for possession of burglary tools where it tended to show that defendant was the driver of the car in which the contraband was found.

3. **Burglary and Unlawful Breakings § 10— indictment—mixture of two offenses charged—indictment insufficiently clear**

An indictment which charged that defendant "did feloniously have in his possession a dangerous and offensive weapon, to wit: a handgun, and did also have in his possession, without lawful excuse, a mask, a 14 inch prybar, two pairs of gloves, two card board boxes and one pair of bolt cutters, for the purpose of Breaking and Entering a building . . ." contained a mixture of the first two offenses defined by G.S. 14-55 and was therefore not sufficiently clear to allow defendant to understand the offense with which he was charged.

APPEAL by defendants from *Gavin, Judge.* Judgment entered 4 August 1977, in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 1 June 1978.

Defendants were charged in bills of indictment which stated that each

> ". . . unlawfully and wilfully did feloniously have in his possession a dangerous and offensive weapon, to wit: a handgun, and did also have in his possession, without lawful excuse, a mask, a 14 inch prybar, two pairs of gloves, two card board boxes and one pair of bolt cutters, for the purpose of Breaking and Entering a building occupied by Cliffside Pharmacy, Inc. a Corp located on North Main Street in Cliffside, North Carolina."

The defendants were arraigned, and both entered pleas of not guilty.

At trial, the State's evidence tended to show that Deputy Sheriff McEntyre of the Rutherford County Sheriff's Department, while on patrol at 2:00 a.m. on 19 September 1976, observed a 1964 Mustang parked in front of a closed drug store. The driver of the Mustang drove away when the deputy shined a light on it. McEntyre stopped the vehicle and discovered that defendant Searcy was driving and that defendant Teague was in the right front seat. Donald Ervin, who said he was the owner of the vehicle, was in the rear seat. Ervin denied McEntyre's request to search, but then consented after McEntyre called Lieutenant Car-

roll Guest to the scene. The items enumerated in the indictments were found in the passenger areas, front and back seats of the vehicle.

Defendants put on no evidence. The jury returned guilty verdicts, and defendants were sentenced to ten years imprisonment. They appealed.

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

Robert L. Harris for defendant appellant Searcy.

Carroll W. Walden, Jr., for defendant appellant Teague.

ARNOLD, Judge.

[1] Both defendants argue that their motions for nonsuit should have been allowed. Defendant Teague argues that he was a mere passenger in the Mustang; that there was no evidence of how he entered the Mustang or of his relationship to the driver or the owner; and that there was no evidence that he had control over either the vehicle or the gun. We agree with defendant Teague that there was no evidence that he was acting in concert or that he was *particeps criminis*. In the case of *State v. Ledford*, 24 N.C. App. 542, 211 S.E. 2d 532 (1975), the fact that contraband was found under the hood of the car is not a significant difference to distinguish it from the case at bar. Here, as in *Ledford*, defendant Teague was shown only to be a passenger of the vehicle in which contraband was found. There being no other evidence linking Teague to the contraband, defendant Teague's motion for nonsuit should have been allowed.

[2] Defendant Searcy's motion, however, was properly denied. In *State v. Glaze*, 24 N.C. App. 60, 210 S.E. 2d 124 (1974), this Court held that the State could overcome a motion for nonsuit by presenting evidence placing the accused within such proximity to the contraband as to justify the jury's conclusion that the contraband was in the accused's possession. In *Glaze*, the Court found that defendant, as driver of the vehicle, had control of its contents, a fact sufficient to give rise to a rebuttable inference of knowledge and possession sufficient to take the case to the jury. As to defendant Searcy, the driver in the present case, the *Glaze* case is apposite, and his motion for nonsuit was properly denied.

[3] Defendant Searcy also assigns as error the trial court's denial of his motion to set aside the verdicts and to arrest judgment. He argues that the bill of indictment upon which he was tried charges two separate offenses and that it is too uncertain to identify the offense under G.S. 14-55 with which he was charged. We agree.

G.S. 14-55 makes three separate offenses felonies:

> "If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be guilty of a felony . . . ."

The indictment, which has already been quoted, contains a mixture of the first two offenses defined by G.S. 14-55. We find that it is not sufficiently clear to allow defendant to understand the offense with which he was charged. Our reversal of the trial court's ruling on the arrest of judgment motion does not, however, preclude defendant's retrial for offenses charged under a proper bill of indictment.

As to defendant Teague, reversed.

As to defendant Searcy, judgment arrested.

Judges BRITT and ERWIN concur.

IN THE MATTER OF KENNETH MAURICE SAMUELS

No. 7826DC124

(Filed 20 June 1978)

Infants § 20— juvenile delinquent—disposition of case not deferred—no error

Where the trial court adjudicated the juvenile defendant delinquent but initially deferred disposition pending receipt of a social summary from a court counselor and announced the conditions of defendant's probation, whereupon

defendant openly informed the court that he would not comply with those conditions, the court's ensuing entry of disposition committing defendant to training school was proper.

APPEAL by juvenile from *Lanning, Judge*. Judgment entered 21 September 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 31 May 1978.

Defendant was charged in a juvenile petition with being a delinquent child, as defined by G.S. 7A-278(2), for the reason that he unlawfully and wilfully attempted to break and enter a certain building in Charlotte on or about 30 June 1977. At the hearing, the State amended the petition to allege misdemeanor breaking. The juvenile defendant, through counsel, indicated that he wished to admit guilt of the charges included in the amended petition. After the court thoroughly advised the juvenile defendant of the consequences of his admission, the defendant did, of his own free will, admit the charge.

The court then received an unsworn statement of facts from a State's witness and, based upon such testimony and the defendant's admission, found beyond a reasonable doubt that defendant did in fact commit the offense as charged.

The court adjudicated the juvenile defendant delinquent but initially deferred disposition, placing defendant on probation pending receipt of a social summary from a court counselor. As a condition of his probation, defendant was to reside with his mother and obey her rules and regulations. At this point, defendant informed the court that he was living with his thirty-one (31) year old girl friend and would not return home. The court then struck the probation, proceeded with defendant's disposition and committed him to training school. The court denied counsel's request to defer disposition. Juvenile defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Assistant Public Defender Ann C. Villier, for the defendant.

MARTIN, Judge.

In the only assignment of error brought forward, defendant contends that the court erred in refusing to defer his disposition

pending receipt of further information. He argues that G.S. 7A-285 contemplates the separation of the adjudicatory and dispositional phases of juvenile cases for the very purpose of allowing the court to secure such information as is necessary "to develop a disposition related to the needs of the child. . . ." While we agree that G.S. 7A-285 does allow the court, *in its discretion*, to continue a juvenile case pending receipt of pertinent information, we cannot find any abuse of discretion in the court's refusal to defer disposition in the instant case. In fact, the court initially set out to defer disposition of defendant's case and had announced the conditions of defendant's probation. It was at this point that defendant openly informed the court that he would not comply with these conditions. The court's ensuing entry of disposition committing defendant to training school was proper under the circumstances of this case.

No error.

Judges MORRIS and VAUGHN concur.

EUDORA B. GARRISON AND HUSBAND, WILTON M. GARRISON, AND LINA B. ARDREY (WIDOW), PETITIONERS/PLAINTIFFS v. WILLIE BLOUNT BLAKENEY (WIDOW); FRANCES BLAKENEY COKER AND HER HUSBAND, BYRON COKER; MARGARET BLAKENEY BULLOCK AND HER HUSBAND, LEONARD S. BULLOCK; AND JAMES A. BLAKENEY (III) AND HIS WIFE, JULIE MILLER BLAKENEY, RESPONDENTS/DEFENDANTS

No. 7726SC544

(Filed 11 July 1978)

1. Rules of Civil Procedure § 56.5— summary judgment—findings of fact unnecessary

In a hearing upon the parties' motions for summary judgment, the trial court did not err in failing to find facts, even though petitioners filed a written request for findings, since the matter would not properly have been one for summary judgment if it had been necessary for facts to be found.

2. Deeds § 6; Seals § 1— requirement of seal

Though the reason for the use of a seal—the authentication of the grantor—has long since been completely eliminated in N. C., a seal is still required in order that a deed shall have validity as a conveyance of property.

3. Deeds § 6; Seals § 1— seal—jury question—summary judgment improper

In a partition proceeding where the petitioners' interest in the land in question depended upon the validity of two deeds which petitioners claimed were invalid, the trial court erred in granting respondents' motion for summary judgment after concluding as a matter of law that one of the deeds was "in all respects good and proper," since the attestation clause in the deed said that the grantor did thereunto "fix my sign and seal" and immediately thereunder appeared the word "Sign"; and the trial court could conclude as a matter of law that the letters "Sign" constituted a seal, but whether grantor placed it there or adopted it as his seal if placed there by someone else were questions for the jury.

4. Deeds § 1— description of land conveyed—genuine issue of material fact

In a partition proceeding where the petitioners' interest in the land in question depended upon the validity of two deeds which petitioners claimed were invalid, summary judgment was improperly entered since the description in the deeds was for a "1/2 interest in my farm" in a named township and county, with adjoining landowners listed indicating by placement on the page the sides on which they adjoined, and with the acreage given, and such description was sufficient to admit extrinsic evidence of the identity of the land in question.

5. Deeds § 8.1— deed supported by consideration—no deed of gift

In a partition proceeding where the petitioners' interest in the land in question depended upon the validity of two deeds which petitioners claimed were invalid, and which the trial court, upon motion for summary judgment, determined to be "in all respects good and valid," petitioners' contention that one of the deeds was invalid because it was a deed of gift and not recorded within two years of its execution was without merit, since the recited consideration was "Five Dollars and other valuable consideration" and the other valuable consideration included a covenant imposing a personal obligation upon the grantee to provide a home for certain family members.

6. Deeds § 7.3— deed not recorded—transfer of title not affected

Where a deed to grantee was not recorded until after grantee had conveyed the property to a third person, grantee's deed to the third person was nevertheless valid since recordation of the deed from grantor to grantee was not necessary to convey title to grantee, and grantee could transfer that title even though the deed was not recorded.

APPEAL by petitioners/plaintiffs from *Walker (Ralph A.), Judge*. Partial judgment entered 15 April 1977, Superior Court, MECKLENBURG County. Heard in Court of Appeals 31 March 1978.

Petitioners, Eudora B. Garrison and Lina B. Ardrey, are daughters of James A. Blakeney, who died in 1928. On 16 May 1975, they filed a petition for partition of lands. They alleged that James A. Blakeney left surviving six children: Bessie, Edmonia, Margaret, Eudora, Lina, and James, Jr.; and that at his death each took an 1/6 undivided interest in his lands. In 1935, Bessie

died intestate and without issue, and her 1/6 undivided interest went to her five siblings. In 1950, Edmonia died intestate and without issue, and her 1/5 interest went to her four surviving siblings. In 1966 Margaret conveyed her 1/4 interest to James, Jr. so that James, Jr. owned an 1/2 undivided interest, Lina owned an 1/4 undivided interest, and Eudora owned an 1/4 undivided interest. James, Jr. died in 1973 leaving a will devising his real property to his wife for life and at her death to such of his children as might then be living and the issue collectively of any of his children who had predeceased her leaving issue surviving, the division to be per stirpes. The respondent Willie Blount Blakeney is the widow of James, Jr., and respondents Frances Blakeney Coker, Margaret Blakeney Bullock, and James A. Blakeney III are all the children of James, Jr., and own an 1/3 remainder interest in an undivided 1/2 interest in the property. The petitioners further alleged that the property is susceptible of an even and equitable partition among the parties, but respondents have refused and rejected efforts at voluntary partition. Petitioners prayed for partition with costs, including attorney fees, to be taxed against respondents.

Respondents answered, by their second defense denied allegations that petitioners each owned an 1/4 undivided interest and respondents, children, owned an 1/2 undivided interest subject to their mother's life estate. They denied that petitioners had any interest and averred that Willie Blount Blakeney owns a life estate in all the property and each of her children owns an 1/3 interest subject only to her life estate.

By their third defense, respondents averred that on or about 13 May 1917 James A. Blakeney and wife conveyed to Alexander Martin an 1/2 undivided interest in the lands, the deed being recorded in the Mecklenburg County Registry, Book 3711 at page 892. They further averred that on or about 13 November 1929, Alexander Martin and wife conveyed the same property to James, Jr., by deed recorded in Book 2722 at page 409, Mecklenburg County Registry. By that deed James, Jr. acquired an 1/2 undivided interest in the property, and his father, at the time of his death, owned only an 1/2 undivided interest, so that the six children inherited an 1/6 interest in an 1/2 undivided interest. By virtue of the death of his sister Bessie in 1935 and the death of his sister Edmonia in 1950, James, Jr. inherited 1/4 of the interest

held by them, and, by virtue of a deed from his sister Margaret, he acquired whatever interest she had.

By their fourth defense, respondents aver that they have acquired title to any interest claimed by petitioners by virtue of their adverse possession. This claim is not before us.

Respondents requested a jury trial on all issues of fact raised by the pleadings. The matter was transferred to the civil issue docket, and both parties moved for summary judgment on the issues raised by the third defense; *i.e.*, the validity of the two deeds and record title ownership of the property described in the petition. The judgment entered after hearing allowed respondents' motion for summary judgment, denied petitioners' motion, and adjudicated that both deeds were valid. Petitioners appeal.

Hicks and Harris, by Tate K. Sterrett and Eugene C. Hicks III, for petitioner appellants.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by William E. Poe and Irvin W. Hankins III, for respondent appellees.

MORRIS, Judge.

[1] Petitioners' first two assignments of error are directed to the failure of the court to find facts. Prior to the entry of the judgment, petitioners filed a written request that the court "find the facts specially and state separately its conclusions thereon" under the provisions of N.C. G.S. § 1A-1, Rule 52(a). This rule, insofar as it might be applicable here, provides first that "[i]n all actions *tried upon the facts without a jury* or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment" and that as to decisions of any motion or order ex mero motu findings of fact and conclusions of law are necessary only when requested by a party and as provided by Rule 41(b). Obviously the first section of the Rule has no applicability, since, by its expressed terms, it is concerned with *actions tried upon the facts*. A motion for summary judgment is not an action tried upon the facts since this motion can only lie where there is no necessity for trying the action upon the facts. But petitioners say the

rule requires the court to find facts in deciding a motion if requested so to do by any party. Again, we point out, as we have already done on numerous occasions, if it is necessary for facts to be found, the matter is not properly one for summary judgment. As was said in *General Teamsters, Chauffeurs and Helpers Union v. Blue Cab Co.*, 353 F. 2d 687, 689 (7th Cir. 1965): "The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised since it would carry an unwarranted implication that a fact question was presented." *See also Klein v. Insurance Co.*, 26 N.C. App. 452, 216 S.E. 2d 479, *aff'd.* 289 N.C. 63, 220 S.E. 2d 595 (1975); *Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238, *cert. denied* 287 N.C. 264, 214 S.E. 2d 437 (1975): *Markham v. Swails*, 29 N.C. App. 205, 223 S.E. 2d 920, *cert. denied* 290 N.C. 309, 225 S.E. 2d 829, 290 N.C. 551, 226 S.E. 2d 510, 429 U.S. 940 (1976); *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E. 2d 641 (1976). There may be cases in which it would be helpful for the court to set out in its judgment those undisputed facts upon which judgment is based, but this procedure would rarely be helpful or necessary and should be used sparingly. When used, the court should be careful to note that it is stating the undisputed facts. They should not be referred to as findings.

Here the court stated in its judgment that it had "determined that there are no contested material issues of fact pertaining to the motions, the only question being the validity and legal effect of the two 'deeds' previously referred to herein as Exhibits A and B, and whether either party is entitled to judgment as a matter of law". The court then stated "The Court makes the following findings and conclusions:" There follows the court's conclusion that the two deeds are valid and effective and its determination of the interests of the parties in the real estate. These are obviously not findings of fact, although erroneously stated to be. Petitioners' first two assignments of error are overruled.

In their own motion for partial summary judgment and their response to respondents' motion for summary judgment the petitioners alleged that the two deeds were invalid.

As to the deed from James Blakeney and wife to Alexander Martin, dated 13 February 1917, the petitioners alleged that it was recorded 57 years after its date and is invalid and ineffectual to convey any interest in real estate for the following reasons: (1)

The description is insufficient, (2) There is no seal affixed after the grantors' names nor otherwise appearing on said paper-writing as being adopted by the grantors, (3) The paper writing was never meant to be a deed, was never meant to be recorded, the signatures were never notarized during the life of either grantor, and its recordation after the death of James, Jr. was done solely to alter the percent of ownership of petitioners, and (4) The purported deed is "off the chain of title" and ineffectual to serve as record notice of a conveyance.

As to the deed from Alexander Martin and wife to James, Jr., dated 13 November 1929, and recorded some 36 years thereafter, the petitioners' allegations of invalidity are as follows: (1) At the time of the conveyance neither grantor owned record title to the property and, therefore, could not convey the property, (2) The description is insufficient, (3) The purported conveyance was a gift and not recorded within two years of its making, and (4) the purported conveyance is "off the chain of title" and cannot give record notice of a conveyance.

All parties agree that the primary issue for decision by this Court is whether the two deeds are valid conveyances.

We first discuss the 1917 document, which we shall refer to as the "Blakeney deed". Petitioners first urge that the court erred in granting respondents' motion for summary judgment because, at the very least, the question of whether the grantor intended to adopt a marking as his seal must be submitted to a jury. But, the petitioners urge, that should not be necessary because, as a matter of law, the deed is not under seal and summary judgment should have been entered for petitioners.

In North Carolina there can be no doubt but that a seal is essential to the validity of a deed. *Williams v. Board of Education*, 284 N.C. 588, 201 S.E. 2d 889 (1974); *Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935); *Strain v. Fitzgerald*, 128 N.C. 396, 38 S.E. 929 (1901), *petition for rehearing allowed*, 130 N.C. 600, 41 S.E. 872 (1902); *Patterson v. Galliher*, 122 N.C. 511, 29 S.E. 773 (1898); *Harrell v. Butler*, 92 N.C. 20 (1885); *Pickens v. Rymer*, 90 N.C. 282 (1884); *Yarborough v. Monday*, 14 N.C. 420 (1832); *Ingram v. Hall*, 2 N.C. 193 (1795); Webster, Real Estate Law in North Carolina § 170 (1971). Originally, the purpose of the seal was to identify the grantor and authenticate the instrument as the grant-

or's. The seal, when first used "exhibited the emblem which its owner had affixed to his person, when covered in the field with his coat of mail, and which being portrayed upon some conspicuous part of his dress, served to designate his person", *Ingram v. Hall*, 2 N.C. at 198, and was used by the nobility and gentry only. Very few people could write even among the nobility and gentry, and the common people had no use for seals, because, for the most part, they were not allowed to have contracts, and the need for identity as a grantor simply did not exist. As trade began to flourish, and the need for contracts became more prevalent, even among those less than nobility, the necessity for authenticating contracts became urgent. Those entering into contracts adopted the only mode of authentication then known, the seal. They used any symbol they chose. Frequently the *pares* of the area did not know the seals and, therefore, could not determine authenticity solely by inspection of the seal. It often became necessary for these jurors to call upon people who knew the seal used by the party to say whether it was his seal. The law, rather than invalidate the transaction, left it to the jury to make the determination.

> "In this country the people have departed still further from the true use of seals, by not making any impression at all, scratching something like a seal upon the margin of the paper, and making that pass for a seal. To the first of these abuses the law has conformed, and will now deem the sealing to be sufficient if found by the jury to be the seal of the party. . . ." *Ingram v. Hall*, 2 N.C. at 200.

[2] Though the reason for the use of a seal—the authentication of the grantor—has long since been completely eliminated in this State, we still require a seal in order that a deed shall have validity as a conveyance of property. An instrument, in form a deed, without a seal may operate as a simple contract to convey, *Willis v. Anderson*, 188 N.C. 479, 124 S.E. 834 (1924), but it is not a deed without a seal. While many states have abolished the requirement of a seal for validity, North Carolina still requires it. 23 Am. Jur. 2d, Deeds, § 27 at 95 (1965). Despite the fact that a seal, or scrawl adopted as a seal, can add nothing to the authentication of a seal as being the act of the grantor, we are bound by the common law requirement, absent an act of the legislature dispensing with the requirement. We find very interesting the comment

of Professor Webster in Real Estate Law in North Carolina, where he said:

> "In other words, any mark *may* be a seal *if proved to be a seal.* But if additional proof is necessary to show that a mark is a seal, i.e., that it is authentic, of what use is a seal?" Webster, Real Estate Law in North Carolina § 170 at 198 and 199 n. 184.

The original instrument was before the court in this case, and it contains no seal affixed after the signature of J. A. Blakeney. Immediately above his signature, the conclusion of the deed is as follows: "In token whereof I do hereto this thirteenth day of February 1917 fix my sign and seal." Under that appears the word "Sign" and opposite that word and on the same line, if there were a line, is "J. A. Blakeney". Under the signature appear a series of dots. Similar dots appear under the signature of witnesses on the left side of the page. It appears that someone had attempted to make lines to indicate signatory lines.

Respondents argue that the word "Seal" is written in "what would appear to be the grantor's own handwriting". There is no evidence whatsoever in the record which would indicate the truth or falsity of that statement. They also argue that the word begins with a capital letter, that it appears immediately over the grantor's signature, and that the sentence is in the emphatic form of the present tense. In *Patterson v. Galliher*, supra, the attestation clause was "Given under my hand and seal this blank day of blank, Anno Domini 18. . . .

. . . .
Sheriff"

which was the form of deed prescribed by Session Laws of 1895, ch. 119, sec. 65, for Sheriffs' deeds. The Court said the attestation clause reads as though a seal were to be affixed; that although the General Assembly could, if it so chose, dispense with the requirement of a seal, there were no express words in the statute which would change the general law requiring a seal, and the Court was not willing to say that such an important change could be made by implication. The deed was held to be invalid and void. *See also Strain v. Fitzgerald, supra*; and *Harrell v. Butler, supra*, where the attestation clause contained similar language, but the

validity of the deed was dependent upon whether the word "Seal" appearing on the left side of the page adjacent the signature of a witness was intended by the grantor, whose signature by mark appeared on the right side of the page, to be his seal. We cannot help but agree with the plausibility of respondents' argument, but the law is otherwise.

[3] The attestation clause in the "Blakeney deed" says that the grantor does hereto "fix my sign and seal". Immediately thereunder appears the word "Sign". It would seem that this word could certainly encompass "Sign and Seal", since any mark or scrawl may be a seal if proved to be a seal. In *Yarborough v. Monday, supra*, the trial court had ruled an instrument to be the deed of defendant where the evidence was that plaintiff's brother had written the contract; that at the bottom he made a scrawl and wrote the word "Seal" inside; that immediately thereafter each party directed him to sign his name to the contract; that he did so and put plaintiff's name opposite the scrawl but did not make another scrawl or anything purporting to be a seal opposite defendant's name. On appeal, the Court held that the court erred in deciding questions of fact; *i.e.*, whether defendant intended to adopt the seal and did adopt it. But the Court further said: "Whether the scrawl affixed was in this State a seal certainly was a question of law to be determined by the court; but whether defendant placed it there or adopted it as his seal if placed there by the plaintiff or some other person were questions for the jury." *See also Williams v. Turner*, supra; *Pickens v. Rymer, supra*. Here the court, in the judgment entered on the motion for summary judgment, found that the deed "is in all respects good and proper". If, in so finding, the court concluded as a matter of law that the letters "Sign" constituted a seal, we would agree, but whether grantor placed it there or adopted it as his seal if placed there by someone else are questions for the jury.

[4] Petitioners assign as an additional reason for the court's error in allowing respondents' motion for summary judgment, their position that the description contained in the deed is insufficient and the deed, therefore, void. The Blakeney deed describes the property to be conveyed as:

> "One-half (1/2) interest in my farm which lies in Providence Township, Mecklenburg County, North Carolina, and adjoins the lands of
>
> Robinson
>
> Bryant Kill
>
> Kerr
>
> and consists of two hundred-fifteen acres more or less (215), what is known as Dunn place is included in this transaction." (The words designating the adjoining landowners are arranged as in the original instrument.)

Petitioners rely on *Holloman v. Davis*, 238 N.C. 386, 78 S.E. 2d 143 (1953). There the description in question was:

> " 'Lying and being in Harrellsville Township, Hertford County, and known as a part of the Evans tract of land, the same being the one-half undivided interest of Vernon R. Holloman in said tract of land, adjoining the lands of J. R. Odom being on the north; on the east by the lands of K. R. Evans; on the west by the lands of J. P. Mitchell, containing 80 acres, in the whole tract, more or less, together with all appurtenances thereto belonging.' " 238 N.C. at 387, 78 S.E. 2d at 144.

The question of the sufficiency of the description was raised in a partitioning proceeding wherein the land sought to be partitioned was described in two separate tracts. One of the respondents claimed an one-half interest in the land sought to be partitioned. Her ownership of that interest was dependent upon the validity of the deed containing the questioned description, because she alleged the land conveyed by the deed under which she claimed was the land described in the petition for partition. Evidence was presented which showed that the lands sought to be partitioned were described in the deed to the former owner and in the petition as two separate and distinct tracts which were more than a quarter of a mile apart and which were separated by a public road. Between these two tracts were lands belonging to others. Under these circumstances the Court affirmed the judgment of the trial court because the description was "insufficient to identify and make certain the land to be conveyed, nor is it sufficient to be aided by parol testimony to fit it to the two separate tracts

of land described in the petition." The respondent simply was not able, after attempting to aid the description by parol to fit it to the lands in which she claimed an interest. Here the description is for an "1/2 interest in *my* farm . . ." (Emphasis supplied) in a named township and county, with adjoining landowners listed indicating by placement on the page the sides on which they adjoined, and with the acreage given. We think this is clearly sufficient to admit extrinsic evidence of its identity. For cases in which similar descriptions have been held sufficient to be aided by parol evidence, *see Carson v. Ray*, 52 N.C. 609 (1860); *Farmer v. Batts*, 83 N.C. 387 (1880); *Janney v. Robbins*, 141 N.C. 400, 53 S.E. 863 (1906); *Hinton v. Roach*, 95 N.C. 106 (1886); *Perry v. Scott*, 109 N.C. 374, 14 S.E. 294 (1891). Nor do we think *Holloman v. Davis, supra*, in any respect overrules these cases or changes the application of the rule of law. *See also* G.S. 8-39 and *Overton v. Boyce*, 289 N.C. 291, 221 S.E. 2d 347 (1976). Respondents are entitled to introduce such evidence as they may be advised in an attempt to fit the land intended to be conveyed by the Blakeney deed to the land sought to be partitioned. For this additional reason, summary judgment was not proper. It disposed of a genuine issue of material fact; *i.e.*, the identity of the land described in the Blakeney deed.

The second deed involved is the deed of Alexander Martin et ux to James A. Blakeney, Jr., dated 13 November 1929, and recorded in the Mecklenburg County Registry on 8 February 1966. This deed we shall refer to as the "Martin deed". As to this deed, the court, in the judgment entered for respondents, found to be "in all respects good and valid". It purports to convey an one-half undivided interest in and to a certain tract of land in Providence Township, Mecklenburg County described as follows: "Two hundred, fifteen acres more or less/known as the Dunn place and bounded by lands now or formerly owned by L. H. Robinson, S. H. Kill, G. B. Bryant and Sam Kerr." What we said in our discussion of the Blakeney deed with respect to the description is equally applicable here and makes summary judgment improper.

[5] Petitioners also assert that the deed is invalid because it is a deed of gift and not recorded within two years of its execution. It is certainly undisputed that the deed was not recorded for some

36 years after its execution. If there was *no* consideration, it must be adjudged to be a deed of gift and, therefore, void.

The recited consideration is "Five Dollars and other valuable consideration". The deed is a form deed, and the printed word "Seal" in parentheses appears after each signature. When this is true, it is presumed that the grantors intended to adopt the seal, *McGowan v. Beach*, 242 N.C. 73, 86 S.E. 2d 763 (1955), and cases there cited. Petitioners do not seriously contend otherwise. An instrument executed under seal imports consideration. *Honey Properties, Inc. v. Gastonia*, 252 N.C. 567, 114 S.E. 2d 344 (1960). Perhaps a more accurate statement would be that the seal gives rise to a presumption of the presence of consideration and "estops a covenantor from denying a consideration except for fraud". *Crotts v. Thomas*, 226 N.C. 385, 387, 38 S.E. 2d 158, 159 (1946). There is nothing in the pleadings suggesting fraud.

Additionally the deed recites "other valuable consideration", and provides:

> "This conveyance is made subject to the following limitations *which are hereby accepted by the party of the second part*:
>
> (1) No mortgage shall be given on the premises herein conveyed so long as the same shall remain the property of the party of the second part.
>
> (2) The premises herein conveyed shall be used as a home for any of the said James A. Blakeney's sisters who may not be able to support themselves, and who may wish to avail themselves of this privilege; *but this clause shall not obligate the Grantee herein to extend this privilege to any other relatives except sisters*." (Emphasis ours.)

Petitioners contend that this cannot serve as consideration because the first limitation constitutes a restraint on alienation and the sisters already had a right to use the premises as cotenants in common with the grantee. True, the sisters had an undivided interest in the property and a right to their share of rents and profits. The limitation, however, required the grantee, who accepted the limitation, to make the premises available to those of his sisters who could not support themselves as a home. This obviously required grantee to do more than recognize their undivided interest in the property. That this is true is indicated

by the specific provision that the grantee should not be obligated to furnish a home for any other relatives. We do not discuss whether the first limitation is a restraint on alienation, or whether the second limitation can be interpreted as a condition precedent or a condition subsequent. Suffice it to say that it is, in our opinion, a covenant imposing a personal obligation on the grantee and is a valuable consideration for the transfer of the property. *Minor v. Minor*, 232 N.C. 669, 62 S.E. 2d 60 (1950). Nor do we discuss whether this recital, contractual in nature, can be varied by parol evidence. Certainly the testimony of Mrs. Blakeney (by deposition) to the effect that the grantee told her his uncle "had given him half of the farm" and that "he never bought an acre in his life" would necessarily be predicated on hearsay and, therefore, incompetent. *Hinson v. Morgan* and *Hinson v. Baumrind*, 225 N.C. 740, 36 S.E. 2d 266 (1945).

[6] Finally, petitioners argue that the Martin deed is invalid and the court should have so found because the grantors did not have record title at the time of the conveyance. This is quite obviously true. The Blakeney deed, dated 13 February 1917, to Martin had not been recorded at the date of the Martin deed to Blakeney, 13 November 1929. Nevertheless, recordation was not necessary to convey title to Martin. If the deed was a valid deed, the grantee therein, Martin, acquired good title which he could transfer, even though the deed was not recorded. "[A] previously executed deed, though not registered, will prevail over all persons who are not purchasers for value or lien creditors. . . ." Webster, Real Estate Law in North Carolina, § 333 at 413 and cases there cited. It is not the purpose of the recording statutes to make a deed effective to transfer title by recordation. Their purpose is to protect prospective purchasers of land and those who desire to encumber land. Of course, a grantee who fails to record a deed conveying land to him assumes the risk of a subsequent grantee of the same land acquiring superior rights to his by recordation. None of these problems exist here.

Because the validity of both deeds can only be determined after questions of fact have been decided by a jury with respect to both deeds, the trial court erred in granting respondents' motion for summary judgment. For the same reason, petitioners' motion was properly denied.

Reversed and remanded.

Judges MARTIN and ARNOLD concur.

LINDA D. VAUGHN v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 7710IC568

(Filed 11 July 1978)

1. State § 10— tort claim—interlocutory order—no appeal

No right of appeal lies from an interlocutory order of the Industrial Commission. Review is by writ of certiorari only. G.S. 7A-29.

2. State § 10— review of findings of Industrial Commission

A finding of fact by the Industrial Commission is binding on appeal if it is supported by any competent evidence.

3. Principal and Agent § 1— essentials of principal-agent relationship

There are two essential ingredients in the principal-agent relationship: (1) authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent.

4. State § 6— Tort Claims Act—foster home program—county director of social services—agent of State

The director of a county department of social services was acting as an agent of the State Social Services Commission of the Department of Human Resources in administering a foster home program funded by the State Foster Home Fund, although he was an employee of the county, since (1) the county director was required by G.S. 108-19(3) to "administer" the Foster Home Fund in the county; (2) G.S. 108-19(5) required the county director to act as an "agent" of the State Commission in work required by the Commission in the county; (3) the State controlled half of the members of the county board of social services which selected the county director; and (4) the State Commission, pursuant to G.S. 108-66, controlled and regulated the county director's actions in administering the foster home program. Therefore, the State would be liable under the Tort Claims Act for the negligence of the director or his subagents in the placement of a child in a foster home under a program funded by the State Foster Home Fund, and the Industrial Commission had jurisdiction of a claim based on such alleged negligence.

ON writ of certiorari to review order of North Carolina Industrial Commission entered 3 February 1977. Heard in the Court of Appeals 5 April 1978.

Claimant filed a claim against the Department of Human Resources with the Industrial Commission 11 December 1975 alleging injury resulting from negligence. In her accompanying affidavit, she stated that a foster child, James R. Mason, was placed in her home by the Durham County Department of Social Services. The child was a carrier of cytomegalo virus. Cytomegalo virus causes birth defects in the children of women infected during pregnancy. The employees of the Durham County Department of Social Services knew that she was attempting to become pregnant. Claimant subsequently became pregnant. She was infected with cytomegalo virus. Because of the high risk that the viral infection would cause birth defects in her unborn child, claimant was forced to abort her pregnancy. This abortion has resulted in economic, physical, and emotional injury.

The Department moved to dismiss the claim alleging that the employees of the Durham County Department of Social Services were not the agents of the Department. Counsel stipulated at the hearing that the alleged agents were actually employees of the Durham County Department of Social Services. Commissioner Stephenson conducted two hearings at which testimony was taken. He found the following facts:

"1. The Durham County Board of Social Services consists of three members; one appointed by the Durham County Commissioners, one by the North Carolina Social Services Commission, and the third selected later by the first two. Members of the Board are paid according to statute.

2. One of the statutory duties of the County Board of Social Services is the appointment of a County Director of Social Services. The County Director's salary is determined in accordance with the classification plan of the State Personnel Board. His salary is paid out of a combination of federal, state and county funds.

3. Thomas W. Hogan has been Director of the Durham County Department of Social Services since May, 1971. He was hired, in accordance with North Carolina law, by the County Board of Social Services. His duties are enumerated in N.C. G.S. 108-19. Among these duties are to administer State programs in accordance with Social Services Commission rules and regulations, to administer funds, to appoint necessary

personnel, to act as agent for the State in relation to work required by the Social Services Commission, and to accept children for placement in foster homes and to supervise those placements.

4. Durham County Department of Social Services staff members are selected, according to law, in accordance with the merit system (rules) of the State Personnel Board. These employees are hired, fired and supervised by the County Director.

5. Among the responsibilities of the Durham County Director of Social Services is the administration of a foster home program. The administration of this program involves the selection of foster homes pursuant to regulations issued by the State Social Services Commission, the inspection of those homes by County staff, and the submission of selected homes to the State Social Services Commission for licensing by the Secretary of Human Resources in accordance with departmental standards. Children who are placed in licensed homes receive funds in their behalf; whereas those children in unlicensed homes do not receive such funds.

6. There are two ways the foster care is funded. The first is through the federal Aid to Families with Dependent Children program (AFDC). If care is funded in this way, the federal AFDC manual, containing federal requirements and policies, is followed by the County staff. The second type of funding, used for the foster care in this case, is the State Foster Home Fund. When funded in this way, the Welfare Programs Division Manual, Chapter IV, 'Foster Care Services,' prepared by the State Social Services Commission, is used by the County staff. In this manual is contained State policies pertaining to foster home care.

7. Created by N.C. G.S. 108-23 and 108-66, the State Foster Home Fund is a program which is administered by the County Departments of Social Services under Rules and regulations adopted by the State Social Services Commission and under the supervision of the Department of Human Resources. By statute, participation in this program is not optional, as is participation in other programs.

8. By statute, when a County Director of Social Services is involved in work required by the Social Services Commission, he acts as an agent of that Commission. Hence, when administering the State Foster Home Fund, Thomas Hogan acted as an agent for the Social Services Commission of the Department of Human Resources."

Commissioner Stephenson's conclusions of law were that Thomas Hogan, Gladys Johnson, Ann Tietz, Cobb Fox, Gertrude Boone, and Marjorie Echols, the named employees of the Durham County Department of Social Services, were agents of the North Carolina Department of Human Resources and that the Industrial Commission has jurisdiction to hear the claim.

The Department appealed to the full Commission. The Industrial Commission adopted the opinion of Commissioner Stephenson. The interlocutory order of the Commission is before this Court on writ of certiorari.

Powe, Porter, Alphin & Whichard, by Charles R. Holton, for the claimant.

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

MORRIS, Judge.

[1] This case came before this Court styled as an appeal. No appeal lies from an interlocutory order of the Industrial Commission. There is a *right of appeal* only from a *final order*. G.S. 7A-29. In the intersts of judicial economy, we have treated the "appeal" as a petition for writ of certiorari and have granted the same.

[2] The Department has excepted to every one of the Commission's findings of fact. A finding of fact by the Industrial Commission is binding on appeal if it is supported by any competent evidence. *Crawford v. Board of Education*, 3 N.C. App. 343, 164 S.E. 2d 748 (1968), *affirmed* 275 N.C. 354, 168 S.E. 2d 33 (1969). We have thoroughly reviewed the evidence introduced in the two hearings. We have found competent evidence to support every finding of fact save one. Assignments of error Nos. 2 through 8 are, therefore without merit.

The Commission found that the Durham County Board of Social Services consisted of three members; one appointed by the county commissioners, one appointed by the North Carolina Social Services Commission, and the third selected by the first two. This procedure is set out in G.S. 108-9(a). Contrary to the Industrial Commission's finding, the record indicates that the actual number of county board members is five. The selection, therefore, would have been pursuant to G.S. 108-9(b) with both the Social Services Commission and the county commissioners selecting two rather than one board member. We will not reverse the order of the Commission for harmless error. To warrant reversal, the error must be material and prejudicial. *Board of Education v. Lamm*, 6 N.C. App. 656, 171 S.E. 2d 48 (1969), *affirmed* 276 N.C. 487, 173 S.E. 2d 281 (1970). The error of which the Department complains is obviously harmless and does not warrant reversal because the procedure and proportion are the very same. Assignment of error No. 1 is overruled.

Assignments of error Nos. 9 through 15 focus upon one crucial question: Were Thomas Hogan, Director of the Durham County Department of Social Services, and his subordinates acting as agent and sub-agents for the State Social Services Commission in placing James Mason in the home of Linda Vaughn? Both parties acknowledge and concede that if Thomas Hogan was acting as agent for the Commission, then the other employees were also acting as agents under theories of sub-agency.

This case is before us to review the order of the Industrial Commission which held that it had jurisdiction to hear the claim. G.S. 143-291 is the jurisdictional statute. It provides that the Industrial Commission can hear claims based upon the "negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority . . . ." G.S. 143-291. The parties stipulated that Hogan was an employee of the county. There is no evidence to suggest that Hogan is either an officer or an involuntary servant. Thus, the remaining question is whether Hogan is an agent of the State. Additionally, we note that the claimant did not object to the Commission's holding that Hogan was not an employee of the State. If Hogan was acting as an agent of the State, the Industrial Commission does have jurisdiction to hear the claim; if not, then the Commission is without jurisdiction.

[3] There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent. *See Sharpe v. Bradley Lumber Company*, 446 F. 2d 152 (4th Cir. 1971), *cert. denied* 405 U.S. 919, 92 S.Ct. 946, 30 L.Ed. 2d 789 (1972); *Julian v. Lawton*, 240 N.C. 436, 82 S.E. 2d 210 (1954); Seavey, Handbook on the Law of Agency (1964), § 11, at 21. The agent must have authority to act on behalf of the principal. It would be manifestly unjust to hold one party liable for the actions taken by another person if that person did not have authority to act for him. Just as "authority" (or, as some courts have termed it, "appointment") justifies holding the principal liable, "control" is the element which distinguishes a true "agency" status from some other status such as that of a true independent contractor. The nature and degree of control which the principal exercises over the agent is often determinative of whether there is a principal-agent relationship. In the case of the "borrowed servant", for example, whether the acts of the "borrowed servant" create liability will depend upon "who has the primary right of control when the act is performed. . . ." Sell, Agency (1975), § 97, at 88.

[4] In the present case, the Commission found that Hogan and the other named persons were agents simply because of the nomenclature used in the statute. G.S. 108-19(5) requires the county director to "act as agent of the Social Services Commission in relation to work required by the Social Services Commission in the county. . . ." G.S. 108-19(15) requires the county director to "accept children for placement in foster homes and to supervise placements for so long as such children require foster home care." The Commission concluded that since this duty was required work, the director was acting as "agent". The Department of Human Resources argues on appeal that accepting children for placement is work required by the legislature and that the director is, therefore, not an "agent". While the Commission's position could be sustained as it is, we believe that a more careful analysis strengthens the position taken.

We believe that the proper approach is to examine the realities of the situation as well as the nomenclature. We will first investigate the "authority" of the county director. As we noted above G.S. 108-19(5) requires him to "act as agent of the Social

Services Commission in relation to work required by the Social Services Commission in the county." Furthermore, G.S. 108-19(15) requires him to "accept children for placement in foster homes. . . ." G.S. 108-19(3) requires the county director to "administer programs of public assistance established by this Chapter. . . ." G.S. 108-66, in the same chapter, establishes the State Foster Home Fund. This program funded the placement of the child, James Mason, in the home of Linda Vaughn. We believe that these statutory provisions clearly demonstrate the authority of Director Hogan to act on behalf of the Commission.

The next question is whether the director's authority to act on behalf of the Commission encompassed the placement of James Mason in the home of Linda Vaughn. In investigating the authority of an agent, one must determine the scope of that authority. If an agent exceeds the scope of his authority, it is obvious that his act will not be binding upon his principal. *See Cordaro v. Singleton*, 31 N.C. App. 476, 229 S.E. 2d 707 (1976). The most restrictive interpretation of the director's authority which can be reasonably supported is that, under G.S. 108-19(3) and (5), the director acts as agent for the Social Services Commission in administering the State Foster Home Fund, set up under G.S. 108-66, in Durham County. The county director is required to administer the State Foster Home Fund since it is a program of public assistance established by Chapter 108. The statute also deems the director an "agent" in relation to work required by the Commission in the county.

The record reveals that placement of James Mason was administered as part of the State Foster Home Fund. Thus, the placement of James Mason was within the scope of the director's authority. The State argues that the State Foster Home Fund is merely a program to reimburse the county for monies expended and that placement is completely foreign to the program. The statute, however, states that the Fund was established "*for the purpose of providing assistance to needy children* who are placed in foster homes by county departments of social services in accordance with the rules and regulations of the Social Services Commission." (Emphasis added.) G.S. 108-66. The statute, thus, clearly establishes a direct link between the needy child and the Commission rather than the disjointed process suggested in the brief for the Department. Thus, we conclude that, in placing

James Mason in the home of Linda Vaughn, the director was acting within the scope of his authority in administering the State Foster Home Fund in Durham County.

We also agree with the Industrial Commission that the director's duties in accepting children for placement in foster homes are encompassed by G.S. 108-19(5) which requires the director to act as "agent" for the State. We note that the record reveals that a child who is denied foster services has the right to appeal that denial to the State Division of Social Services. If the placement of children in foster homes were not part of the work required by the Commission of Social Services, such an appeal would be a vain and meaningless act. If, on the other hand, placement were part of the required work, it would be logical to have a right of appeal. We do not think that such a determination is necessary to our decision in this case. We think that even under the more restrictive interpretation of the director's authority discussed in the preceding paragraph, there is ample evidence to support the conclusion that the director was acting within the scope of his authority in the placement of James Mason.

The crucial question in this case is whether the Social Services Commission had sufficient control over the director to support the conclusion that he was an "agent" of the State as that term is used in G.S. 143-291. Where, as here, the parties have stipulated that the director and other named parties were the "employees" of the county, the element of "control" becomes more important than usual. If the county alone controls these persons, it is apparent that the county alone should be liable for their acts. Conversely, if the State has control over these actions in the placement of children in foster homes, then it is reasonable to hold the State liable, under the Tort Claims Act, for the acts of these officials.

First of all, we note that the actual authority to hire and discharge the county director is vested in the county board of social services. G.S. 108-15. The Commission does not have the power to hire and discharge. The Commission does have indirect control, however. Under G.S. 108-9(b), the Commission appoints two members of the county board. The power within the county board is in precise balance between the State and the county. If the four initial appointees on the board cannot agree on the fifth

member, that member is selected by the resident superior court judge, an independent judicial officer. We also note that the county board's authority to select and discharge is not unlimited. The county must select the county director "in accordance with the merit system rules of the State Personnel Board. . . ." G.S. 108-17(a). Additionally, any discharged director has "the right of appeal under the same rules." G.S. 108-17(a). Thus, the State is quite entangled in the hiring and discharge process.

A short review of the underlying history is quite revealing. Initially, the county commissioners selected the county board. Sess. Laws of 1917, chap. 170. In 1919, the State Board was given the power to select all members of the county board, but the county commissioners and county board of education, in joint session, selected and discharged the county superintendent (forerunner of the county director). Sess. Laws of 1919, chap. 46, sec. 3. This procedure was followed until 1941 when the present day process was adopted. It was at this same time that the county superintendent (now county director) was required to administer the State program for aid to dependent children (forerunner of the State Foster Home Fund) which was established in 1937. Sess. Laws of 1941, chap. 270; *see also* Sess. Laws of 1937, chap. 135, secs. 1-3. Thus, one can see that there is an historical pattern of State control and that as new duties were imposed, that control was increased.

We are aware that our courts have repeatedly held that the State is not liable under the Tort Claims Act for the actions of school officials. *See, e.g., Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211 (1959). The Court has discussed the importance of the element of control. In *Turner v. Board of Education*, the Court noted that "the local boards select and hire the teachers, other employees and operating personnel. The local boards run the schools." 250 N.C. at 463, 109 S.E. 2d at 216. The real distinction between cases involving schools and the present case is the manner in which the local boards are selected. County and city school boards are entirely local in nature; the State is not involved in any manner in the selection of the board members. On the other hand, the State has absolute control over one-half of each county board of social services. The importance of that distinction is illustrated in *Assurance Co. v. Gold, Comr. of Insurance*, 248 N.C. 288, 103 S.E. 2d 344 (1958), a case dealing with

the North Carolina Firemen's Pension Fund. In that case, the Court relied heavily on the fact that a majority of the board of trustees was not selected by the State in holding that the board of trustees was not a State agency. Thus, we believe that there is a valid distinction between the present case and the cases involving school officials.

The Department, in the hearing on its motion to dismiss, relied heavily upon the contentions of both county and State officials that the only sanction imposed by the State is to withhold funds from the county. First of all, a close review of the statutes suggests that this method of control may not be the only means of control available to the State. Whether there are other means available to control these county employees is not as important as the fact that the State has adopted some procedures to control the actions of these persons. The fact that the State has not found it necessary to attempt to impose other sanctions strongly suggests that the present means of control is effective.

Again, we note that under G.S. 108-19(3), the county director is required to administer the State Foster Home Fund program. Also, we again quote from G.S. 108-66, the statute which establishes the State Foster Home Fund:

> "The General Assembly shall appropriate funds to the Department of Human Resources for the purpose of providing assistance to needy children who are placed in foster homes by county departments of social services *in accordance with the rules and regulations of the Social Services Commission. . . .*" (Emphasis added.)

The legislature clearly contemplated a pattern of control over the county director, and, consequently, those persons serving under him, when it directed the county director to administer the Fund and, at the same time, gave the Commission rule-making and regulatory authority.

The control given the Commission has been implemented and exercised. The Commission has promulgated, as part of its Family Children's Services Manual, "Foster Care Policies". These policies are followed by the local staff, and, at least in Durham County, disciplinary procedures have been established to deal with personnel who do not follow these "policies". Evidence for the

Department indicates that the Commission controls the administration of the State Foster Home Fund through its absolute power over funds disbursement. In short, the Commission issues its rules and regulations as a part of its manual, and, if the county does not comply with these rules and regulations, the funds are withheld.

We do not suggest that every action taken by a county director of social services is an action for which the State may be liable under the Tort Claims Act. We do believe, however, that when the county director is required by statute to "administer" a State program and is, by that same statute, termed an "agent" of a State Commission and when the State Commission regulates and controls the county director's actions in administering that program, the county director is functioning as an agent of the State. Under these circumstances, the county director is an "agent" within the meaning of that term as it is used in G.S. 143-291. Thus, the State would be liable for the tortuous acts of the county director when he functions as an agent of the Social Services Commission.

It may well be that the term "agent" was never intended to be applied in a situation such as this. If so, the statutory change to obviate the possibility is for the General Assembly and not the courts.

The order of the Industrial Commission finding that it has jurisdiction in this case and directing that the case be set for hearing on the merits is

Affirmed.

Judges MARTIN and ARNOLD concur.

PHILLIP A. STONE AND JOAN T. STONE v. PARADISE PARK HOMES, INC. AND JEAN R. WILLIAMS, EXECUTRIX OF THE ESTATE OF J. SHARPE WILLIAMS

No. 774SC705

(Filed 11 July 1978)

1. **Evidence § 11.7— dead man's statute—inapplicable to corporate defendant—applicable to decedent's executrix**

In an action to recover damages for breach of warranty and fraud in the sale of a house, the dead man's statute, G.S. 8-51, did not apply to render incompetent as to the corporate defendant testimony by plaintiffs concerning conversations which they had with the deceased individual defendant, but the dead man's statute did render such testimony incompetent as to the executrix of the deceased defendant's estate.

2. **Evidence § 11.8— dead man's statute—no waiver by cross-examination**

Defendants did not waive their exceptions to plaintiffs' testimony made incompetent by the dead man's statute when they cross-examined plaintiffs concerning their personal transactions with decedent.

3. **Fraud § 12— sale of house—insufficiency of evidence of fraud**

Plaintiffs' evidence was insufficient to support a claim against the executrix of a deceased defendant for fraud in the sale of a house where plaintiffs' testimony as to representations by deceased was incompetent under the dead man's statute, and the competent evidence showed only that deceased took part in filling with vegetable debris the land on which the house was constructed.

4. **Evidence § 48— construction standards—qualification of expert**

The trial court did not err in permitting plaintiffs' witness to testify as an expert that plaintiffs' house was not built according to acceptable construction and engineering standards prevailing in the area at the time where the evidence showed that the witness was a professor of engineering and held a Ph.D. in materials engineering, he was a licensed building contractor, and that some of the six houses he had built were built less than 25 miles from the house in question.

5. **Sales § 19— sale of house—breach of implied warranty—measure of damages**

The trial court did not err in instructing the jury that the measure of damages for breach of implied warranty in the sale of a house was either (1) the difference in fair market value or (2) the amount which would be required to bring the house up to the standard of the implied warranty.

6. **Trial § 52.1— refusal to remit verdict**

In an action for breach of warranty and fraud in the sale of a house, the trial court did not err in failing to remit the verdict of $16,000 to $12,500 because plaintiffs' evidence showed that the total damages were $16,000, of which $7,000 resulted from settlement of the house, and the jury found that damages of only $3,500 were caused by settlement, since the jurors may

believe all, part or none of the testimony, and the jurors apparently believed that the total damages amounted to $16,000 but that only $3,500 was allocable to settlement.

7. **Unfair Competition § 1; Fraud § 13; Sales § 19— sale of house—unfair trade practice—fraud—breach of warranties**

Fraud in the sale of a house constituted an unfair or deceptive act or practice in the conduct of trade or commerce within the meaning of G.S. 75-1.1 for which the buyer was entitled to treble damages under G.S. 75-16; however, the buyer was not entitled to treble damages under those statutes for breach of express and implied warranties in the sale of the house.

8. **Attorneys at Law § 7.5; Unfair Competition § 1— unfair trade practice—attorney's fees**

The trial court did not err in refusing to award attorney's fees under G.S. 75-16.1 to a plaintiff who prevailed in a suit to recover for deceptive acts and practices in the sale of a house where there was no evidence in the record to support findings that defendant willfully engaged in the act or practice and that there was an unwarranted refusal by defendant to pay plaintiffs' claim.

APPEALS by plaintiffs and defendants from *Webb, Judge.* Judgment entered 28 March 1977, in Superior Court, ONSLOW County. Heard in the Court of Appeals 30 May 1978.

Plaintiffs instituted this action seeking damages for breach of express and implied warranties and for fraud in the sale of a house which was under construction when plaintiffs purchased it from defendant, Paradise Park Homes, Inc. (Paradise). Plaintiffs also sought treble damages for violation of portions of Chapter 75 of the North Carolina General Statutes and punitive damages for the fraud. Originally, all claims were alleged against J. Sharpe Williams (Williams), the principal stockholder and president of defendant Paradise, and against defendant Paradise. The complaint alleged that Williams acted individually and as agent of the corporate defendant.

Prior to trial, defendant Williams died and the defendant Jean R. Williams, executrix of the estate of J. Sharpe Williams, was substituted as a party defendant to this action. When the case was called for trial, plaintiffs took a voluntary dismissal with prejudice on all portions of this action as to defendant Jean R. Williams, executrix, except that portion that arose out of the alleged failure of the deceased, individually and as agent of Paradise, to disclose that the house described in the complaint was constructed on land filled with vegetable debris.

At trial, the plaintiffs offered evidence tending to show that they contracted to purchase the house on 7 April 1973, after Williams assured them that the house would be completed in the manner requested by plaintiffs. After being advised by Williams that the house had been completed, plaintiffs moved from Quantico, Virginia, only to find that the construction had not been completed. Again Williams assured plaintiffs that the house would be finished, and, relying on these assurances, plaintiffs made the purchase and occupied the house.

Thereafter, defendant Paradise did little to complete the home. Later in 1973, Williams told Mrs. Stone that he would not finish the house, and, as a result, portions of the interior of the house were never completed by defendant. In addition, soon after occupying the house, plaintiffs discovered that the glass skylight over the atrium leaked, and that it could not be readily repaired; that the large fixed glass windows located in the front and the rear of the home had been improperly constructed and leaked during rainfalls causing damage to the woodwork, floors and carpet; that sewage was being released under the house; that the septic tank drain field was inadequate so that sewage was released in the backyard which became a breeding ground for rat-tail maggots; and that various lighting circuits did not work because of improper installation.

Within six months of the closing, vertical and horizontal cracks appeared in a large chimney in the center of the home; cracks appeared in the brick walls of the brick veneer; kitchen cabinets pulled away from the wall; and doors became out of plumb and would not close. In March 1974, the plaintiffs discovered that the land on which the house was constructed had been filled with vegetable debris, including trees, pine cones and needles.

Plaintiffs called as a witness, Charles R. Manning, who qualified as an expert in construction and materials engineering. Dr. Manning had examined the house in May 1974, and he testified extensively concerning defects he had discovered. He concluded that, in his opinion, the house

> "was not built in respect to good construction standards and engineering standards in that all the problems that I have noted were due to inadequate foundation, undersized

materials, poor workmanship. These are the things that contributed to, in my opinion, that it was not of good standard."

He further testified, over objection, that it was his opinion that in June of 1973, it would have cost $16,000 to repair the defects described.

Defendants offered no evidence. At the close of the instructions to the jury, the trial court submitted the following issues to the jury. The jury's answers are in parentheses.

"Number One, Have the plaintiffs suffered damages by reason of breach of express warranty by the defendant, Paradise Park Homes, Incorporated? (Yes)

"Two, Have the plaintiffs suffered damages by reason of breach of implied warranty by the defendant, Paradise Park Homes, Incorporated? (Yes)

"Three, If so, in what amount have the plaintiffs been damaged thereby? ($16,000)

"Four, Have the plaintiffs suffered damages by reason of fraudulent acts and conduct of the defendants as alleged in the complaint? (Yes)

"Five, If so, in what amount have the plaintiffs been damaged by reason thereof? ($3,500)"

Both plaintiffs and defendants appeal.

A. D. Ward, Alfred D. Ward, Jr. and Joshua W. Willey, Jr., for plaintiffs.

Warlick, Milsted & Dotson, by Alex Warlick, Jr., and Ellis, Hooper, Warlick, Waters & Morgan, by John D. Warlick, Jr., for defendants.

ARNOLD, Judge.

Defendants' Appeal

We shall consider four assignments of error made by defendants.

I.

[1] Defendants argue that the trial court erred in admitting the testimony of the plaintiffs concerning conversations and transactions they had with the deceased original defendant, J. Sharpe Williams. The North Carolina dead man's statute, G.S. 8-51, provides in pertinent part:

> "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

Since defendant Paradise is not an executor, administrator, or survivor of J. Sharpe Williams, deceased, we hold that the dead man's statute did not apply to make evidence of conversations plaintiffs had with Williams incompetent as to Paradise. On the other hand, we conclude that the evidence of those conversations was incompetent as to the executrix of the estate of Williams, because (1) the witnesses were parties to the action, (2) testifying in their own behalf, (3) against the personal representative of the deceased person, (4) concerning personal transactions and communications between the witnesses and the deceased. *See Peek v. Shook*, 233 N.C. 259, 63 S.E. 2d 542 (1951).

Plaintiffs argue, in essence, that, even if the evidence were incompetent as to the executrix of the estate of Williams, there was enough competent evidence from which the jury could reach a decision that Williams, and therefore his estate, were liable for fraud, the only claim alleged against the executrix defendant.

Assuming *arguendo* that plaintiffs are correct, and that the members of the jury could sort among the competent and incompetent evidence as to the liability of the executrix defendant, no attempt was made to limit the evidence relating to conversations with the deceased. The jury, therefore, was left with testimony replete with evidence concerning representations made by the deceased. We cannot say that they did not rely on these representations to find liability for fraud as against defendant executrix.

[2] Plaintiffs also argue that even if the evidence were incompetent, defendants waived their exceptions by cross-examining plaintiffs on the same personal tranactions, thereby "opening the door" to evidence by plaintiffs. We do not agree. First of all, since the evidence was competent as to defendant Paradise, to hold that defendants could not cross-examine plaintiffs' witnesses because they would waive their exception to incompetent evidence as to defendant executrix, is tantamount to denying defendants the right to cross-examine at all. This we refuse to do. For somewhat analogous dilemmas, *see Jones v. Bailey*, 246 N.C. 599, 99 S.E. 2d 768 (1957); *State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Godwin*, 224 N.C. 846, 32 S.E. 2d 609 (1945); *Shelton v. R.R.*, 193 N.C. 670, 139 S.E. 232 (1927).

Secondly, in the cases cited by plaintiffs to support their waiver argument, *Gay v. Supply Co.*, 12 N.C. App. 149, 182 S.E. 2d 664 (1971), and *Smith v. Dean*, 2 N.C. App. 553, 163 S.E. 2d 551 (1968), and in all the cases we researched, waiver of an exception to incompetent evidence under G.S. 8-51 occurs when the objecting party *first succeeds* in eliciting the incompetent evidence. *See, e.g., Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966); *Hayes v. Ricard*, 244 N.C. 313, 93 S.E. 2d 540 (1956); *Andrews v. Smith*, 198 N.C. 34, 150 S.E. 670 (1929); *Phillips v. Land Co.*, 174 N.C. 542, 94 S.E. 12 (1917).

Having concluded that plaintiffs' evidence of conversations with the deceased was incompetent as against the executrix defendant, we also conclude that the court should have granted the executrix defendant's motion for a directed verdict at the close of plaintiffs' evidence. The question presented by defendant's motion for a directed verdict under G.S. 1A-1, Rule 50, is whether the evidence, when considered in the light most

favorable to plaintiffs, is sufficient evidence to be submitted to the jury. *See, e.g., Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In the instant case, competent evidence was required to show the essential elements of actionable fraud: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *See, e.g., Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974).

[3] In view of the extensive evidence which we view to be incompetent as against the executrix defendant by reason of G.S. 8-51, the only remaining evidence to support plaintiffs' claim for fraud was that the deceased Williams actually took part in filling the land on which the house was built. This evidence clearly will not support a claim for fraud against the executrix defendant, and her motion for a directed verdict should have been granted.

II.

[4] Defendants argue that the trial court erred in admitting the testimony of the witness, Charles R. Manning, that plaintiffs' house was not built according to acceptable construction and engineering standards prevailing in the area at the time. Defendants cite *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974), to show that Manning, in order to render an opinion of the construction of the house, should have been more knowledgeable about workmanlike quality in Onslow County in the year plaintiffs' house was constructed. After reviewing Dr. Manning's qualifications, we conclude that he was qualified to render an opinion and that the court's admission of his opinion was, therefore, not error. There was uncontroverted evidence that Dr. Manning was a Professor of Engineering of North Carolina State University; that, among other degrees, he held a Masters Degree and a Ph.D. in Materials Engineering; that he was a licensed building contractor in North Carolina and had been since 1972; that, among six houses he had built, some were built at Emerald Isle, Carteret County, less than twenty-five miles from Jacksonville. Based on these qualifications, we cannot find that the trial court abused its discretion in allowing Dr. Manning to testify as an expert.

III.

[5] There is also no merit in defendants' contention that the trial court erred in instructing the jury as to the measure of damages for breach of an implied warranty. The portion of the instructions to which defendants took exception reads:

> "And I instruct you, that would also be the measure of damages. You may answer this issue—You measure the damages in either one of two ways. You may answer it by the difference in the fair market value of it or you can answer it in an amount which you are satisfied by the greater weight of the evidence would be required to bring this house up to the standard of the implied warranty.
>
> DEFENDANTS' EXCEPTION NO. 127."

In *Hartley v. Ballou, supra,* a case involving breach of implied warranties, our Supreme Court assumed that prior to extensive efforts by defendant builder to remedy the defects, plaintiff could have maintained an action for damages for such breach, either (1) for the difference between the reasonable market value of the subject property as impliedly warranted, and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty. *Id.* at 63, 209 S.E. 2d at 783. Since defendant builder had made extensive efforts to remedy the defects, and since plaintiff, with knowledge of defendant's efforts, accepted the subject property, the Court held that the proper measure of damages was damages for plaintiff's inconvenience and expense during the period from initial occupancy to completion of defendant's remedial efforts. We do not find the present case analogous to *Hartley v. Ballou,* and we accept the trial court's instructions regarding the measure of damages for breach of implied warranties. Furthermore, we reject defendants' efforts to apply G.S. 25-2-316(3)(b) to the facts of this case.

IV.

[6] After the jury's verdict, defendants moved to remit the sixteen thousand dollars in order to make the verdict consistent with the verdict of thirty-five hundred dollars. Plaintiff's evidence on the issue of damages showed that the total damage was $16,000, of which $7,000 resulted from settlement of the house.

We do not agree with defendants' argument that since the jury returned a verdict of $3,500 on the question of damages caused by settlement, the $16,000 figure should have been reduced to $12,500. The jurors, as triers of fact, may believe all, part, or none of the testimony of a given witness. *See, e.g. Brown v. Brown*, 264 N.C. 485, 141 S.E. 2d 875 (1965). In the case *sub judice*, the jurors apparently believed that total damages amounted to $16,000, but that only $3,500 was allocable to damage due to settlement. We, therefore, see no error in the trial court's refusal to remit the amount of damages.

(Moreover, we note that plaintiffs do not contend that the jury's answers to the issues as submitted entitle them to combine the $16,000 and $3,500 for a total award of $19,500. That question, therefore, is not presented by this appeal.)

Plaintiffs' Appeal

[7] Plaintiffs present only one issue, albeit a difficult one, for our determination. In their complaint, plaintiffs allege that the acts of defendants constituted unfair and deceptive acts and practices in the conduct of trade and commerce as declared unlawful by G.S. 75-1.1, and that, pursuant to G.S. 75-16, plaintiffs are entitled to treble damages and attorney's fees. The question is whether the trial court erred in denying plaintiffs' motion for treble damages and for an award of reasonable counsel fees. We cannot agree with plaintiffs that they are entitled to treble the $16,000 award. We find, however, that they are entitled to treble the $3,500 award because it was based upon fraud. In *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975), our Supreme Court noted that "[p]roof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts . . . ." *Id.* at 309, 218 S.E. 2d at 346.

There is no authority to support plaintiffs' argument that the remainder of the $16,000, *i.e.*, the portion attributable to damages solely for breach of implied and express warranties, should be trebled. G.S. 75-16 reads:

> "If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this

> Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict."

Breach of such warranties alone does not constitute a "violation of the provisions" of Chapter 75 of the General Statutes. Hence, we conclude that it is inappropriate to treble damages resulting solely from breach of warranties.

[8] As for attorney's fees, G.S. 75-16.1 states:

> "In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> "(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit; or
>
> "(2) The party instituting the action knew, or should have known, the action was frivolous and malicious."

Since we find no evidence in the record that would support the trial judge's findings that the contingencies in (1) occurred, we cannot find that he abused his discretion in refusing to award attorney's fee.

In summary, we conclude that the executrix defendant, Jean R. Williams, was entitled to a directed verdict, and judgment as to this defendant is hereby reversed. Judgment against Paradise Homes, Inc., however, is affirmed and modified to grant plaintiffs treble damages for that part of the verdict based upon fraud. It thus appears that plaintiffs are entitled to an award of $12,500 plus $10,500 ($3,500 trebled), or a total of $23,000.

Reversed in part.

Modified and affirmed in part.

Judges BRITT and ERWIN concur.

JAMES F. HUGHEY v. POLIE Q. CLONINGER, GEORGE A. JENKINS, BUD BLACK, GENE CARSON, HARLEY B. GASTON, JR., ROBERT A. HEAVNER, AND CHARLES A. RHYNE, COUNTY COMMISSIONERS OF GASTON COUNTY; AND GASTON COUNTY

No. 7727SC702

(Filed 11 July 1978)

Schools § 1; Taxation § 7.1— public purpose—private nonprofit dyslexia school

Even though the Dyslexia School of North Carolina, Inc. as a nonprofit corporation was engaged in a clearly benevolent activity, which would not be constitutionally prohibited if provided through the public schools of Gaston County, it nevertheless remained a private entity, and, as such, could not receive appropriations and expenditures from the County's unappropriated general fund as a constitutionally permissible *means* of achieving the desirable and commendable end of assisting in the education of the dyslexic children of Gaston County.

APPEAL by plaintiff from *Ervin, Judge*. Judgment entered 14 July 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 26 May 1978.

This action was brought by the plaintiff, James F. Hughey, a citizen and taxpayer of Gaston County, to enjoin the appropriation and expenditure by disbursement of public funds by the Gaston County Commissioners to the Dyslexia School of North Carolina, Inc. All facts set forth herein were stipulated by the parties or uncontroverted.

On 15 January 1977, the Gaston County Commissioners appropriated the sum of $47,068 to be disbursed directly to the Dyslexia School of North Carolina, Inc., for the remainder of the 1976-1977 school year. The appropriated funds were to be drawn by the County from its unappropriated general fund balance which is a mixture of ad valorem taxes, fees and federal revenue sharing funds.

The plaintiff instituted this action on 18 April 1977 alleging that these appropriations and expenditures by Gaston County were not authorized by statute and violated the Constitution of North Carolina. The plaintiff prayed that the court grant both temporary and permanent injunctive relief enjoining the defendants from appropriating or disbursing any funds from the general fund balance of Gaston County on behalf of the school.

By their answer, the defendants admitted all material allegations of the complaint and denied only those portions of the complaint amounting to conclusions of law. The defendants contended in their answer that the complaint failed to state a claim against them upon which relief could be granted. Therefore, they prayed that the plaintiff's action be dismissed. A hearing was held before the court for the purpose of allowing the defendants to show cause why a temporary restraining order and injunction should not be entered pending a determination of the issues presented. After conferring with counsel for both parties, however, the court determined that no funds had been disbursed to the school since 18 April 1977 and that no further appropriations would be disbursed to the school until the issue of their legality could be resolved. Counsel for the parties agreed that injunctive relief was unnecessary. Therefore, the court neither considered nor granted temporary or permanent injunctive relief.

The uncontroverted evidence indicated that, as of the filing of the plaintiff's complaint on 18 April 1977, Gaston County had disbursed directly to the school $25,000 of the $48,068 appropriated. The remainder of the funds appropriated have not been disbursed. The school has submitted a budget request for an additional appropriation of $113,000 for the 1977-1978 school year.

The Dyslexia School of North Carolina, Inc., is a nonprofit corporation organized under Chapter 55A of the General Statutes of North Carolina. The purpose of the school is "to operate exclusively for educational purposes and to furnish programs of instruction for children with dyslexia." The school is not a part of the public school system. It is, however, an approved non-public school certified by the North Carolina State Department of Public Instruction as a special school. This approval allows school-aged children to attend the school in lieu of the public schools without violation of compulsory school attendance requirements. It also qualifies students attending the school to receive direct educational expense grants from the State.

The school offers a strictly academic program which does not include vocational training. At the time this action was instituted, the school served seventy-three children, some of whom were from Gaston County. The school charges tuition to all of its students. Some of the funds appropriated by Gaston County to be

disbursed to the school were, however, used to reduce the tuition of Gaston County residents from $500 to $150 per student per semester.

Dyslexia is a generic classification descriptive of a group of learning disabilities occurring in several forms. These learning disabilities manifest themselves primarily in the academic area of the language arts. The public schools of Gaston County presently provide services for learning disabled children, including dyslexic children, through forty-eight full or part-time teachers trained in the area of learning disabilities.

On 31 May 1977 the Superintendent of the Gaston County Schools, Zane E. Eargle, filed applications with the State Department of Public Instruction seeking direct educational expense grants to dyslexic children in which he indicated that the public schools in Gaston County did not have enough teachers to adequately serve all its resident students with such learning disabilities. He also indicated that the Gaston County Board of Education would request additional local funds from the Gaston County Commissioners for four additional teachers trained in learning disabilities for the 1977-1978 school year. He expressed his opinion that these new positions would remove the necessity for these educational expense grants directly to individual children with learning disabilities in Gaston County during the 1977-1978 school year. The Dyslexia School of North Carolina, Inc., is classified as a special school by the State Department of Public Instruction and is thereby approved to receive, for special educational training, students who qualify for the direct individual educational expense grants available for such training.

All of the facts previously set forth herein were either specifically stipulated or uncontroverted. The parties entered a stipulation prior to the hearing of this case by the trial court on 6 June 1977 which resulted in the judgment from which the plaintiff appeals. At that time the parties stipulated that the hearing was a hearing on the merits before the trial court, and that the trial court could "determine all issues raised by the pleadings and the evidence and render judgment in or out of term of court in or out of the county, and that this was basically a question of law."

In its order of 14 July 1977, the trial court found facts essentially identical to those previously set forth herein and concluded

as a matter of law that the funds appropriated by Gaston County for expenditure by direct disbursement to the Dyslexia School of North Carolina, Inc., were for a public purpose. The trial court also concluded as a matter of law that the public schools of Gaston County did not have adequate personnel assigned in the area of learning disabilities to meet the educational needs of its children, and that the appropriation and direct disbursement of funds by the County to the school were to provide services for the educational needs of its children not available in the public schools. The trial court additionally concluded as a matter of law that the expenditure of funds from the appropriated sum of $48,068 by Gaston County "was in accordance with the Fiscal Control Act giving the County control over the expenditure of the funds."

Based upon its findings of fact and conclusions of law, the trial court ordered, *inter alia,* that the plaintiff's action be dismissed with costs taxed to the plaintiff. From this judgment, the plaintiff appealed.

Roberts & Planer, P.A., by Joseph B. Roberts III, for plaintiff appellant.

Hollowell, Stott & Hollowell, by Grady B. Stott, for defendant appellees.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., for amicus curiae, North Carolina School Boards Association.

Chambers, Stein, Ferguson & Becton, P.A., by James C. Fuller, Jr., for amicus curiae, North Carolina Association of Educators.

MITCHELL, Judge.

The plaintiff appellant assigns as error the trial court's conclusion as a matter of law that Gaston County could lawfully appropriate and expend public funds by direct disbursement to and for the Dyslexia School of North Carolina, Inc. In support of this assignment, the plaintiff refers us to numerous sections of the Constitution of North Carolina which he contends prohibit such appropriations and expenditures. We need consider only one.

The Constitution of North Carolina commands that: "The power of taxation shall be exercised . . . for public purposes only.

. . ." N.C. Const. art. V, § 2(1). This "public purpose" requirement acts as a limitation equally upon the power to tax and the power to appropriate and expend public funds. In *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968), the Supreme Court of North Carolina expressly declared that:

> The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent. . . .
>
> . . . .
>
> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises . . . and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. . . . Often public and private interests are so comingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. . . . (citations omitted).

273 N.C. 143-144, 159 S.E. 2d 749-750.

Clearly, both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E. 2d 551 (1970). In determining whether the particular appropriations and expenditures by direct disbursement to the school in the case before us are for a "public purpose" in the constitutional sense, however, we must look to the *means* to be employed as well as the end to be attained. *Turner v. Reidsville*, 224 N.C. 42, 44, 29 S.E. 2d 211, 213 (1944). Here, the appropriations and expenditures by direct disbursements to and for a

private nonprofit corporation, although clearly an attempt to attain a benevolent and commendable end, constitute a primary benefit to the private entity itself. Of the seventy-three children enrolled in the school, those children from Gaston County who receive a tuition reduction are directly benefited by the appropriations and expenditures. Only a portion of the funds, however, are used for tuition reduction. Assuming the entire student body of the school to be comprised of students from Gaston County, which the record reveals it is not, the $350 reduction in tuition per student per semester would only amount to a total of $25,550 of the $48,068 appropriated for the spring semester of 1977. A minimum of $22,518, on the other hand, would go directly to benefit the private entity.

Even where, as here, it is clear that the promotion of the school and its program will be of advantage to the community and the public welfare, it is the character of the school as the object of the appropriations and expenditures which must determine their validity. For this reason, the Supreme Court of North Carolina has held that direct assistance to private entities such as this school, distinguishable from direct disbursements to students for educational purposes, may not be the *means* used to effect a public purpose. *See Stanley v. Department of Conservation and Development*, 284 N.C. 15, 34, 199 S.E. 2d 641, 653-654 (1973), *and Foster v. Medical Care Commission*, 283 N.C. 110, 195 S.E. 2d 517 (1973).

In *Foster* the Supreme Court of North Carolina held that tax funds could not be employed to finance a nonprofit hospital even though its primary purpose was the same public purpose served by publicly owned hospitals. Here the school serves the clearly benevolent and commendable purpose of providing educational assistance to dyslexic children. The public schools, which clearly could be used as a constitutionally permissible *means* for achieving this legitimate end, apparently lack sufficient teachers to provide for these children adequately. This lack does not, however, make the present case distinguishable from *Foster*. There, the private nonprofit hospital also would have provided a valuable public service not otherwise adequately available. We are, therefore, of the opinion that *Foster* is the controlling authority to be applied in the present case and requires us to find that the appropriations for and expenditures by disbursement to the

school do not serve a "public purpose" in the constitutional sense, as the private school may not be used as a legitimate *means* for achieving this end. Even though the school as a private nonprofit corporation is engaged in a clearly benevolent activity, which would not be constitutionally prohibited if provided through the public schools of Gaston County, it remains a private entity. As such it may not receive appropriations and expenditures from public funds as a constitutionally permissible *means* of achieving the desirable and commendable end of assisting in the education of the dyslexic children of Gaston County. *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 34, 199 S.E. 2d 641, 653-654 (1973); *Turner v. Reidsville*, 224 N.C. 42, 44, 29 S.E. 2d 211, 213 (1944); *see also Wells v. Housing Authority*, 213 N.C. 744, 197 S.E. 693 (1938). The foregoing authorities require our holding that the trial court erred in its conclusion as a matter of law that the funds appropriated by Gaston County to the Dyslexia School of North Carolina, Inc., were for a "public purpose" in the constitutional sense.

Having determined that the appropriations and expenditures of the funds in question were not constitutionally permissible, we must also hold that the trial court erred in concluding that the expenditures of the funds here involved by Gaston County were in accordance with The Local Government Budget and Fiscal Control Act, G.S. 159-7 through G.S. 159-40. That act itself proscribes expenditures of revenues for purposes otherwise prohibited by law. G.S. 159-13(b)(4). As the expenditures of revenues by direct disbursements to and for the school were not constitutionally permissible, they were prohibited by the terms of the act. Therefore, the act does not tend to be brought into conflict with our holding in regard to the constitutionality of the appropriations and expenditures in this case.

The defendants have referred us to numerous other sections of the Constitution of North Carolina and the General Statutes as authority for the appropriations and expenditures for the school by Gaston County. Our holding that the appropriations and expenditures were not constitutionally permissible makes detailed analysis of these contentions unnecessary. Nevertheless, we have reviewed each and find, for various reasons, that none of the sections of the Constitution of North Carolina or the General

Statutes relied upon by the defendants authorized appropriations or expenditures such as those presented on these facts.

The judgment of the trial court is reversed, and this case is remanded to the Superior Court of Gaston County for entry of judgment granting a permanent injunction in accordance with the plaintiff's prayer for relief.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

ALLIS-CHALMERS CORPORATION v. RICHARD L. DAVIS, WAYNE L. MORRIS AND GEORGE GLANCE, T/D/B/A HAYWOOD EXCAVATING COMPANY

No. 7730DC519

(Filed 11 July 1978)

1. **Uniform Commercial Code § 46— sale of collateral—inadequacy of price—commercial reasonableness as jury question**

In N. C. when a debtor offers independent evidence of a gross inadequacy of price received for the collateral, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury; therefore, in an action to obtain a deficiency judgment for the difference between the amount for which plaintiff creditor sold a backhoe and the amount defendants owed on the backhoe, the trial court erred in directing verdict for plaintiff since the evidence showed that the sale price for the equipment was $3500, but defendant showed that the retail price of a similar machine being sold in the same general locale at the same time was $6500, and a disinterested witness testified that in his opinion the value of the machine was $6500 to $7000 at the time of the sale in that same locality. G.S. 25-9-507(2).

2. **Uniform Commercial Code § 46— sale of collateral—sales price evidence of value—no directed verdict on claim for deficiency**

Once the secured party makes a prima facie showing that the sale was otherwise "commercially reasonable" under the Code, then the price he actually receives for the collateral must be accepted as competent evidence of the value of the collateral and, therefore, as competent evidence that the price was "commercially reasonable"; hence, the trial court did not err in denying defendants' motion for directed verdict as to plaintiff's claim for deficiency, since the evidence and pleadings established a prima facie showing of conformity with the Code's requirement, thus making the sales price competent evidence of value, and such evidence was sufficient to withstand defendants' motion for a directed verdict and to take the case to the jury.

APPEAL by defendants from *Snow, Judge*. Judgment entered 11 March 1977 in District Court, HAYWOOD County. Heard in the Court of Appeals 29 March 1978.

Defendants purchased from plaintiff's predecessor in interest an Allis-Chalmers 615 loader and backhoe for $14,971.32 on 19 October 1972. Defendants traded a used backhoe and received $4,471.32 credit for it. The balance of $10,500 was financed. A promissory note, security agreement, and financing statement were executed. Occasionally, defendants were late paying and, in July 1974, entirely stopped making payments. Plaintiff repossessed the backhoe on 26 September 1974 because of defendants' default.

At the time of repossession the equipment was carried to Fulmer Equipment Company in Sylva, North Carolina (the dealer who initially sold it). During the early part of October 1974, the backhoe was moved from Fulmer Equipment to Craven Equipment Company in Asheville, North Carolina, because Fulmer Equipment went out of business. On 23 October 1974, Allis-Chalmers Credit Corporation (plaintiff's assignor) notified defendants (1) that a balance of $6,282.64 was owed on the debt and (2) that they intended to sell the equipment at private sale on or after 4 November 1974 unless redeemed. Defendants attempted to redeem the machine, but their check was returned because of insufficient funds.

Craven Equipment, according to defendant Richard Davis's testimony, is an established dealer in heavy equipment. Defendant testified that he himself had previously purchased similar heavy machinery from Craven Equipment and that he had also used their services in selling similar heavy equipment. Plaintiff held the backhoe for sale on the premises of Craven Equipment and enlisted the services of Craven Equipment in its efforts to sell the backhoe. Additionally, plaintiff's assignor circulated in each Allis-Chalmers Credit Company Office throughout the nation a listing of the backhoe, its condition, and price. The asking price was $6,000 to retail customers and $5,000 to wholesale customers. Defendant Davis testified that he sent two prospective buyers who were willing to purchase, but they were unable to locate the machine because it had been moved. Finally, in April 1975, the machine was sold by plaintiff's assignor to Godley Auction Company for $3,500.

Defendant Davis testified that the machine was worth $8,500 in his opinion. Michael Duckett, a disinterested witness, testified that he saw an Allis-Chalmers 615 loader and backhoe on the lot of Godley Auction, about the same time, which he believes was the unit with which this case is concerned. Godley was asking $6,500 for the machine. He believed the value of the backhoe to be $6,500 to $7,000 in that area of the State in the spring of 1975.

Plaintiff filed suit 12 December 1976, seeking a deficiency judgment of $2,651.08, the difference between the amount realized and the amount owed. Defendants answered admitting the debt and other essential allegations but denied any deficiency liability. Defendants also counterclaimed for damages under G.S. 25-9-507 alleging that the secured party did not sell in a commercially reasonable manner. The case was tried before a jury. At the close of all the evidence, the trial court granted plaintiff's motion for directed verdict both as to its claim and as to defendants' counterclaim, and denied defendants' motion for directed verdict. Judgment in the amount of $2,651.08 plus costs was entered in plaintiff's favor 11 March 1977. From that judgment defendants appeal.

Morris, Golding, Blue & Phillips, by J. N. Golding, for plaintiff appellee.

Bennett, Kelly & Cagle, by Robert F. Orr, for defendant appellants.

MORRIS, Judge.

The first question for decision is whether the sale of the Allis-Chalmers 615 backhoe and loader was commercially reasonable as a matter of law.

G.S. 25-9-504 provides in part that

"(1) [a] secured party after default may sell . . . the collateral . . . .

* * *

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale . . . may be as a unit or in parcels and at any time

and place and on any terms *but every aspect of the disposition including method, manner, time, place and terms must be commercially reasonable. . . .*" (Emphasis added.)

G.S. 25-9-504 also establishes that "unless otherwise agreed, the debtor is liable for any deficiency. . . ." However, in order to recover the deficiency, the creditor must first prove that the disposition of the collateral was commercially reasonable. *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976). As to all elements of the sale save one there is no question as to commercial reasonableness.

So far as "method", "manner", and "place" are concerned defendant Davis testified that Craven Equipment was a well-known local dealer and that he had previously employed their services in selling similar equipment. He also testified that the same procedures used by Craven Equipment in selling heavy equipment were followed by most equipment dealers. The record does not suggest that the secured party was too hasty in selling the machine; nor does it suggest that there was an unnecessary delay. Therefore, the only issue remaining is whether the "terms" were "commercially reasonable". "Price" is obviously one of the "terms" of the sale. *See Associates Finance Co. v. Teske*, 190 Neb. 747, 212 N.W. 2d 572 (1973). Thus, under *Credit Co. v. Concrete Co.*, plaintiff would have the burden of proving that the price was commercially reasonable in order to be entitled to a deficiency judgment. The trial court directed the verdict as to the claim for deficiency in favor of plaintiff, the party with the burden of proof. In North Carolina, the court can direct the verdict in favor of the party with the burden of proof "only when the evidence presents a question of law based on admitted facts." *Cutts v. Casey*, 278 N.C. 390, 418, 180 S.E. 2d 297, 312 (1971). Neither in the pleadings nor at trial, did defendants admit the commercial reasonableness of the sale. Thus, as a purely technical matter, one can clearly see that the trial court should not have directed the verdict. However, we discuss this issue more fully in order to clarify our holding.

[1] Plaintiff relies heavily upon G.S. 25-9-507(2) which provides that "[t]he fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish

that the sale was not made in a commercially reasonable manner. . . ." Defendants do not argue that the sale was commercially unreasonable because plaintiff should have sold at another time or in a different place. Defendants contend that the sale was commercially unreasonable because the price plaintiff accepted was commercially unreasonable when sold in that manner at that time. G.S. 25-9-507(2) only prohibits second-guessing the secured party; it does not give him unbridled discretion. Obviously, there may be cases in which the price paid for the collateral will be commercially reasonable even though a higher price could have been obtained at a different time or in a different market. Nor do we suggest that a price which is slightly inadequate must necessarily be commercially unreasonable. The trier of fact must consider all the elements of the sale together. However, when the debtor offers independent evidence of a gross inadequacy of price, in North Carolina, that sufficiently raises the issue of the commercial reasonableness of the sale to take the case to the jury.

Plaintiff also places great reliance on the G.S. 25-9-507(2) provision which states that if the secured party "has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. . . ." The sale of a single unit cannot be "in conformity with reasonable commercial practices among dealers" when the sale is for a commercially unreasonable price. In short "reasonable commercial practices" necessitates a commercially reasonable price. Again, we do not think that G.S. 25-9-507(2) makes every inadequacy in price, however slight, commercially unreasonable. A truly gross inadequacy in price, however, if established by the evidence and believed by the jury, will support a finding that the sale was not "in conformity with reasonable commercial practices among dealers".

It is settled law in North Carolina that, in ruling on a motion for a directed verdict by the party with the burden of proof, the trial court must deny the motion when the evidence is in conflict. The jury, not the judge, must weigh credibility and resolve conflicts in the evidence. *Cutts v. Casey, supra.* In this case the sale price for the backhoe was $3,500. Evidence for defendant showed that the retail price of a similar machine being sold in the same general locale at the same time was $6,500. Witness Michael Duckett, a disinterested person, testified that in his opinion the

value of the machine was $6,500 to $7,000 at the time of the sale in that same locality. This evidence of gross inadequacy in price created a serious conflict in the evidence as to whether the price and, therefore, the sale was commercially reasonable. That conflict must be resolved by a jury. Therefore, the trial court erred in granting plaintiff's motion for a directed verdict as to its claim.

[2] This appeal also brings before us the question of whether the trial court erred in denying defendants' motion for directed verdict as to plaintiff's claim for deficiency. It is obvious that, in light of *Cutts v. Casey*, the defendants would be granted a directed verdict more readily than plaintiff since they do not have the burden of proof on this issue. However, in ruling upon *their* motion for directed verdict, we must still resolve any discrepancies in the evidence in favor of the plaintiff. The evidence of the plaintiff showed that the sale price was $3,500. Once the secured party makes a prima facie showing that the sale was otherwise "commercially reasonable" under the Code, then the price he actually receives for the collateral must be accepted as competent evidence of the value of the collateral and, therefore, as competent evidence that the price was "commercially reasonable". *See Credit Co. v. Concrete Co., supra; Community Management Association of Colorado Springs, Inc. v. Tousley*, 32 Colo. App. 33, 505 P. 2d 1314 (1973). Indeed, at that point, it may be the best evidence the trier of fact has before it. Because the evidence and pleadings establish a prima facie showing of conformity with the Code's requirement, the $3,500 sales price is competent evidence of the value. This evidence is sufficient to withstand defendants' motion for a directed verdict and to take the case to the jury.

Defendants' appeal also brings before this Court the cross-motions for a directed verdict as to defendants' counterclaim. In passing, we note that defendants' counterclaim is for damages only and that damages is the most to which defendants are entitled since their counterclaim does not allege any bad faith on the part of the purchasers. G.S. 25-9-504(4) and G.S. 25-9-507(1). Insofar as defendants' counterclaim is concerned, defendants have the burden of proving lack of commercial reasonableness. We have fully discussed the conflict in the evidence in earlier parts of this opinion. It is unnecessary to re-hash those issues. Defendants' independent evidence suggesting a gross inadequacy in price is sufficient evidence of commercial unreasonableness to withstand

plaintiff's motion for a directed verdict. Therefore, the court erred in granting plaintiff's motion for a directed verdict.

In a like manner, plaintiff's prima facie showing of conformity with the Code requirements, makes the $3,500 sales price competent evidence. Thus, plaintiff's evidence was also sufficient to withstand defendants' motion for a directed verdict.

Finally, defendants contend that failure of the complaint to allege the asignment of the note/security agreement from Fulmer Equipment to Allis-Chalmers Credit Corporation was a fatal defect and entitled defendants to a directed verdict. First, the note/security agreement, which was incorporated by reference, did suggest that there had been an assignment. Second, the complaint states that under the note/security agreement "the defendants agreed to pay to plaintiff the unpaid balance. . . ." We believe that under our liberal rules of pleading this allegation is sufficient to encompass assignment by the original seller to plaintiff. In any event, the proper procedure for the trial court would be to allow plaintiff permission to amend the complaint to conform with the evidence under Rule 15. *See Reid v. Bus Lines*, 16 N.C. App. 186, 191 S.E. 2d 247 (1972). This assignment of error is overruled.

In this case, because there was a clear conflict in the evidence, the case should have been submitted to the jury, and plaintiff's motion for directed verdict should have been denied. The judgment of the trial court is reversed, and the case is remanded for trial.

Reversed and remanded.

Judges MARTIN and ARNOLD concur.

AMERICAN IMPORTS, INC. v. G. E. EMPLOYEES WESTERN REGION FEDERAL CREDIT UNION AND CAROLYN J. McQUEEN

No. 775SC784

(Filed 11 July 1978)

1. **Rules of Civil Procedure § 37— failure to appear for deposition—sanctions—willfulness**

   There is no requirement that the court find that the failure to appear for a deposition was willful before the court may impose sanctions for failure to appear. G.S. 1A-1, Rule 37(d).

2. **Rules of Civil Procedure § 37— failure to appear for deposition—default judgment**

   The trial court did not abuse its discretion in granting defendant credit union judgment on its cross-claim against the individual defendant as a sanction for the failure of the individual defendant to appear for a deposition to be taken by the credit union where the individual defendant was given proper notice of the deposition, neither the individual defendant nor her counsel appeared at the sanction hearing, and no explanation for her failure to appear was ever before the court.

3. **Uniform Commercial Code § 20— acceptance of automobile—action for purchase price—peremptory instructions**

   There was no question as to whether defendant accepted an automobile sold to her by plaintiff, and the trial court properly gave peremptory instructions to the jury in plaintiff's favor in an action to recover the purchase price, where plaintiff showed the sale and delivery of the automobile at an agreed price, and defendant admitted that she took the automobile, executed the papers connected with the sale, and later refused to pay the purchase price.

4. **Automobiles § 6.5— mileage—insufficient evidence of fraud**

   No question of fraud in the sale of an automobile because of its mileage was raised where defendant's evidence showed only that the odometer was not working properly shortly after the sale, there was no evidence that the mileage figure shown on the odometer was not the actual mileage, and plaintiff never represented that the automobile had fewer miles on it.

5. **Automobiles § 6.2; Uniform Commercial Code § 24— revocation of acceptance of automobile—odometer not working—broken fan belt**

   An automobile buyer had no right under G.S. 25-2-608 to revoke her acceptance of the automobile because (1) the odometer was not working when the car was delivered to her or (2) the fan belt broke two days after the delivery, since there was no evidence that the mileage shown on the odometer was not the actual mileage or that she was prevented from discovery of the actual mileage by the seller's assurances, and since the breaking of the fan belt was insufficient to show such nonconformity as would allow her to revoke her acceptance.

6. Automobiles § 6.5— damages under Vehicle Mileage Act

Defendant was not entitled to damages under the Vehicle Mileage Act, G.S. 20-340 *et seq.*, where there was only a technical failure to comply with the Act in that the mileage statement was not completely filled out, defendant offered no evidence of an intent to defraud, and there was no evidence that the mileage shown on the odometer was incorrect.

APPEAL by defendant McQueen from *Rouse, Judge.* Judgment entered 16 May 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 22 June 1978.

Plaintiff is a dealer in Fiat cars. Defendant McQueen attempted to buy a new Fiat from plaintiff in 1975 with financing through defendant G.E. Employees Western Region Credit Union. After a disagreement with plaintiff over the car, defendants stopped payment on their checks. Plaintiff brought this action for the purchase price. Defendant McQueen denied her liability for the purchase price and counterclaimed for damages for violations of the State's unfair trade practices law and of the vehicle mileage act. Defendant Credit Union also denied liability for the purchase price and further cross-claimed against McQueen on the promissory note she executed to them as part of the loan transaction.

McQueen failed to attend a deposition properly scheduled and of which notice was given by Credit Union for the taking of her oral testimony. Neither she nor her attorney appeared before the court for a hearing on the proper sanctions to be applied. The court made findings of fact and ordered that the Credit Union be granted judgment on its cross-claim against McQueen and that it recover $200.00 in attorneys fees and expenses from her.

In this posture the case came on for trial where all parties presented evidence. The evidence tended to show that McQueen negotiated with plaintiff for the sale of a 1975 Fiat Spider with air conditioning, luggage rack and other options at a price of $6,591.00. Plaintiff gave her an estimate to this effect which she took to the Credit Union where she arranged to finance $5,272.80 or 80% of the total cost. The deal included a $500.00 trade in allowance on McQueen's Oldsmobile. McQueen took possession of the Fiat on 21 November 1975, paying plaintiff with checks totaling $5,495.80 and promising to deliver the Oldsmobile for trade in the next week. At that time the car was not equipped with air conditioning or luggage rack and the bill of sale showed that the

car cost $5,995.80. Two days later the car overheated. McQueen had also discovered that neither the speedometer nor the odometer functioned properly. Plaintiff towed the car to its garage, replaced a broken fan belt, and tightened a nut on the speedometer which also controlled the odometer. After the above repairs were made, McQueen said that she wanted a new car and left the Fait on plaintiff's premises.

The court instructed the jury that defendant McQueen had offered no evidence which would constitute a defense in the action and that if it believed the plaintiff's evidence it should find that McQueen owed plaintiff $5,995.80, the purchase price of the car. The jury was also instructed that if it believed the evidence it should find that Credit Union owed plaintiff $5,272.80, the amount of its check on which payment had been stopped. The court also directed verdicts against McQueen on each of her statutory counterclaims on the grounds that she had offered no evidence in support of them. The jury returned the verdicts as directed, and judgment was entered accordingly.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams and Ronald H. Woodruff, for plaintiff appellee, American Imports, Inc.; Rountree & Newton, by William B. Harris III, for defendant appellee, G.E. Employees Western Region Federal Credit Union.

Cherry and Wall, by Frank D. Cherry, for defendant appellant, Carolyn J. McQueen.

VAUGHN, Judge.

[1, 2] Defendant McQueen first assigns as error the court's imposition of sanctions for her failure to appear for her deposition. This question is properly reviewed on appeal of the entire case. While a default judgment on a cross-claim may be reviewed immediately under G.S. 1-277, it is not a "final judgment" until all claims made in the action are adjudicated, unless the court makes findings pursuant to G.S. 1A-1, Rule 54(b), that there is no just reason for delay and the severed claim should be granted final judgment. *Hamilton v. Hamilton*, No. 7722DC511, filed 20 June 1978. Nevertheless, there is no merit in McQueen's position. G.S. 1A-1, Rule 37(d) allows a judge to default a claim as a sanction for failure to appear for a deposition after having been given proper

notice. The imposition of sanctions under Rule 37(d) is in the sound discretion of the trial judge. *Hammer v. Allison,* 20 N.C. App. 623, 202 S.E. 2d 307 (1974), *cert. den.,* 285 N.C. 233, 204 S.E. 2d 23. Although defendant McQueen contends that the court must find that her refusal to attend was willful before it imposes sanctions, the language of G.S. 1A-1, Rule 37(d) requires no such finding. We note that the cases cited by plaintiff date from a time when the Federal Rules of Civil Procedure did require that the offense be willful before imposition of sanctions. *See* 4A Moore's Federal Practice, § 37.05. McQueen can show no abuse of the court's discretion. She was given proper notice of the taking of her deposition. She did not notify the Credit Union's counsel that she would not attend until the day scheduled for the deposition. Moreover, neither she nor her counsel appeared at the hearing on the imposition of sanctions, and no explanation for her behavior was ever before the court.

> "Imposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits." 4A Moore's Federal Practice, §§ 37.08 at 37-112,13.

With all these factors in mind, we find that there was no abuse of discretion in entering judgment against McQueen on her note to the Credit Union.

[3] McQueen also assigns as error the giving of peremptory instructions to the jury in plaintiff's favor on the action for the purchase price, contending that she raised questions of defenses under G.S. 25-1-103 and G.S. 25-2-607 which should properly have been considered by the jury. Plaintiff's proof of the sale and delivery of the car at an agreed price and defendant McQueen's admission that she took the car, executed the papers connected with the sale and then refused to pay the purchase price makes out a case entitling plaintiff to recover the amount due on the purchase price, nothing else appearing. *See* G.S. 25-2-301; *Stevens Co. v. Mooneyham,* 211 N.C. 291, 189 S.E. 780 (1937). We cannot agree with McQueen that there is any question about whether she

accepted the car. Her actions in delivering the checks, signing all the paperwork, and taking delivery of the car were so inconsistent with the seller's ownership as to preclude any other interpretation. G.S. 25-2-606. For these reasons it was not error to give the jury peremptory instructions in plaintiff's favor.

[4, 5] McQueen also contends that her evidence raised questions both of fraud and of proper revocation of acceptance. It is clear that the evidence does not show any material misrepresentation on the part of plaintiff which might reasonably have been calculated to deceive McQueen. The mileage figure was clearly on the odometer, and plaintiff never represented that the car had fewer miles on it. In the absence of a misrepresentation, there can be no actionable fraud. *Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974). Nor does G.S. 25-2-608 give McQueen a right to revoke her earlier acceptance. The right to revoke acceptance of the car arises only if it was accepted.

> "(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance *or* by the seller's assurances." G.S. 25-2-608(1).

There was no evidence that the car was accepted with any knowledge of a nonconformity. There is no evidence that the mileage as shown on the odometer was not the actual mileage or that she was prevented from discovery by the seller. *See Performance Motors, Inc. v. Allen,* 280 N.C. 385, 186 S.E. 2d 161 (1972). That two days after the sale the fan belt broke is insufficient to show such nonconformity as would allow her to revoke her acceptance. Nor can plaintiff show that she did not discover the mileage of the car due to the difficulty of discovery or due to the seller's assurances. She does not, therefore, qualify for relief under G.S. 25-2-608.

[6] McQueen also contends that she offered evidence tending to show that defendant failed to give her a fully completed vehicle mileage statement in compliance with the Vehicle Mileage Act, G.S. 20-340 *et seq.* It is true that McQueen testified that the statement was in blank when she signed it. (She did not offer her copy at trial.) Plaintiff's copy was introduced at trial and showed

the mileage figure as being the same as the figure on the odometer when the sale was made. Plaintiff's copy was incomplete, however, in other respects. Nevertheless, there must be more than a technical failure to comply in order to give rise to an action for damages under the act. The noncompliance must be accompanied by an intent to defraud. McQueen has offered no evidence of such intent. There is nothing to indicate that the mileage shown on the odometer was incorrect or that there was any other misrepresentation.

We have considered all of McQueen's arguments and conclude that she has failed to show prejudicial error.

No error.

Judges MORRIS and MARTIN concur.

JAMES RICHARD ENGLE, HAROLD LEE ENGLE, AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, HARTFORD ACCIDENT AND INDEMNITY COMPANY, JERRY FRANKLIN ABERNATHY, CLARENCE EUGENE ABERNATHY, RONALD WAYNE NORMAN, MARCUS VAUGHN WOODRING, ERIC VON WOODRING, CATHERINE WOODRING, MELISSA D. WOODRING, J. BRUCE MCKINNEY, ADMINISTRATOR OF THE ESTATE OF WILLIAM MICHAEL SILVERS, AND DALLAS FOX, ADMINISTRATOR OF THE ESTATE OF TONY MARTIN FOX

No. 7725SC549

(Filed 11 July 1978)

Insurance § 87.3— permission to drive given by insured's son—driver in lawful possession of vehicle

The trial court did not err in finding as a fact and concluding as a matter of law that, at the time of the collision in question, a driver was in "lawful possession" of a car insured by plaintiff insurance company where the evidence tended to show that the driver had the express permission of insured's son to drive the car; for all practical purposes, the son was the "owner" of the car, though the title was in the name of his father, the insured; and, though insured had instructed his son to let no one else drive the car, he nevertheless made no effort to get back possession of the car when he discovered two days before the accident that his son had let someone else borrow it. G.S. 20-279.21(b)(2).

APPEAL by plaintiffs from *Snepp, Judge.* Judgment entered 10 May 1977 in Superior Court, BURKE County. Heard in the Court of Appeals 3 April 1978.

Plaintiffs instituted this action pursuant to the Declaratory Judgment Act to determine liability under an insurance policy issued by plaintiff insurance company (Farm Bureau).

Following a trial without a jury, the court made findings of fact which are summarized in pertinent part as follows:

On 17 August 1975 a collision occurred in Catawba County between a 1970 MG driven by William Michael Silvers (Silvers), a 1968 Camaro owned by Catherine Woodring and driven by Marcus Woodring, and a 1966 Chevrolet owned by Charles Abernathy and operated by Jerry Abernathy. Plaintiff James Engle was the registered owner of the MG. Tony Fox (Fox) and Ronald Norman (Norman) were passengers in the MG and Eric, Catherine and Melissa Woodring were passengers in the Camaro.

On 14 December 1974 Farm Bureau issued to James Engle a policy of automobile liability insurance covering the MG. This policy was issued as Proof of Financial Responsibility pursuant to G.S. 20-279.21(b)(2) and the provisions of § (b)(2) of that statute were deemed written into said policy as a mater of law. The policy covered James Engle as "Named Insured" and "any resident of the same household" together with "any other person using such automobile with the permission of the named insured, provided that his actual operation or (if he is not operating) his actual other use thereof is within the scope of such permission." Defendant State Farm Mutual Automobile Insurance Company (State Farm) had issued to Silvers a policy of automobile liability insurance which was in full force and effect on 17 August 1975. At the time of the accident in question said policy insured Silvers' operation of the MG in an amount equal to the minimum limits then required by North Carolina law.

Harold Engle (Harold), born 2 October 1955, is the son of James Engle. He is and was unmarried, and on 17 August 1975 was a resident of the same household as his father. On the date of the accident Harold was over eighteen years of age and became 20 years of age on 2 October 1975. On 14 August 1975 he was attending school part time and working part time. From his own funds and collision insurance proceeds from another vehicle which

had been wrecked at an earlier time, Harold made the down payment on the MG which was purchased in May 1975. He also made subsequent payments and paid for the care and maintenance of the MG from his own funds. Like the previously wrecked car, the MG was titled in the name of James Engle. However, until 14 August 1975 the MG was operated primarily by Harold for his own purposes. He "came and went" with the MG as he pleased. In the presence of Norman on occasions prior to 17 August 1975 Harold had referred to the MG as "his" car. James Engle did not exercise any control over the MG other than to instruct Harold not to permit others to drive it; the only occasion on which James Engle drove the car was when it was first purchased.

From the time Harold obtained a driver's license at age 16 his father had repeatedly instructed him not to let anyone else drive a car titled in his (James Ingle's) name and this instruction was repeated when the MG was purchased. On several occasions prior to 17 August 1975 James Engle instructed Harold not to let anyone else drive the MG. Nevertheless, Harold had permitted other persons to operate the MG on several occasions prior to 14 August 1975. Norman and Silvers had been permitted to drive the MG while Harold was a passenger therein. Norman was Harold's first cousin. On 14-17 August 1975 neither Norman nor Silvers was a resident of the same household as James Engle.

On the night of 14 August 1975 Harold gave his permission for the possession of the MG to Fox, Norman and Silvers. At Harold's request Norman agreed for Harold to use his vehicle and delivered the keys to it to Harold in exchange for the keys to the MG, thereby consumating an exchange of vehicles. At the time the vehicles were exchanged Harold was aware that the MG was to be taken to Myrtle Beach by Fox, Norman and Silvers. At the time of the exchange of automobiles no restrictions were placed on who could or could not drive the MG, nor were any instructions given as to who might operate it while being driven to and from the beach. Silvers drove the MG from the time it left a parking lot in Morganton until it arrived in Myrtle Beach and for several days thereafter. During the return trip to Morganton on 17 August 1975 a wreck occurred while Silvers was operating the MG, proximately causing the death of Fox and causing serious and permanent injuries to Norman.

On Friday morning, 15 August 1975, James Engle observed that the MG was not at his residence but that an Oldsmobile belonging to Norman was there. James was informed upon inquiry of Harold that the MG had been loaned to Norman and others to go to Myrtle Beach. James never reported the absence of said MG to police officers. Nor did he go himself or request anyone else to go and obtain possession of the MG. Possession of the Oldsmobile was retained by Harold through Sunday, 17 August 1975, and for several days thereafter.

The suit filed against the administrator of Silvers' estate and James Engle in the Superior Court of Burke County by the administrator of Fox's estate and by Norman have been settled by consent judgments and copies of the same have been made a part of the record in this case. Claims of other parties to this case injured in the accident have all been settled by State Farm.

The parties stipulated that the issue in this case is "Was William Michael Silvers, at the time of the accident on August 17, 1975, in lawful possession of the 1970 MG automobile?" "The court finds as a fact that he was in lawful possession of and the driver of the MG at that time."

Upon said findings of fact, the court concluded as a matter of law that Farm Bureau issued its policy of insurance insuring the MG; and that said policy was in full force and effect on 17 August 1975 while the MG was being operated by Silvers; that Silvers was in lawful possession of the MG at the time of the collision in question; that Farm Bureau is liable under its policy issued to James Engle which covered Silvers in said accident to the limits of its liability thereunder; and that State Farm is liable under its policy which covered Silvers in the accident in question to the limits of its liability thereunder.

The court adjudged that both Farm Bureau and State Farm provided coverage for the operation of the MG by Silvers at the time of the accident in question.

Plaintiffs appealed.

Patrick, Harper & Dixon, by Charles D. Dixon and Stephen M. Thomas, for plaintiff appellants.

Byrd, Byrd, Ervin & Blanton, by Robert B. Byrd, for the defendant appellee, administrator of the estate of Tony Martin Fox; and Hatcher, Sitton, Powell & Settlemeyer, by Claude S. Sitton, for the defendant appellee, Ronald Wayne Norman.

BRITT, Judge.

The only parties with interest remaining in the outcome of this litigation are plaintiffs, defendant Norman and defendant Fox, administrator. The consent judgments entered in the Norman and Fox cases provide that State Farm would pay its remaining coverage to these claimants. Farm Bureau agreed that if it is ultimately determined in this action that it did provide coverage to Silvers for the accident in question, it would pay its policy limits to both Norman and Fox's administrator. These claimants agreed to accept either the remainder of State Farm's coverage or that amount plus the limits of Farm Bureau's coverage in each case (depending on the outcome of this action), in total settlement of their claims.

Plaintiffs' sole contention is that the trial court erred in finding and concluding that Silvers was in "lawful possession" of the MG at the time of the accident in question. They rely primarily on *Insurance Co. v. Broughton,* 283 N.C. 309, 196 S.E. 2d 243 (1973).

In *Broughton,* the parties stipulated: Budget Rent A Car, the insured specifically named in the automobile liability insurance policy, by written agreement rented the insured vehicle to Carraway, a qualified licensed driver who agreed to be bound by all provisions of the lease. The lease contained provisions that all authorized drivers of the rented vehicle must be 21 or older and licensed; and the renter agreed that the vehicle would not be used, operated or driven by any person except the renter, an additional driver shown on the agreement, or a qualified licensed driver over 21, with lessor's permission first obtained. Very soon after renting the car, Carraway relinquished control of it to Massey who was only 19 and not a member of Carraway's household. Carraway proceeded to use his own car while Massey used the rented car. Massey was involved in an accident and suit was brought to determine the insured's liability.

The Supreme Court, in an opinion by Justice Higgins, held that the owner of the rented vehicle obligated itself to be responsible for Carraway's negligence but "Carraway could not, in violation of his own agreement, make the owner responsible for Massey's negligence. No provision is made for owner's liability either by the policy or by G.S. 20-279.21, as amended, until lawful

possession is first established. This may be done by express or implied permission of the owner." The court upheld the trial court's conclusion that as a matter of law Massey was not a person in lawful possession of the rented automobile and was not insured by the terms of the policy. The court further held that Massey was not within the coverage required by G.S. 20-281 as he did not come within any of the terms enumerated therein.

In a concurring opinion, Justice Branch agreed with the conclusion reached in the majority opinion but took the position that the case was governed by G.S. 20-281, the statute relating to persons engaged in renting motor vehicles. He pointed out that G.S. 20-281 does not include as an insured "any other person in lawful possession"; and that it was not necessary or proper that the court consider whether Massey was in "lawful possession" at the time of the collision.

While *Broughton* comes close to supporting plaintiff's contention, we do not think it controls the case at hand due primarily to the difference in the facts in the two cases. In *Broughton*, Carraway violated a written agreement which he entered into with the owner of the vehicle in question; in the case at hand, Harold did nothing more than disregard instructions given to him by his father. In *Broughton*, Budget Rent A Car did not know that its vehicle had been delivered to another driver until after the damage had been done; in this case, James knew on Friday morning that Harold had loaned the MG to Norman and others and he made no effort to get the MG back before the accident occurred on the following Sunday afternoon. Furthermore, for all practical purposes Harold was the "owner" of the MG.

In *Insurance Co. v. Chantos*, 25 N.C. App. 482, 214 S.E. 2d 438, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 624 (1975), this court held that where the original permittee, the son of insureds, gave another person express permission to use the vehicle, the other person was thereby placed in "lawful possession" under G.S. 20-279.21(b)(2). While *Insurance Co. v. Chantos*, *supra*, later found its way to the Supreme Court on another appeal, 293 N.C. 431, 238 S.E. 2d 597 (1977), that court did not disturb the principle just stated. In fact, the court restated principles which are applicable here as follows:

> Under the Financial Responsibility Act, all insurance policies covering loss from liability growing out of the ownership, maintenance and use of an automobile are mandatory to the extent coverage is required by G.S. 20-279.21. The primary purpose of this compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy. The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. (Citations omitted.) 293 N.C. 440-441.

Chapter 1162 of the 1967 Session Laws reinstated the words "or any other persons in lawful possession" to G.S. 20-279.21(b)(2). The preamble to said chapter suggests very strongly that the reason for adding the quoted words was to alleviate the necessity of proving that the operator of a vehicle belonging to another had "the express or implied permission of the owner to drive [the vehicle] on the very trip and occasion of the collision".

We hold that the trial court did not err in finding as a fact and concluding as a matter of law that Silvers was in "lawful possession" of the MG at the time of the collision in question and in declaring Farm Bureau liable under its policy.

The judgment appealed from is

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. ANTHONY WALLER

No. 783SC214

(Filed 11 July 1978)

1. **Assault and Battery § 11.3— assault on police officer—allegations required in warrant**

A warrant charging a violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office at the time the assault occurred without alleging specifically exactly what that duty was, and the decision in *State v. Mink*, 18 N.C. App. 346, to the contrary is overruled.

2. **Assault and Battery § 14; Arrest and Bail § 6— arrest of defendant—assault on officers—arrest constitutional and legal—no nonsuit of assault charges**

Where a probation officer had probable cause to believe that defendant had violated a condition of probation, the officer's arrest of defendant was constitutional, and the warrantless arrest was also legal, since G.S. 15-200 and -205, read together, give a probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document; therefore, the trial court properly denied defendant's motion for nonsuit on assault charges, since defendant's contention that he was entitled to resist the officers with reasonable force because his arrest was both unconstitutional and illegal was without merit.

Chief Judge BROCK and Judge MORRIS concur in overruling *State v. Mink*, 18 N.C. App. 346.

APPEAL by defendant from *Small, Judge.* Judgments entered 10 November 1977 in Superior Court, PITT County. Heard in the Court of Appeals 26 June 1978.

Defendant was tried on his pleas of not guilty to charges of assaulting William R. Bonar, a probation-parole officer, and G. W. Williams, a police officer, while they were discharging or attempting to discharge duties of their offices, in violation of G.S. 14-33(b)(4). After conviction in the district court, defendant appealed and was tried de novo in the superior court.

The State presented evidence to show that defendant was on probation under the supervision of his probation officer, William R. Bonar. On 27 July 1977, Bonar decided to arrest defendant for violating conditions of probation after discovering that defendant had failed to make any periodic payments on his indebtedness for court costs as required by the terms of his probation. Bonar requested and obtained the assistance of Officer Williams in making

the arrest. The two men went to defendant's house where Bonar made the arrest. While the officers were driving back to the magistrate's office, defendant, sitting in the back seat of the police car, became abusive. He began cursing the officers and threatened to kill both of them when he got out of jail. Defendant then took off his belt, wrapped it around his hand with the metal buckle exposed, and struck Bonar and Williams on their heads. Officer Williams stopped the car as Bonar attempted to subdue defendant with Mace. Defendant was handcuffed and taken to the magistrate's office. Neither officer was injured, and neither officer struck defendant.

Defendant presented evidence contradicting that of the State and tending to show that Bonar and Williams beat the defendant on his back and shoulders with a blackjack and with defendant's belt.

The trial judge granted defendant's motions for nonsuit as to the principal charges and submitted to the jury only the lesser offenses of simple assault. The jury found defendant guilty on both charges of simple assault. From judgments of imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney T. Michael Todd for the State.

Robert L. White for defendant appellant.

PARKER, Judge.

Defendant first assigns error to the denial of his motions to quash the warrants upon which he was tried. He contends that the warrants were insufficient to charge a violation of G.S. 14-33(b)(4) because they failed to allege the specific duties which the officers were discharging or attempting to discharge at the time of the assaults. The short answer to this contention is that defendant was not convicted on charges of violating G.S. 14-33(b)(4). The judge dismissed the charges against him under that section and submitted the cases to the jury only on the lesser included charges of simple assault under G.S. 14-33(a). As to those charges the allegations of the warrants were clearly sufficient.

[1] By pointing out that defendant was convicted only on charges of simple assault under G.S. 14-33(a) which were fully supported by the allegations of the warrants, we in no way intend to imply that the warrants in this case were deficient in charging violations of G.S. 14-33(b)(4). That section makes a separate offense of an assault on a law enforcement officer "while the officer is discharging or attempting to discharge a duty of his office." The warrants in the present case did allege that at the time of the assaults the officers were discharging or attempting to discharge duties of their office. For the reasons hereinafter stated, this was sufficient to charge violations of G.S. 14-33(b)(4) without further specifying the particular duty which the officers were discharging or attempting to discharge at the time of the assaults.

A related offense to that described in G.S. 14-33(b)(4) is found at G.S. 14-223. For a warrant to charge a defendant with resisting, delaying, or obstructing an officer in discharging or attempting to discharge a duty of his office in violation of G.S. 14-223, the warrant must indicate the official duty the officer was discharging or attempting to discharge. *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967); *State v. Smith*, 262 N.C. 472, 137 S.E. 2d 819 (1964). However, there is a distinction between the offenses of resisting an officer under G.S. 14-223 and assault on an officer under G.S. 14-33(b)(4).

> In the offense of resisting an officer, the *resisting* of the public officer in the *performance* of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the *assault* on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance.

State v. Kirby, 15 N.C. App. 480, 488, 190 S.E. 2d 320, 325, *appeal dismissed*, 281 N.C. 761, 191 S.E. 2d 363 (1972). Based upon the above reasoning, this Court in *Kirby* concluded that the warrant in that case was sufficient to charge the offense of assaulting an officer, even without an allegation of the particular duty the of-

ficer was discharging or attempting to discharge at the time of the offense.

In *State v. Mink*, 18 N.C. App. 346, 196 S.E. 2d 552 (1973) a panel of this Court composed of Brock, Judge (now Chief Judge), and Judges Morris and Parker failed to recognize the distinction drawn in *State v. Kirby, supra*, between the offense proscribed by G.S. 14-33(b)(4) and the offense proscribed by G.S. 14-223. As a result of failure to recognize this distinction, this Court in *State v. Mink, supra*, applied the same requirement for specificity of allegation concerning the particular duty the officer was performing or attempting to perform to a charge of violating G.S. 14-33(b)(4) as is required for a charge of violating G.S. 14-223. We now express our agreement with the reasoning in *Kirby* and therefore reaffirm that decision. An assault upon an officer while he is discharging or attempting to discharge a duty of his office is an offense punishable under G.S. 14-33(b)(4), regardless of its effects or intended effects upon the officer's performance of his duties. The particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was "performing or attempting to perform *any* duty of his office." *State v. Kirby, supra* at 488, 190 S.E. 2d at 325. Our decision in *State v. Mink, supra*, to the contrary is overruled, and defendant's first assignment of error is overruled.

Although we hold that a warrant charging a violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office at the time the assault occurred, without alleging specifically exactly what that duty was, we caution that to sustain a conviction of violating that statute it is still necessary, of course, that the State present evidence and that the jury find under appropriate instructions from the court that the officer was discharging or attempting to discharge *some* duty of his office when the defendant assaulted him.

[2] Defendant's second assignment of error is directed to the trial judge's denial of his motions for nonsuit. He contends that he was entitled to resist the officers with reasonable force because the evidence shows that his arrest was both unconstitutional and illegal. We disagree. The State presented sufficient evidence to show that the arrest was both constitutionally and legally valid.

Whether an arrrest is legal or illegal, it is constitutionally valid if the officer has probable cause to make the arrest. *State v. Eubanks*, 283 N.C. 556, 196 S.E. 2d 706 (1973). In the present case, the probation officer testified that one condition of defendant's probation was that he pay fifteen dollars per week on his court costs. However, when the probation officer conducted a check of defendant's "court indebtedness," he discovered that the "court indebtedness was not being paid, as we decided on earlier in June." This evidence was clearly sufficient to show that the probation officer had probable cause to believe that defendant had violated a condition of probation.

We next consider defendant's contention that the arrest was illegal because the probation officer made the arrest without a warrant. G.S. 15-205 specifically gives a probation officer the power to arrest in the execution of his duties. In addition, any other officer with the power of arrest may arrest a probationer without a warrant if he has a "written statement signed by said probation officer setting forth that the probationer has, in his judgment, violated the conditions of probation." G.S. 15-200 (subsequently amended and recodified at G.S. 15A-1345, effective 1 July 1978). As a matter of sound policy, a probation officer may often elect to follow this procedure and have another law enforcement officer perform the actual arrest in order for the probation officer to properly maintain his role as advisor to the probationer. *See* Clarke, *Probation and Parole in North Carolina: Revocation Procedure and Related Issues*, 13 Wake Forest L. Rev. 5 (1977). However, if a simple conclusory statement from the probation officer, containing no factual allegations, is sufficient to permit another officer to arrest a probationer without a warrant, then it is reasonable to conclude that G.S. 15-200 and -205, read together, give the probation officer the authority to arrest a probationer under his supervision for violations of conditions of probation without a warrant or other written document. The trial judge properly denied defendant's motions for nonsuit.

There was also no error in the trial judge's rulings denying defendant's motions in arrest of judgment and for a new trial.

In defendant's trial and in the judgments entered, we find

No error.

Judges CLARK and ERWIN concur.

Brock, Chief Judge, and Morris, Judge, join in this opinion for the purpose of expressing their concurrence in overruling the holding in *State v. Mink, supra.*

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY, APPLICANT; RUFUS L. EDMISTEN, ATTORNEY GENERAL, DAVID SPRINGER, CONSUMERS' CENTER OF NORTH CAROLINA, INC., YADKIN RIVER COMMITTEE, AND HIGH ROCK LAKE ASSOCIATION, INC., INTERVENORS.

No. 7710UC836

(Filed 11 July 1978)

1. **Electricity § 2.5; Utilities Commission § 15— electric generating facility—certificate of public convenience and necessity**

The purpose of the statute requiring a certificate of public convenience and necessity from the Utilities Commission before an electric generating facility can be built is to prevent costly overbuilding, and environmental concerns are generally left to other regulatory agencies except as they affect the cost and efficiency of the proposed generating facility. G.S. 62-110.1.

2. **Utilities Commission § 51— appellate review of Commission order**

Where actions of the Utilities Commission do not violate constitutional provisions or exceed its statutory authority, appellate review of an order of the Commission is limited to errors of law, arbitrary action, or decisions unsupported by competent and substantial evidence.

3. **Electricity § 2.7; Utilities Commission § 15— electric generating facility—certificate of public convenience and necessity**

The Utilities Commission's issuance of a certificate of public convenience and necessity to Duke Power Company for the construction of a nuclear powered generating facility for electricity on the Yadkin River was supported by findings of fact based upon competent evidence, and the Commission adequately considered the effect of the project on the river and surrounding property below the proposed plant.

APPEAL by Intervenor, High Rock Lake Association, Inc., from the North Carolina Utilities Commission. Order entered 4 March 1977. Heard in the Court of Appeals 29 June 1978.

On 16 July 1975, Duke Power Company applied to the North Carolina Utilities Commission for a Certificate of Public Conven-

ience and Necessity for the construction of the Perkins Nuclear Station in Davie County. High Rock Lake Association, Inc., Consumers' Center of North Carolina, Inc., and Yadkin River Committee were allowed to intervene in the proceeding. Only High Rock Lake Association, Inc. appealed. Appellant is a nonprofit corporation organized to promote the recreational benefits and property values around High Rock Lake, which is located downstream on the Yadkin River from the proposed plant site.

Hearings were held on the application in October, 1975, January, 1976, and February, 1977. Duke, the Utilities Commission, the intervenors, and other interested parties put on evidence from which the Commission made findings of fact and conclusions of law. The evidence put on by Duke and the Commission staff largely related to the needs for power in the area, the suitability of the Perkins' site for a generating plant, the economics of nuclear power production as opposed to coal fired generation, and the costs of building cooling towers as opposed to redesign costs. The appellant offered evidence tending to show that High Rock Lake is a shallow lake and, therefore, very sensitive to changes in water level, that the consumption of large amounts of water by evaporation from the cooling towers proposed for the Perkins Nuclear Station would adversely affect the water level in the lake downstream, and that any major reduction in the lake level would adversely affect property values around it. Based on, among other things, Duke's and the Commission staff's analysis of future requirements, the Commission found that the public convenience and necessity requires Duke to construct almost 4,000 MW of additional electric capacity before 1989. It also found that the proposed site and design of the Station are most appropriate, considering public convenience and necessity, and the total environmental impact. Among the facts in evidence to support these findings were data concerning Duke's load center, the costs of alternative sources of power and sites, the costs both in time and money of alternative designs, and the projected environmental impact of the plant.

The Commission granted a certificate of public convenience and necessity to Duke for the construction of the Perkins Nuclear Station subject to conditions imposing limitations upon use of water from the Yadkin River. The conditions were the same as those imposed by a prior agreement between Duke and the En-

vironmental Management Commission and included periodic review by that Commission. The certificate was also specifically subject to Duke's receiving construction and operating licenses from the Nuclear Regulatory Commission and the North Carolina Department of Natural and Economic Resources.

Special Deputy Attorney General Jesse C. Brake and Assistant Attorney General Dan C. Oakley, for Attorney General Edmisten.

William G. Pfefferkorn, for intervenor appellant.

Steve C. Griffith, Jr., William L. Porter and John E. Lansche; Kennedy, Covington, Lobdell & Hickman, by John M. Murchison, Jr., attorneys for applicant appellee.

VAUGHN, Judge.

[1] Duke made its application for a certificate of public convenience and necessity under G.S. 62-110.1. This regulatory statute was enacted in 1965 to help curb overexpansion of generating facilities beyond the needs of the service area. To this end, the General Assembly used the term "public convenience and necessity" to define the standard to be applied by the Utilities Commission to proposed facilities. In reviewing the Commission's application of the standard in other regulatory actions, the Court has held that public convenience and necessity is based on an "element of public need for the proposed service." *State ex rel. Utilities Comm'n. v. Carolina Tel. & Tel. Co.*, 267 N.C 257, 270, 148 S.E. 2d 100, 110 (1966); *see also State ex rel. Utilities Comm'n. v. Southern Coach Co.*, 19 N.C. App. 597, 199 S.E. 2d 731 (1973), *cert. den.*, 284 N.C. 623, 201 S.E. 2d 693 (1974); *State ex rel. Utilities Comm'n. v. Queen City Coach Co.*, 4 N.C. App. 116, 166 S.E. 2d 441 (1969). Moreover in 1975, an "act to establish an expansion policy for electric utility plants in North Carolina, to promote greater efficiency in the use of all existing plants, and to reduce electricity costs by requiring greater conservation of electricity" was enacted by the General Assembly, 1975 Sess. Laws Ch. 780. This act, codified as G.S. 62-110.1(c)-(f), directs the Utilities Commisssion to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and the construction costs of the project before granting a cer-

tificate of public convenience and necessity for a new facility. From these statutes and the case law, it is clear that the purpose of requiring a certificate of public convenience and necessity before a generating facility can be built is to prevent costly overbuilding. Environmental concerns were generally left to other regulatory agencies, except as they affect the cost and efficiency of the proposed generating facility.

[2] Upon appeal from orders of the Utilities Commission, the authority of this Court to reverse or modify an order of the Commission or to remand the matter for further proceedings is limited by G.S. 62-94. Where the Commission's actions do not violate constitutional provisions or exceed its statutory authority, then appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent and substantial evidence. The Court must look to the findings of fact and conclusions of the Commission and determine if the Commission has considered the factors required by law and if the findings of fact necessary to support granting of the certificate are supported by substantial evidence in view of the whole record. *See State ex rel. Utilities Comm'n. v. VEPCO,* 285 N.C. 398, 206 S.E. 2d 283 (1974).

[3] Appellant does not except to the Commission's finding that the area served by Duke Power Company will need the additional generating capacity for its service area operation between 1985 and 1989. The Commission made this finding after "considering the possibility of available purchase power and pooling agreements." Neither does the appellant except to the Commission's approval of the construction cost, nor to findings that the construction will be consistent with the Commission's plan for the expansion of electric generating capacity and that the proposed Perkins Nuclear Station is most appropriate in view of the area's economic and social needs. Instead, appellant's assignments of error relate to alleged flaws in the design and placement of the facility. The High Rock Lake Association contends that the Perkins Nuclear Station as projected will consume too much water and that it will pollute the Yadkin River or otherwise adversely affect the river below the power plant. We point out first that these concerns, though not at the heart of the regulatory process as the Utilities Commission decides on the application for a certificate of public convenience and necessity, were adequately considered by the Commission. The Commission,

after making adequate findings that Perkins was needed in the sense that its output was required to meet the projected growth in the area, reviewed extensive evidence of alternate sites, fuels, and cooling designs, and concluded that the public would best be served by a site near the load center, by nuclear fuel, and by the existing cooling tower technology. All of these findings were made from competent evidence and all were directed to the primary mandate of G.S. 62-110.1 to the Commission, which is to regulate the expansion policy of electric utility plants in North Carolina to provide for the public need for electricity without wasteful duplication or overexpansion of generating facilities. There was ample evidence to support the Commission's findings as to the appropriateness of the site and the need for the facility. That the Utilities Commission was aware of and concerned with intervenor's legitimate interest in the quality of the Yadkin River is evidenced by the conditions placed upon the certificate which subject construction of the facility to approval by agencies better equipped to deal with environmental projection, i.e. the North Carolina Department of Natural and Economic Resources, the Environmental Management Commission, and the Nuclear Regulatory Commission. Moreover, the order refers to at least four other federal agencies and one other state department whose regulations affect certain aspects of the construction and the record suggests that many more local, state and federal bodies will be involved. The Utilities Commission in this proceeding considered all the factors required by law and issued an order fully supported by the evidence.

Appellant's brief speaks at great length on the questions of the legal rights of riparian owners. It is sufficient to say only that there has been no "taking" of property rights by the proceedings before the Commission. If there is an involuntary taking of any of the property rights of appellant's members, the question of compensation is for the court under the statutes providing for the exercise of the power of eminent domain.

We have considered all of the arguments made by appellant. No error of law has been shown. The order of the Commission, therefore, must be affirmed.

Affirmed.

Judges MARTIN and MITCHELL concur.

SAM ZAHREN AND WIFE LUCY I. ZAHREN v. THE MAYTAG COMPANY AND HOLMES ELECTRIC, INC.

No. 7712SC160

(Filed 11 July 1978)

1. **Evidence § 40; Sales § 14.1— clothes dryer—negligent manufacture—breach of warranty—procedures of manufacturer—personal knowledge of witness**

In an action to recover for the negligent manufacture of a clothes dryer and for breach of warranties of merchantability and fitness of the dryer, the supervisor of quality control for defendant manufacturer was properly allowed to testify as to who made the allegedly defective thermostats for the manufacturer, the operating temperature of the thermostats, testing and inspection procedures employed by the manufacturer, and whether the thermostats and dryer were UL approved, where the supervisor was testifying from his own personal knowledge.

2. **Witnesses § 1; Trial § 15— inconsistent testimony—competency of witness—denial of voir dire—harmless error**

Error, if any, in the trial court's denial of a motion to conduct a voir dire to determine a witness's personal knowledge of defendant's testing procedures about which he testified, made after the witness gave inconsistent testimony as to his familiarity with the procedures, was rendered harmless when the witness on redirect examination testified that he had set up the testing procedures which he described and had observed their performance.

3. **Evidence § 49.1— expert testimony—hypothetical question—photographs and testimony presented by plaintiff**

Defendants' expert was properly allowed to answer a hypothetical question which included his opinion from an examination of photographs taken by plaintiffs' expert, testimony by plaintiffs' expert, and testimony by the female plaintiff.

4. **Evidence § 49— expert opinion—hypothetical question—explanation of opinion**

The trial court did not err in permitting defendants' expert, who had given his opinion in response to a hypothetical question, to explain how he arrived at his opinion.

5. **Negligence § 37— instructions—"alleged and contended"**

It was not error for the court to fail to instruct that plaintiffs "alleged and contended" certain negligence.

6. **Sales § 22— absence of fail-safe device on clothes dryer—no negligence by manufacturer**

The trial court did not err in failing to instruct the jury that the failure of the manufacturer of a clothes dryer to install a "fail-safe" device on the dryer could constitute negligence.

7. Sales § 23— clothes dryer—no dangerous instrumentality

The trial court did not err in failing to instruct that a clothes dryer was a dangerous instrumentality and to instruct on the duties of a defendant who manufactures such a dangerous instrumentality.

8. Sales § 22— fire in clothes dryer—vapors from outside dryer—instructions—inference from evidence

In an action to recover damages caused by a fire in a clothes dryer, the trial court's instruction that defendant manufacturer was not liable if plaintiffs' damages were caused by volatile vapors or another substance being pulled into the dryer from an outside source was supported by legitimate inferences from the evidence presented although there was no direct testimony of any observation of such vapors or substance.

APPEAL by plaintiffs from *Herring, Judge.* Judgment entered 28 October 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 January 1978.

The facts giving rise to this lawsuit can be briefly summarized as follows: On or about 10 April 1972, plaintiffs purchased from defendant Holmes Electric, Inc. of Fayetteville, an electric clothes dryer manufactured by defendant Maytag Company. The dryer was installed in plaintiffs' home in Fayetteville by Holmes Electric. From 10 April 1972 to 23 February 1973, plaintiffs experienced no problems with the Maytag dryer.

On 23 February 1973, Mrs. Zahren put a load of sheets and towels in the dryer and went upstairs in her house. When she came back downstairs, she smelled something burning. She cut off the dryer, opened its door, and found the fabrics inside of the tumbler tub of the dryer in flames. She grabbed a burning towel and took it to her kitchen to extinguish it. By the time she returned to the dryer, the fire had spread to an adjoining sofa and ultimately caused extensive damage to plaintiffs' home.

In their complaint plaintiffs alleged negligence of defendant Maytag in several respects, including, *inter alia,* negligence in the design, construction and testing of two thermostats and a clock motor which allegedly malfunctioned and allowed the dryer to overheat and cause ignition of fabrics inside of the tumbler, negligence in the failure to provide fail-safe devices, and negligence in the failure to provide adequate warning as to the danger of the dryer overheating. Plaintiffs' complaint further alleged that both defendants breached implied warranties of merchantability and fitness of the dryer.

At the trial of the case, the issues submitted to the jury without objections were the negligence of defendant Maytag and breach as to both defendants of the implied warranties of merchantability and fitness for ordinary purpose. The jury answered the issues in favor of the defendants, finding that plaintiffs were not damaged by negligence of defendant Maytag, that both defendants had impliedly warranted the dryer but that there was no breach of the implied warranties by either defendant.

From judgment that they have and recover nothing of defendants, plaintiffs appeal.

Anderson, Broadfoot & Anderson, by Henry L. Anderson, Jr., for the plaintiffs.

Nance, Collier, Singleton, Kirkman & Herndon, by James R. Nance, Jr., for defendant The Maytag Company.

Berry & Caudle, by H. Dolph Berry, for defendant Holmes Electric, Inc.

BROCK, Chief Judge.

[1] Plaintiffs' first assignment of error is based upon 16 exceptions to the testimony of Gerald Weaver, supervisor of quality control engineering for defendant Maytag, and requires little discussion. Weaver was permitted to testify, over objections, as to whom manufactured the allegedly defective thermostats for Maytag, as to testing and inspection procedures employed by Maytag in 1972, as to operating temperatures of the thermostats as indicated by numbers printed thereon, and as to whether the thermostats and the Maytag dryer were UL approved. Plaintiffs' contention, basically, is that the witness was incompetent to testify as to these matters, as they did not constitute facts within his personal knowledge. However, contrary to plaintiffs' assertion, it is clear from the record that Mr. Weaver testified from his own personal knowledge. He was admonished on several occasions by the trial court to answer only of his own personal knowledge. On other occasions, questions directed to Mr. Weaver were prefaced with "Do you know . . ." and received affirmative responses. Plaintiffs failed to show, on cross-examination or otherwise, that the witness was not competent to testify on these matters.

[2] Plaintiffs also contend that the trial court erred in denying their motion to conduct a *voir dire* of Mr. Weaver on his personal knowledge of 1972 testing procedures for thermostats. The witness at one point had testified that he was not familiar with Maytag's inspection system for purchase parts in 1972. Later he stated that he was familiar with Maytag's testing procedures for thermostats during 1972. It was at this point that plaintiffs moved to *voir dire* the witness in light of his inconsistent testimony. This motion having been denied, the witness was allowed to testify as to the testing procedures. Still later, Mr. Weaver testified on redirect examination that during 1972 he was a quality control engineer for Maytag and had set up the testing procedures which he had described on direct examination and had observed their performance. Although the trial court clearly had the authority to allow the *voir dire* which plaintiffs requested, *see Hughes v. Lundstrum,* 5 N.C. App. 345, 168 S.E. 2d 686 (1969), the error, if any, in its denial was clearly rendered harmless by the witness' testimony on redirect.

Plaintiffs argue only the competency of the witness himself and not the competency or relevance of the matters to which he testified. Having determined that Mr. Weaver was a competent witness as to the testimony challenged by the plaintiffs, the first assignment of error is overruled.

By their second assignment of error plaintiffs argue that much of the testimony of defendants' expert witness, Hinkle, was incompetent and prejudicial. Obviously Hinkle's testimony was highly prejudicial to plaintiffs' efforts to establish negligence or breach of implied warranty, but that does not render it incompetent. We shall explore only the competency of the challenged testimony.

Dr. Hinkle was qualified and permitted to testify as an expert in physical science and fire analysis. There is no controversy but that this was proper.

Plaintiffs undertake to argue their exception number 17 regarding certain testimony of Hinkle. While it is true that the court first overruled plaintiffs' objection, after a conference at the bench the court sustained the objection. This renders the matter academic and we decline to discuss it.

[3] Plaintiffs argue that it was error to allow defendants' expert, Hinkle, to answer a hypothetical question which included his opinion from "an examination of the photographs taken at the scene by Mr. Wallace, testimony of Mrs. Zahren and the testimony of Mr. Wallace."

The photographs in question were taken by plaintiffs' expert, Wallace, described by him in detail, and introduced by plaintiffs into evidence. Defendants' expert, Hinkle, testified that he had examined the photographs in detail, that he heard all of the testimony of Mrs. Zahren and Mr. Wallace, and that he did not dispute what they did or what they saw. The exhibits and the testimony were already before the jury, and defendants' expert, Hinkle, obviously took plaintiffs' entire factual evidence into consideration in rendering his opinion. He merely arrived at a different conclusion. We find no merit in plaintiffs' argument upon this point.

[4] Plaintiffs argue that it was error to allow defendants' expert, Hinkle, "to testify as to the basis of his opinion after having previously given that opinion in response to a hypothetical question." Plaintiffs argue that the expert did not base his opinion on the evidence referred to in the hypothetical. We disagree. The defendants' witness merely explained how he arrived at his opinion from an examination of the factual evidence already offered by plaintiffs.

The remaining arguments of plaintiffs under this assignment of error assume error in the admission of defendants' expert's opinion in response to their hypothetical question. We having already determined that plaintiffs' exception to the hypothetical question is without merit, we hold that the remaining arguments in this assignment of error are likewise without merit. Plaintiffs' assignment of error number 2 is overruled.

Plaintiffs' remaining assignments of error are related to the trial court's instructions to the jury.

[5] Under assignment of error number 3 in all but one instance plaintiffs argue that it was error for the court to fail to instruct the jury that plaintiffs "alleged and contended" certain negligence. We find no merit in these arguments. The court is required to state the evidence sufficiently to permit it to apply the

law thereto. It is not required to state the allegations of the parties. It is not required to state the contentions of the parties, although if it does it must give equal stress to the contentions of the various parties. There is no argument that equal stress was not given in the contentions that were stated.

[6] Under this same assignment of error plaintiffs argue that it was error for the court not to instruct that the failure of defendant Maytag to install a "fail-safe" device on the machine could be negligence. The only evidence about a "fail-safe" device came from the testimony of plaintiffs' expert, Wallace. This same witness testified that he had never seen a dryer with a "fail-safe" device, and did not know of any standard that would require a "fail-safe" device on a clothes dryer. There was absolutely no evidence to support a finding that failure to install a "fail-safe" device on a clothes dryer could be negligence. The trial court was correct in not so instructing the jury. Plaintiffs' assignment of error number 3 is overruled.

[7] Under assignment of error number 4 plaintiffs argue that it was error for the trial court to fail to instruct that a clothes dryer was a dangerous instrumentality and the duties of a defendant who manufactures a dangerous instrumentality. There was absolutely no evidence to support such a charge and the trial judge was correct in not doing so. The only testimony concerning a dangerous instrumentality came from plaintiffs' expert, Wallace. He stated: "My opinion is that a drier equipped with two thermostats that are defective, can't be anything but a dangerous machine." This is a far cry from evidence to support an instruction that the manufacture of a clothes dryer is the manufacture of a dangerous instrumentality. Plaintiffs' assignment of error number 4 is overruled.

[8] Under assignment of error number 5 plaintiffs argue that the following instruction was unsupported by evidence:

> "Now I instruct you that if you should find that the alleged buyer damage sustained by the plaintiffs and other damage was proximately caused by volatile vapors or some other substance being pulled into the clothers drier from an outside source, then such would not constitute negligence in this case even if there was a failure on the part of the manufacturer to exercise due care in the manufacture of the drier."

We disagree. While there is no direct testimony of observation of such vapors or substance being pulled into the dryer from an outside source, clearly these are legitimate inferences which could be drawn from the evidence presented. Plaintiffs' assignment of error number 5 is overruled.

Assignments of error numbers 6, 7 and 8 have been reviewed and considered. We do not feel that a discussion would be of any value to the bench or bar. In our opinion the case was presented to the jury under applicable principles of law, the jury understood its duties, and the results were just although disappointing to the plaintiffs. The whole case depended upon the credit the jury might give to the testimony of plaintiffs' expert and of defendants' expert. Apparently the jury chose to rely on the testimony of defendants' expert.

No error.

Judges VAUGHN and ERWIN concur.

F. E. DAVIS PLUMBING COMPANY, INC. AND KEEN SUPPLY CORPORATION v. INGLESIDE WEST ASSOCIATES, A LIMITED PARTNERSHIP; GEORGE S. RUSH, D/B/A RUSH ENGINEERS; BULLARD & GOFF CONTRACTORS, INC.; AND GREAT AMERICAN INSURANCE COMPANY

No. 7718SC729

(Filed 11 July 1978)

Rules of Civil Procedure § 37— failure to make discovery—defenses struck—sanction proper

In an action to recover on a construction contract where defendants failed to comply with a discovery order requiring specific information with respect to defendants' allegations of misrepresentation by plaintiff, negligence and carelessness by plaintiff and overpayment to plaintiff, the trial court did not abuse its discretion in entering an order striking those defenses since the evidence disclosed that defendants were either alleging defenses which they could not support with evidence or willfully refusing to disclose information to which plaintiff was entitled, and the sanction imposed by the court was within the limits prescribed by G.S. 1A-1, Rule 37.

APPEAL by defendants from *Walker (Hal H.), Judge.* Order entered 25 March 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 May 1978.

This civil action was instituted by plaintiffs F. E. Davis Plumbing Co., Inc., subcontractor (hereinafter Davis); and Keen Supply Corporation, to recover on a construction contract from defendants Ingleside West Associates, owner of the real property; George S. Rush, doing business as Rush Engineers, Inc., the general contractor (hereinafter Rush); Bullard & Goff Contractors, Inc.; and Great American Insurance Company, surety upon a performance and payment bond. The following facts are uncontroverted:

On 9 April 1974 plaintiff Davis and defendant Rush executed a contract whereby the former would provide services in conjunction with the construction of an apartment complex in High Point, North Carolina, for which it would be paid $131,893.00. Pursuant to the contract plaintiff Davis was paid $87,950.98 for work completed in November, 1974. In January, 1975, plaintiff Davis ceased working and instituted suit for breach of the construction contract, seeking $33,724.17 in damages. In January of 1976 the parties negotiated an agreement whereby plaintiff Davis was to receive $30,000 for work performed from November, 1974, to January, 1975, payable on 12 February 1976; and $32,000 for the completion of the plumbing work. On 19 February 1976 the defendants notified the plaintiffs that they did not intend to pay the $30,000 for past services because of fraud and misrepresentation on the part of plaintiff Davis.

On 14 September 1976 the plaintiffs filed a supplemental complaint alleging breach of the settlement agreement and sent the defendants a Request for Admissions of Facts and Genuineness of Documents and some interrogatories. In their answer filed 1 November the defendants alleged that the settlement agreement "was negotiated by fraud and misrepresentation on the part of the plaintiff, F. E. Davis Plumbing Co., Inc.; that the misrepresentation as to material circumstances, work completed, materials, and other matters were misrepresented to the defendants in an effort to induce defendants to enter into said paper writing of January 14, 1976." The defendants also filed answers to the plaintiffs' Request for Admissions of Facts and Genuineness of Documents and answers to the plaintiffs' interrogatories. On 3 November the plaintiffs filed a motion pursuant to Rule 37 of the North Carolina Rules of Civil Procedure for sanctions for the

defendants' failure to answer 39 of the plaintiffs' interrogatories and 4 of the Requests for Admissions. On 18 November a discovery order was entered in which the defendants were ordered to respond fully and in good faith to all of the interrogatories and Requests. The defendants submitted additional answers to the plaintiffs' interrogatories and Requests on 30 November.

On 9 December 1976 the plaintiffs for the second time moved for sanctions to be applied against the defendants for failure to answer Interrogatory Number 37 which requested the defendants to state specifically the basis of their defense of misrepresentation. On 25 March 1977 the trial court entered an order in which it struck the defendants' defense of misrepresentation and stated the following:

> [T]he following facts shall be taken to be established for the purpose of this action in favor of the plaintiffs:
>
> (a) The plaintiff did not make any misrepresentations to the defendants in procuring the settlement agreement dated January 14, 1976.
>
> (b) The defendants made no overpayments to the plaintiff.
>
> (c) The plaintiff did not commit any acts of negligence or carelessness in the installation and work on the Ingleside West Apartment Project.
>
> (d) The plaintiff did not submit any false or fraudulent information and did not make any false and fraudulent allegations to the defendants negotiating the settlement agreement dated January 14, 1976.

From the foregoing order imposing sanctions for the defendants' failure to make discovery, the defendants appealed.

McNairy, Clifford & Clendenin, by R. Walton McNairy, Jr., for F. E. Davis Plumbing Co., Inc., plaintiff appellee.

Short, McNeil & Ray, by Larry W. McNeil, for Keen Supply Corporation, plaintiff appellee.

Shreve & Baynes, by Robert L. Baynes for defendant appellants.

HEDRICK, Judge.

Assuming that the order dated 25 March, 1977, is interlocutory and non-appealable, we treat the appeal as a petition for a writ of certiorari and allow the same in order to dispose of the matter on its merits.

The trial judge's authority to impose sanctions for failure to make discovery is derived from G.S. 1A-1, Rule 37 of the North Carolina Rules of Civil Procedure, which in pertinent part provides the following:

> (b) Failure to Comply With Order.
>
> . . .
>
> (2) Sanctions by Court in Which Action is Pending.—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; . . . .

In *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E. 2d 191, 200 (1976), Justice Exum wrote the following:

> Emphasis in the new rules is not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that

> evidence at trial may flow smoothly and objections and other interruptions be minimized.

Rule 37 contemplates that these objectives can be accomplished only if the court has the means and power to compel recalcitrant parties to abide by the rules of discovery. Thus, the trial judge has broad discretion in imposing sanctions to compel discovery under Rule 37. *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. denied*, 285 N.C. 233, 204 S.E. 2d 23 (1974). The essence of the defendants' argument is that the trial judge abused his discretion in imposing the sanction without regard to the ability of the defendants to comply with the discovery order.

We disagree. The record discloses that seven days after defaulting on payments due to plaintiffs under the settlement agreement the defendants informed the plaintiffs that they would not comply with the agreement because it had been induced by misrepresentation and that "the evidence which we are presently adducing will substantiate our position." Thereafter, on 8 March 1976, an agent of the defendants and the defendants' former attorney signed an affidavit in which they alleged misrepresentation on the part of the plaintiff Davis "as to materials on site and work performed, which resulted in overpayment" to plaintiff Davis. These general allegations of misrepresentation were later repeated by the defendants in answer to the plaintiffs' supplemental complaint. At this point the defendants' answer was clearly deficient in its failure to aver with particularity the circumstances constituting misrepresentation. G.S. 1A-1, Rule 9(b). The plaintiffs attempted through discovery to procure the information upon which the defendants were basing their allegation of misrepresentation.

In Interrogatory Number 37 the plaintiffs requested the following information relative to the defendants' defense of misrepresentation:

> Referring specifically to the affidavit of Glen F. Lambert and Stanley A. Gertzman of March 8, 1976, state specifically and in full detail:
>
> (a) All misrepresentations you allege that were made to the general contractor by the plaintiff.

(b) All overpayments you claimed to have been made by Rush Engineers to F. E. Davis Plumbing Company.

(c) All acts of negligence and carelessness of F. E. Davis Plumbing Company in the installation and work on the apartment project.

(d) All false and fraudulent allegations and information you claim to have been submitted by F. E. Davis Plumbing Company.

The defendant Rush initially responded to this interrogatory by explaining that he was unable to provide the answer since the item was "handled through Rush Engineers' Agents, Servants, Employees and/or Sub and Independent Contractors." Subsequent to the discovery order of 18 November 1976 the defendant Rush made the additional answer "that the affidavit filed on March 8, 1976, in this action is full and complete and is herein realleged as if specifically set forth in full." At no time before or after the discovery order did the defendants raise an objection to any of the interrogatories. *See Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 26 N.C. App. 414, 216 S.E. 2d 379, *cert. denied*, 288 N.C. 242, 217 S.E. 2d 679 (1975).

We think the record demonstrates that the defendants were either alleging a defense which they could not support with evidence or willfully refusing to disclose information to which the plaintiffs were entitled. In either event the trial court's order was "just" and the sanction imposed was within the limits prescribed by Rule 37. Since the defendants have failed to show any abuse of discretion, the order appealed from is affirmed.

Affirmed.

Judges PARKER and MITCHELL concur.

STATE OF NORTH CAROLINA v. DEVOYD EUGENE "PETE" GLAZE AND ROBERT LEE HART

No. 7829SC188

(Filed 11 July 1978)

1. **Burglary and Unlawful Breakings § 5.3— break-in—aiding and abetting—insufficiency of evidence**

The State's evidence was insufficient to support defendant's conviction of aiding and abetting the actual perpetrators of a breaking and entering and larceny where there was no evidence that defendant was actually present at the scene of the crime or that he was in a position to render assistance and give encouragement at the time the crimes were being committed; and though there was evidence that he helped plan the break-in and that he drove away with the perpetrators after the offenses were committed, he did not wait in the getaway car, and did not own or control the getaway car.

2. **Burglary and Unlawful Breakings § 5.3— accessory before the fact to break-in —sufficiency of evidence**

Evidence was sufficient to show that defendant was an accessory before the fact to the principal offenses of breaking and entering and larceny where such evidence tended to show that defendant helped to plan the break-in but was not present when the offenses were committed by the principals.

3. **Criminal Law § 122.2— failure of jury to reach verdict—instructions not coercive**

Where the jury deliberated for one hour, took its evening recess, and deliberated the following morning for one hour and twenty-five minutes before stating that they could not reach a verdict, the trial court's instructions to the jury to try again to reach a verdict did not tend to coerce the jury into rendering a verdict of guilty.

APPEAL by defendants from *Baley, Judge.* Judgments entered 12 August 1977 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 20 June 1978.

Defendants were tried on their pleas of not guilty to indictments charging them with breaking and entering the Medical Arts Pharmacy on 31 January 1977 and larceny therefrom of a quantity of drugs, watches, and cash.

The State presented evidence to show that on the night in question Rodney Wiggins was staying at the Withrow Motel. At approximately 3:00 a.m. defendants Hart and Glaze, along with a man named Brooks, came to Wiggins's motel room. Wiggins testified that when they entered the room, "Hart asked me if I

knew where a store was, 'where we might make some money.' " After some discussion regarding the Medical Arts Pharmacy, Brooks got tools from the car in which the three men had arrived, and he, along with Glaze and Wiggins, went to the pharmacy. Hart stayed in the motel room and did not go in the pharmacy. Glaze and Wiggins broke into the pharmacy and stole the drugs, watches, and cash while Brooks stayed outside the pharmacy to maintain a lookout. Brooks, Glaze and Wiggins returned to the motel and Brooks put the stolen items in the trunk of the car. Wiggins went into his motel room to get his coat, and all four men went to Charlotte in the car driven by Brooks. In Charlotte, they split the drugs three ways. Hart did not participate in the split, but he did receive "[a] few of the drugs." Wiggins testified that he had known Hart "about all my life."

Defendant presented no evidence.

The jury found both defendants guilty of felonious breaking and entering and felonious larceny. Defendants appeal from judgments imposing prison sentences.

Attorney General Edmisten by Assistant Attorney General Ben G. Irons II, for the State.

Carroll W. Walden, Jr., for defendant appellant Devoyd Eugene "Pete" Glaze.

George R. Morrow for defendant appellant Robert Lee Hart.

PARKER, Judge.

[1] The State presented ample evidence to support the conviction of defendant Glaze as a principal in the first degree, and he concedes this point in his brief. However, Hart contends that the State's evidence was not sufficient to support his conviction of aiding and abetting the actual perpetrators of the offense.

To convict Hart of aiding and abetting, the State was required to present sufficient evidence to show that he was present, either actually or constructively, at the scene of the crime with the intent to aid the perpetrators if necessary and that the intent to render assistance was communicated in some manner to the actual perpetrators. *State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (1973). "In order to determine whether a defendant is present, the

court must determine whether 'he is near enough to render assistance if need be and to encourage the actual perpetration of the felony.' " *State v. Lyles*, 19 N.C. App. 632, 635, 199 S.E. 2d 699, 701 (1973). Viewed in the light of these principles, we conclude that the State's evidence was insufficient as a matter of law to show that Hart was actually or constructively present at the scene of the crime.

There was no evidence that Hart was actually present at the scene of the crime, the State's evidence being that Hart stayed inside the motel room while the criminal acts were committed. We cannot agree with the State's contention that the evidence gives rise to a reasonable inference that Hart was constructively present. Although there was evidence that Hart helped plan the break-in, that he drove away with the perpetrators after the offenses were committed, and that he received "[a] few of the drugs," the evidence falls short of showing that he was in a position to render assistance and give encouragement at the time the crimes were being committed. The evidence showed that the motel was located in front of the pharmacy. The back portion of the motel was located approximately fifty feet from the pharmacy, while the front of the motel was approximately 250 feet from the pharmacy. There was also evidence that a person "can see a portion of the motel from the Medical Arts [Pharmacy] building," but there was no evidence that the pharmacy or any adjacent area was visible from the motel room occupied by Hart. The evidence showed that Hart did not wait in the getaway car while the offenses were committed and that he did not drive the getaway car. Furthermore, there was no evidence that he owned or controlled the getaway car.

[2] Although the evidence was insufficient to support Hart's conviction as a principal, he is not entitled to a dismissal of the charges because there was sufficient evidence that he was an accessory before the fact to the prinicpal offenses. A person who "shall counsel, procure or command any other person to commit any felony" is guilty as an accessory before the fact. G.S. 14-5. The evidence of Hart's involvement in the planning of the offenses with which he was charged is sufficient to show that he counseled and advised the actual perpetrators. In addition, the evidence showed that Hart was not present when the offenses were committed and that the offenses were committed by the

principals, Glaze, Brooks, and Wiggins. *See State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580 (1961); *State v. Buie,* 26 N.C. App. 151, 215 S.E. 2d 401 (1975).

The indictment in the present case only charged Hart with the principal offenses, and the trial judge did not instruct the jury on the offense of accessory before the fact. However, "[t]he crime of accessory before the fact is included in the charge of the principal crime." *State v. Jones,* 254 N.C. 450, 452, 119 S.E. 2d 213, 214 (1961). At a new trial, Hart may be tried for accessory before the fact on the indictment charging only the principal offenses, despite the failure of the trial judge to instruct on accessory before the fact at the previous trial. *State v. Buie, supra; State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972). Therefore, as to defendant Hart, the case will be remanded so that the district attorney, should he elect to do so, may try the defendant Hart under the original bill of indictment for the offense of being an accessory before the fact to breaking and entering and for the offense of being an accessory before the fact to larceny.

In view of our disposition of this case as to defendant Hart, it is unnecessary to consider his second assignment of error, which is directed to the trial judge's definition of aiding and abetting in the charge to the jury.

[3] Defendants' final assignment of error arises out of the jury's difficulty in reaching a verdict. The jury began its deliberations late in the afternoon. After deliberating for just over an hour, the court took its evening recess, and the jury resumed deliberations the following morning. After deliberating one hour and twenty-five minutes, the jury returned into the court, and the foreman informed the judge that it appeared that a verdict could not be reached. Without indicating which way the majority had voted, the foreman informed the judge that the jury was split eleven to one. The judge then instructed the jury to try again to reach a verdict. Defendants contend that these instructions tended to coerce the jury into rendering a verdict of guilty. We do not agree. While encouraging the jury to reach a verdict to avoid the time and expense of another trial, the judge stated that he did not want his comments to be interpreted as coercion, and on two occasions he admonished the jurors not to surrender their con-

scientious convictions. The instructions urging the jury to agree on a verdict were not specifically directed to the juror in the minority but were directed to the jury as a whole. Therefore, we find that the instructions were not coercive. *See State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Butler*, 269 N.C. 483, 153 S.E. 2d 70 (1967). Accordingly, this assignment of error is overruled.

As to defendant Hart, the case is remanded for a

New Trial.

As to defendant Glaze, we find

No Error.

Judges HEDRICK and MITCHELL concur.

DAVID E. DUNN, JR. AND HIS WIFE, GERTRUDE M. DUNN v. JACK DUNN AND HIS WIFE, JO ANN SMITH DUNN, AND LEWIS P. ENGLISH AND JOHN WISHART CAMPBELL

No. 7716SC806

(Filed 11 July 1978)

Partition § 7— lottery to allot parcels—absence of one commissioner

Where the court in a partitioning proceeding ordered that "the commissioners" conduct a lottery before the clerk to determine the allotment of the separate parcels, the absence of one of the three commissioners because of illness when the drawing before the clerk was held did not invalidate the drawing.

APPEAL by petitioners from *Preston, Judge.* Judgment entered 4 May 1977 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 26 June 1978.

This is a partition proceeding relating to a tract of land in Scotland County in which petitioner, David E. Dunn, Jr., owns an undivided one-half interest and the respondents, Jack Dunn and wife, Jo Ann Smith Dunn, own the remaining one-half undivided interest as tenants by the entirety. On 2 December 1975 the clerk

of superior court entered an order finding that the nature of the property was such that actual partition could not be made without injury to the interest of one or more of the owners. On this finding the clerk directed a sale for partition. On appeal to the judge of the superior court by the respondents, Judge Braswell entered an order dated 18 February 1976 in which he found that actual partition was feasible. Accordingly, he remanded the proceeding to the clerk with directions that the clerk appoint commissioners pursuant to G.S., Chap. 46 to make actual division of the land. Judge Braswell's order of 18 February 1976 also contained the following directions:

> After the commissioners have made their division, the commissioners shall meet in the office of the clerk of Superior Court of Scotland County, and upon notice to the parties, shall there, in the presence of the clerk, conduct a lottery, which the parties or their legal representatives being present, and the party petitioner and the party defendant shall draw for one of the two respective parcels. Thereafter, the commissioners shall make written report to the clerk, reporting their work, and as to which party won which parcel in the lottery, and who was allotted what in the partition.

Following entry of this order, the clerk appointed three commissioners who, after being duly sworn, proceeded to divide the property into two lots. Lot No. 1 being charged with owelty of $5,000.00 in favor of Lot No. 2. On 27 August 1976 the commissioners filed their report of their actions with the clerk. All three commissioners signed this report.

On 21 September 1976 a meeting was held before the clerk in the Scotland County Courthouse at which, in addition to the clerk, the following were present: the petitioner, David E. Dunn, Jr. and his attorney; the respondent, Jack Dunn, and his attorney, who also represented the respondent, Jo Ann Smith Dunn; and two of the three commissioners. The third commissioner was ill and was in the hospital. The clerk prepared two small cardboard strips, upon one of which was written "Lot No. 1" and upon the other of which was written "Lot No. 2." Each of these was then placed in a separate unmarked envelope. The envelopes were placed in a hat, which was held in the air and moved about so that no one could see which envelope was which. A coin was flipped to deter-

mine whether the petitioner, David E. Dunn, Jr., or the respondent, Jack Dunn, would have the first draw. Jack Dunn won the call and the right to have the first draw. He made the first drawing and drew the envelope containing the card marked "Lot No. 2." David E. Dunn, Jr. then drew the remaining envelope, which contained the card marked "Lot No. 1."

On 8 October 1976 the commissioners filed with the clerk their report, which was signed by all three commissioners, allotting Lot No. 1 to David E. Dunn, Jr., subject to owelty of $5,000.00 payable to the owners of Lot No. 2, and allotting Lot No. 2 to the respondents, Jack Dunn and his wife, Jo Ann Smith Dunn. On 27 October 1976 the clerk entered an order approving and confirming the commissioners' report. The respondents, Jack Dunn and wife, excepted to the clerk's order of confirmation and appealed to the judge of the superior court. The appeal was heard by Judge Preston, who entered judgment dated 4 May 1977 in which he found the facts as to what had previously occurred in this proceeding. On these findings Judge Preston concluded that Judge Braswell's order of 18 February 1976 had not been carried out in a critical respect in that only two commissioners had been present at the time of the drawing before the clerk on 21 September 1976, the third commissioner being then ill and in the hospital. For this reason, Judge Preston vacated the clerk's order of confirmation and directed that a new drawing be made.

From Judge Preston's judgment dated 4 May 1977, petitioners appeal.

McLean, Stacy, Henry & McLean by William S. McLean for petitioners appellants.

No counsel contra.

PARKER, Judge.

So far as the record before us discloses, no interested party has at any time raised any objection to the manner in which the commissioners divided the land or to the amount of owelty assessed. No contention has been made that the drawing which was held before the clerk in the presence of two of the three commissioners was in any way unfair, and a careful reading of the record discloses no valid basis on which such a contention could be made.

The sole basis on which Judge Preston rested his judgment vacating the clerk's order of confirmation and directing a new drawing was that one of the three commissioners was absent when the drawing before the clerk was made. The judgment appealed from thus rests solely upon the judge's conclusion that, as a matter of law, the presence of all three commissioners at the drawing was essential to its validity and that, one of the commissioners having been absent because of illness, the drawing was fatally defective. We find that conclusion to be in error, and accordingly we reverse the judgment appealed from.

The procedure for the partitioning of real property is governed by the provisions of Article 1 of Chapter 46 of our General Statutes. No section in that Article makes provision for a drawing to determine by lot or chance the manner in which the separate parcels of partitioned real property should be allotted among the several owners. Nevertheless, "in this state partition proceedings have been consistently held to be equitable in nature," and "[t]he statutes are not a strict limitation upon the authority of the court." *Allen v. Allen*, 263 N.C. 496, 498, 139 S.E. 2d 585, 587 (1965). Therefore, there can be no question, and none has been raised, as to the validity of the direction contained in Judge Braswell's order of 18 February 1976 that "the commissioners" meet in the office of the clerk and there conduct a lottery at which the interested parties should "draw for one of the two respective parcels." The sole question presented by this appeal thus becomes the narrow one of whether the reference to "the commissioners" in this portion of Judge Braswell's order made it mandatory that all three commissioners be present at the drawing, else the drawing be fatally defective. Judge Preston concluded that to be the case. With that conclusion we do not agree.

Although our statutes make no provision for a drawing to determine the allotment of separate parcels by chance, they do throw some light upon the narrow question now before us. After making provision in G.S. 46-7 for the appointment of three disinterested commissioners and specifying in other sections the manner in which the commissioners should perform their duties, our statutes provide, in G.S. 46-17, that the commissioners "shall make a full and ample report of their proceedings, *under the hands of any two of them*, specifying therein the manner of executing their trust and describing particularly the land or parcels

of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value." (Emphasis added.) Thus, by statute, two of the three commissioners are empowered to act for all in making report to the court of "the manner of executing their trust." If two could act for all in such an important matter, surely it is reasonable to hold that two could act for all in performing the purely ministerial duty of conducting a drawing. After all, the essential matter was that the drawing be conducted fairly, and, as already noted, there has been no contention that it was not.

The judgment appealed from is reversed, and this cause is remanded to the superior court with direction that judgment be entered approving and affirming the clerk's order dated 27 October 1976 which in turn approved and confirmed the commissioners' report in all respects.

Reversed and remanded.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. ELBERT C. MILLER

No. 7818SC216

(Filed 11 July 1978)

1. Constitutional Law § 30; Bills of Discovery § 6— witnesses' descriptions of robber—denial of discovery at trial—harmless error

The trial court in an armed robbery case erred in the denial of defendants' motions at trial for discovery of statements given by the State's witnesses to police regarding their descriptions of the robber; however, such error was harmless beyond a reasonable doubt where such statements were revealed to defendant during cross-examination of the police officers and were used by defendant in his cross-examination of the other State's witnesses.

2. Criminal Law § 66.9— photographic identification—no impermissible suggestiveness

Photographic identification procedures were not impermissibly suggestive so as to taint in-court identifications of defendant by three witnesses where each witness looked through hundreds of photographs of black males, some in a mug book and others in two trays containing 1200 unattached photographs;

and each witness on separate viewings of the photographs selected a photograph identified as a photograph of defendant.

3. **Criminal Law § 66.16— in-court identifications—independent origin—no taint by photographic identifications**

The trial court's determination that in-court identifications of defendant by three witnesses in an armed robbery case were of independent origin and not tainted by photographic identification procedures was supported by the court's findings, based on competent evidence, that the interior of the store where the robbery occurred was well lighted with fluorescent lights; two witnesses who were in the store had an opportunity to observe the armed robber's face for several minutes; the third witness was outside the store in a well lighted area and was able to observe the robber's face for forty-five seconds as he headed toward the witness; the initial description given by one witness which was inconsistent with a later description was the result of her state of anxiety and excitement about the robbery; and both of the other witnesses described the robber as a man similar in stature to defendant.

4. **Criminal Law § 99.5— court's remarks to defense counsel—no denial of right to effective counsel or to confrontation**

The trial court's remarks to defense counsel did not deny defendant his rights to effective counsel and confrontation of witnesses where they constituted efforts to control the trial by preventing defense counsel from testifying, arguing with witnesses, interrupting witnesses and repeating issues already exhausted.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 15 April 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 June 1978.

Defendant was charged in a bill of indictment, proper in form, with armed robbery. He entered a plea of not guilty.

On defendant's pretrial motion to suppress the in-court identifications of the State's witnesses, a *voir dire* was held. The motion was denied. No evidence was presented by defendant at the *voir dire*. The State's evidence on *voir dire*, essentially the same as that at trial, tended to show the following:

On 19 December 1976 at approximately 8:00 p.m., two black males entered the Fairfield Superette in High Point. Lavada Fivecoat, part owner of the store, and David Thompson, an employee, were working there at the time. One of the black males pulled out a sawed-off shotgun and demanded all the money from the cash register. In the meantime, the other man had pulled a toboggan or mask over his face. Mrs. Fivecoat handed over the money, approximately $350.00, and the two men left. About this time, John Sexton was outside the store putting gas into his car

and observed two black males hurriedly leaving the store. He was able to get a good look at the one carrying the shotgun, because that person was not wearing a toboggan or mask over his face. All three of the eyewitnesses gave a description of the armed robber to the police immediately after the robbery and identified defendant as that person.

Defendant's evidence at trial tended to show that on the day in question, he was with his girl friend, Ann Friday, and her children the entire day. He has never owned or possessed a sawed-off shotgun.

The jury returned a verdict of guilty as charged and defendant was sentenced to a term of not less than twenty-four (24) years nor more than forty (40) years imprisonment. Defendant appealed.

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

Assistant Public Defender Frederick G. Lind, for the defendant.

MARTIN, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motions at trial for discovery of the statements given by the State's witnesses to police regarding their descriptions of the robber. He argues that, as a result of the court's rulings, he was denied his right to due process and right of confrontation in that he was unable effectively to cross-examine, for impeachment purposes, State's witnesses Fivecoat and Thompson with regards to their in-court identifications of defendant.

In the recent case of *State v. Hardy,* 293 N.C. 105, 235 S.E. 2d 828 (1977), our Supreme Court held that G.S. 15A-904(a), the statute applicable in the case at bar, does not bar the discovery at trial of prosecution witnesses' statements and that the trial court, in its discretion, must have the power to compel the disclosure of such facts when relevant and not otherwise privileged. In addition, we find in *Hardy* the following pertinent language:

> ". . . [W]e believe justice requires the judge to order an *in camera* inspection when a specific request is made at trial

for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious."

Thus, in the instant case, the trial court's denial, without more, of the subject motions was error.

In our opinion, however, this error was harmless beyond a reasonable doubt, *see State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978), for the reason that the record on appeal clearly discloses that defendant was in fact fully informed about the only statements shown to exist, and had ample opportunity to cross-examine the witnesses with respect thereto. Defendant's cross-examination of Officer Brown, one of the investigating officers, revealed that the only statement taken down by the investigating officers was Mrs. Fivecoat's description of the two black males. This statement was actually read into the record by Officer Brown and tended to show a discrepancy, in terms of weight and height, when compared with her later description and identification of the armed robber, allegedly defendant. Defendant was, therefore, aware of the contents of this statement before his cross-examination of Mrs. Fivecoat and did in fact cross-examine her on this point at trial. Again, on cross-examination of Officer Brewer, another investigating officer, defendant elicited the text of the statement given by Mrs. Fivecoat and Mr. Thompson. It was identical to the statement read into the record by Officer Brown. In light of the foregoing, we cannot find that defendant was denied his right to cross-examine the witnesses, for impeachment purposes, about their prior statements. This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in denying his motion to suppress the in-court identifications of defendant by the State's witnesses Fivecoat, Thompson and Sexton. He argues that the pretrial photographic identification procedures used by the police were so suggestive in nature that the subsequent in-court identifications were irreparably tainted.

In-court identification of a defendant by a witness is barred when photographic identification procedures are "so impermissibly suggestive as to give rise to a very substantial likelihood

of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968). In the instant case, the evidence presented on *voir dire* established that each of the State's witnesses was requested to look through literally hundreds of photographs of black males—some in a mug book and the others in two trays which contained approximately twelve hundred (1200) unattached photographs. Each of the State's witnesses—Fivecoat, Thompson and Sexton—on separate viewings of these photographs selected the same photograph, being the one identified on *voir dire* as the photograph of defendant. Prior to trial, the witnesses were shown the photograph of defendant and asked to identify it as being the one they had picked out. We are of the opinion that this record does not disclose a photographic procedure so impermissibly suggestive as to violate defendant's constitutional right to due process.

[3] Even were we to find that the pretrial photographic identification of defendant was impermissibly suggestive, which we expressly do not do, the in-court identification of defendant by the State's witnesses would be admissible if found to be of independent origin based solely upon the witnesses' observations at the time of the offense. *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978). At the conclusion of the *voir dire*, the trial court found, *inter alia:* (1) that the interior of the store where the robbery occurred was well lighted with fluorescent lights; (2) that both Mrs. Fivecoat and Mr. Thompson had opportunity to observe the face of the person holding the shotgun for several minutes; (3) that Sexton was outside the store in a well lighted area and was able to observe the face of the person with the shotgun for forty-five seconds as he headed straight towards Sexton; (4) that Mrs. Fivecoat's initial description of the armed robber was inconsistent with a later description, but was the result of her state of anxiety and excitement on the occasion of the robbery; and (5) that both Thompson and Sexton described the armed robber as a man similar in stature to defendant. Based on these findings, which are supported by competent evidence, the trial court concluded that the in-court identifications of the defendant by the State's three eyewitnesses were of independent origin, based upon observations made by them at the scene of the alleged robbery. We find no error in the court's conclusion. This assignment of error is overruled.

[4] By his next contention, defendant argues that the trial court's remarks to defense counsel denied defendant his rights to effective counsel and confrontation of witnesses. We disagree. The instances of the trial court's comments to defense counsel were numerous. Suffice it to say that in each of these instances, the court's comments were efforts to control the trial by preventing defense counsel from testifying, arguing with witnesses, interrupting witnesses and repeating issues already exhausted. We find defendant's reliance on *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976) misplaced. That case was clearly limited to the inherent dangers concomitant with judicial warnings and admonitions to a *witness with reference to perjury*, and therefore, is inapposite to the case at bar. This assignment of error is overruled.

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

No error.

Judges VAUGHN and MITCHELL concur in the result.

ALVIN R. DIXON AND MARVIN C. MILLS v. THOMAS W. RIVERS AND WIFE, IZABEL B. RIVERS, J. CARLTON PARSONS, JR., AND E. B. AYCOCK AND WIFE, JEAN H. AYCOCK

No. 773DC671

(Filed 11 July 1978)

Landlord and Tenant § 13.2— lease for stated term—covenant for perpetual renewal enforceable

The trial court properly concluded as a matter of law that a lease between plaintiffs' predecessor in title and defendants was a lease for a term of ten years with a valid and enforceable covenant for perpetual renewal where the lease provided that the lease "shall begin as of the date hereof and shall exist and continue for a period of 10 years" and that "this lease shall be renewed for an additional period of 10 years, and thereafter shall be renewable every 10 years for so long as parties of the second part so desire," provided that the tenants kept the property in good repair.

Judge MORRIS dissents.

APPEAL by plaintiffs from *Phillips (Herbert O.), Judge.* Judgment entered 31 May 1977 in District Court, PAMLICO County. Heard in the Court of Appeals 23 May 1978.

Plaintiffs, owners of a certain parcel of land which they purchased from G. B. Hardison and wife in January 1976, seek to have defendants ejected from the property on the ground that their lease agreement with N. W. Hardison (G. B. Hardison's predecessor) created a tenancy at will which was terminated by plaintiffs as of 15 July 1976. In June 1950, N. W. Hardison leased to J. C. Parsons a tract or parcel of land lying and being on Baird's Creek in Pamlico County which lease was duly recorded in the office of the Register of Deeds of Pamlico County and subsequently assigned by J. C. Parsons to J. C. Parsons, Jr. On 15 July 1953, N. W. Hardison, by and with the consent of J. C. Parsons, Jr., entered into a new lease with Thomas W. Rivers and wife, Izabel B. Rivers, for the tract or parcel of land in question. The defendants Rivers and defendants Aycock have at all times from July 15, 1953, forward paid the rent due under the lease and have also complied with the other conditions of said lease as to maintenance of the building and improvements on said property. In 1976 plaintiffs purchased a large tract of land, which included the tract or piece of land leased to defendants, from Garvin Hardison and others (who were successors in interest to N. W. Hardison), and in said conveyance were duly alerted to the existence of the lease to Thomas W. Rivers and wife, and their heirs and assigns, by reason of the lease dated July 15, 1953, and recorded at the office of the Pamlico County Registry. Thereafter, plaintiffs notified defendants to vacate the premises, which demand was refused, and the defendants continued to occupy and to remain in possession of the property which they had occupied since 1953. When plaintiffs refused to accept the rent duly tendered, defendants paid the rent money for 1976-1977 into the hands of the Clerk of the Superior Court of Pamlico County to be held pending the decision of this lawsuit.

All parties filed motions for summary judgment. The court denied plaintiffs' motion and allowed defendants' motion after finding defendants to be in lawful possession under the terms of the lease, said lease being for a term of ten years with a perpetual right of renewal for additional periods of ten years. Plaintiffs appealed.

Stubbs and Perdue, by Gary R. Perdue, for the plaintiffs.

Underwood & Manning, by Sam B. Underwood, Jr., for the defendants T. W. Rivers and wife, Izabel B. Rivers, and E. B. Aycock and wife, Jean H. Aycock.

MARTIN, Judge.

The question presented by this appeal is whether the trial court erred in concluding, as a matter of law, that the subject lease agreement created a lease for a term of ten (10) years with a perpetual right of renewal for like terms, and that defendants are in lawful compliance with the terms of said lease.

In the case at bar, the lease in question provides in pertinent part as follows:

> "1. This lease shall begin as of the date hereof and shall exist and continue for a period of 10 years.
>
> "2. Upon the expiration of the abovementioned period of 10 years, if said property has been kept in a good state of repair, and if said parties of the second part so desire, this lease shall be renewed for an additional period of 10 years, and thereafter shall be renewable every 10 years for so long as parties of the second part so desire.
>
> * * *
>
> "5. This lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, and assigns."

Plaintiffs contend that the above language does not create a lease for a term of years, but, at most, creates a tenancy at will. In support of this contention, plaintiffs rely upon *Barbee v. Lamb*, 225 N.C. 211, 34 S.E. 2d 65 (1945) (cases cited therein) where the Court held that when one "enters into possession of premises . . . under an agreement which is for an indefinite and uncertain term, (citation omitted), or for so long as the tenant may wish to occupy the premises (citation omitted), he becomes a tenant at will." They argue that, in the instant case, the duration of the term was indefinite and uncertain in that clause two of the lease, as set forth above, allows the lease to last "for so long as parties of the second part so desire." While we recognize the principle enun-

ciated in *Barbee*, we find such inapposite to the case at bar and, thus, cannot agree with plaintiffs' construction of the subject lease.

In *Barbee* and each of the cases cited therein, the use and possession of the premises was conveyed to the tenant for "so long as [he] and his family would live thereon" or "so long as [he] may wish to tend it himself." However, in none of these cases does language appear purporting to delineate the length of the term or providing for a covenant to renew the term. Clearly, the instant case is distinguishable. The language of the subject lease provides that the lease shall commence "as of the date hereof [15 July 1953]" and shall exist for a definite "period of 10 years." Such language clearly creates a lease for a term of ten (10) years. *See Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). The effect of clause two is to create a *covenant to renew* the lease, upon expiration of the initial ten (10) year period, for a like term of ten (10) years. Pertinent to the covenant to renew created therein, clause two further provides, in clear and unequivocal language, that the lease "shall be renewable every 10 years for so long as parties of the second part so desire." We are of the opinion that this language, taken in conjunction with clause five—set forth above—unmistakably indicates the parties' intention to permit the lessees, and their heirs and assigns, to renew the lease *perpetually*.

Our courts have not been previously confronted with the construction and validity of perpetual leases or leases containing covenants for perpetual renewal. However, the generally accepted rule, followed by a majority of other jurisdictions, is that while the law does not favor a covenant to renew a lease perpetually, the covenant will be enforced where the language of the lease unmistakably indicates that the parties intended to provide for such renewal. *See* Annot., 31 A.L.R. 2d 607. Inherent in this general statement of the law, and equally well settled as law, is the proposition that a covenant for perpetual renewal does not contravene the rule against perpetuities. Simes, The Law of Future Interests, § 132 (2d ed. 1966); Annot., 162 A.L.R. 1147 (cases cited therein). There is no violation of the rule against perpetuities because the covenant to renew is a part of the lessee's *present interest* in the leasehold, a vested interest; hence, it is not open to objection for remoteness of vesting. Gray, The Rule Against Perpetuities,

§ 230 (4th ed. 1942); *see* Annot., 66 A.L.R. 2d 733. Accordingly, we find no error in the trial court's conclusion, as a matter of law, that the subject lease is a lease for a term of ten (10) years with a valid and enforceable covenant for perpetual renewal.

In addition, we concur with the trial court's conclusion of law that there exists no genuine issue of material fact as to whether defendants are in compliance with the terms of said lease and, therefore, in lawful possession of the leasehold. Plaintiffs admit in their complaint that, prior to their purchase of the subject land, they were aware of defendants' leasehold interest in and possession of a certain parcel of the subject tract. In fact, plaintiffs' deed to this land contains an express exception alerting them to the existence of the lease agreement with defendants. We note also that in their answers to defendants' request for admissions, plaintiffs admit that payment of the annual rent, due on or before 15 July 1976, was duly tendered by defendants in apt time and well before 15 July 1976. Finally, we find of particular importance the parties' stipulation of 15 February 1977 that

> "[A]t all times beginning from the date of July 15, 1953, and thereafter, payment of the annual rent duly due under the terms of the lease dated July 15, 1953, . . . was duly tendered by [defendants] to plaintiffs' predecessors in interest and that since said date of July 15, 1953, defendants Thomas W. Rivers and wife, Izabel B. Rivers, have maintained all buildings and improvements on said property in a good state of repair."

Based on our construction of the lease and on the above pleadings, admissions and stipulations, we find that there is no genuine issue of material fact as to the lawfulness of defendants' possession under the lease. Summary judgment was, therefore, properly entered in defendants' favor.

Affirmed.

Judge VAUGHN concurs.

Judge MORRIS dissents.

STATE OF NORTH CAROLINA v. FRED DAVIS

No. 7820SC128

(Filed 11 July 1978)

1. **Criminal Law § 66.16— in-court identification—lineup not impermissibly suggestive—independent origin**

The trial court properly admitted a robbery victim's in-court identification of defendant where the evidence on voir dire supported the trial court's findings that the witness had ample opportunity to observe the defendant at close range in well-lighted circumstances with nothing obstructing her view or covering defendant's face, the witness previously identified defendant in a lineup at which defendant was represented by counsel, and all individuals in the lineup were similar to each other in age, build and dress, and the findings supported the court's conclusions that the lineup was not impermissibly suggestive and that the in-court identification was of independent origin based solely on what the witness observed during the crime.

2. **Robbery § 5.4— attempted armed robbery—refusal to submit common law robbery—real or toy gun**

The trial court in a prosecution for attempted armed robbery was not required to submit the lesser offense of attempted common law robbery because of the failure of the State's witnesses to testify that the sawed-off shotgun used by defendant was not a toy, and the court did not err in refusing to submit an issue as to attempted common law robbery where all of the evidence indicated that defendant used a sawed-off shotgun in the crime and there was no evidence that the shotgun was not a real and functioning deadly weapon.

3. **Robbery § 6— improper verdict—subsequent acceptance of proper verdict**

The trial court in a prosecution for attempted armed robbery did not err in accepting the verdict after the jury foreman first indicated that the jury found defendant "guilty of attempted firearm" where the court did not accept the verdict until it was in the proper form and indicated that the jury found defendant guilty of attempted robbery with a firearm.

4. **Criminal Law § 138.1— more lenient sentence for accomplice**

A sentence of not less than twenty-five nor more than thirty years imposed on defendant for attempted armed robbery did not constitute cruel and unusual punishment or a penalty for defendant's not guilty plea because an accomplice who previously pled guilty to the same offense received a sentence of only ten years where the evidence revealed that defendant was the dominant of the two persons committing the crime, and he was closer to the victim, directed the course of the robbery and personally pointed a sawed-off shotgun at the victim's face from very close range.

APPEAL by defendant from *Barbee, Judge*. Judgment entered 14 September 1977 in Superior Court, STANLY County. Heard in the Court of Appeals 31 May 1978.

The defendant was indicted for the felony of attempted robbery with dangerous weapons and entered a plea of not guilty. The jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of not less than twenty-five years nor more than thirty years, the defendant appealed.

The State offered evidence tending to show that on 21 July 1975 Faye Blalock was working alone in Blalock's Grocery in Stanly County. She was behind the counter at approximately 5:55 p.m. when the defendant and another man entered the store. One of the men asked her for cigarettes and a soft drink. She turned her back to the defendant and the other man in order to get the cigarettes. When she turned back toward the men, the defendant, Fred Davis, was standing directly across the counter from her pointing a sawed-off shotgun into her face. The other man was standing at the end of the counter pointing a pistol at her. The defendant then stated, "This is a holdup." The witness Blalock then screamed and ran from the store. The witness had never had any difficulty with her vision and had an unobstructed and well-lighted view of the defendant at the time of the robbery.

The State's evidence also tended to show that the defendant was seen by Orrin Colson at the store at the time of the robbery. Colson entered into a conversation with the defendant at that time and positively identified him as being present at the store.

The defendant offered evidence tending to establish the defense of alibi. Such evidence was offered both through his own testimony and that of others.

Other facts pertinent to this appeal are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Sarah Lee Fuerst, for the State.

Gerald R. Chandler for defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the failure of the trial court to exclude the in-court identification of the defendant by the witness Blalock. This assignment is without merit.

Upon timely objection by the defendant, the trial court conducted a voir dire to determine the admissibility of the witness' identification of the defendant. Based upon competent evidence, the trial court found the witness had ample opportunity to observe the defendant at close range in well-lighted circumstances with nothing obstructing her view or covering the defendant's face. The trial court also found the witness had previously identified the defendant in a lineup at which the defendant was represented by counsel who was present at all times pertinent. One person was excused from the lineup at the request of the defendant's counsel, and all individuals in the lineup were similar to each other in age, build, and dress. Based upon these findings and others, the trial court concluded that the lineup was not impermissibly suggestive. The trial court additionally concluded that the in-court identification of the defendant by the witness was of independent origin based solely upon what she actually observed during the attempted robbery and was not the result of any out-of-court confrontation or identification procedure. The evidence introduced on voir dire completely supported the trial court's findings of fact which fully justified its conclusions. Therefore, the findings of fact and conclusions drawn therefrom are conclusive and binding upon appeal. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Davis*, 33 N.C. App. 736, 236 S.E. 2d 722 (1977).

[2] The defendant next assigns as error the trial court's denial of his motion that the jury be instructed upon the law of attempted common law robbery and permitted to consider it as a possible lesser included offense of attempted robbery with a dangerous weapon. In support of this assignment, the defendant contends that the failure of the State's witnesses to testify that the sawed-off shotgun used by the defendant was not a toy required such an instruction permitting the jury to consider the lesser included offense. We do not agree.

All of the evidence introduced indicated that the defendant committed a robbery with a sawed-off shotgun. There was no evidence indicating that the sawed-off shotgun was other than a real and functioning deadly weapon. Thus, there was no evidence tending to show an attempted common law robbery. Therefore, the trial court properly declined to instruct on attempted common law robbery or to permit the jury to consider returning a verdict

on that lesser offense. *State v. Evans*, 25 N.C. App. 459, 213 S.E. 2d 389 (1975); *see also State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955); *and State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

[3] The defendant also assigns as error the trial court's acceptance of the jury's verdict as a verdict of guilty. The foreman, in attempting to return the verdict, first indicated that the jury found the defendant "guilty of attempted firearm." The defendant contends that this was tantamount to a verdict of not guilty.

The foreman did experience difficulty in announcing a proper verdict. The trial court did not accept the verdict, however, until it was proper in form and indicated that the jury found the defendant guilty of attempted robbery with a firearm. Additionally, the trial court offered to have the jury polled. This offer was declined by the defendant. We, therefore, find this assignment without merit and it is overruled. *State v. Rhinehart*, 267 N.C. 470, 148 S.E. 2d 651 (1966); *State v. May*, 22 N.C. App. 71, 205 S.E. 2d 355 (1974).

[4] The defendant next assigns as error the sentence imposed by the trial court. He contends that, as one Chester Melton had previously pled guilty to the same offense arising from the same robbery and been sentenced to imprisonment for a term of ten years, the trial court's sentence of imprisonment for not less than twenty-five years nor more than thirty years in this case was cruel and unusual punishment and constituted a penalty for the defendant's pleading not guilty and demanding trial by jury. This assignment is without merit.

The evidence clearly revealed that this defendant was the dominant of the two individuals committing the attempted robbery with a dangerous weapon. He was closer to the victim than the other man, directed the course of the armed robbery and personally pointed a sawed-off shotgun at the victim's face from very close range. The clear danger to human life created by the defendant's acts justified the sentence imposed.

Sentencing is a matter for the sound discretion of the trial court and is reviewable on appeal only where manifest and gross abuse of discretion is shown. No such abuse was shown in the present case. Although the trial court specifically indicated that the offense for which the defendant had been convicted would

justify an even longer sentence, no greater sentence was imposed here than that imposed by the trial court after the defendant's prior trial and conviction arising from this same offense. The prior sentence was nullified by our opinion in *State v. Davis*, 33 N.C. App. 736, 236 S.E. 2d 722 (1977), granting the defendant a new trial. Further, as the punishment imposed does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in the constitutional sense. *State v. Elliott*, 269 N.C. 683, 153 S.E. 2d 330 (1967). When a defendant believes his sentence to be excessive, although within statutory limits, his remedy is through executive clemency. *State v. Baugh*, 268 N.C. 294, 150 S.E. 2d 437 (1966).

Finally, the defendant assigns as error the action of the trial court in allowing Orrin Colson, a witness who had not been made known to the defendant previously, to testify as a rebuttal witness for the State. The defendant presents no arguments in support of this assignment, and we deem it abandoned pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976).

The defendant received a fair trial free from prejudicial error, and we find

No error.

Judges PARKER and HEDRICK concur.

LLOYD P. SLOAN, JR., D/B/A/ SLOAN INSURANCE AGENCY v. JOSEPH EARL WELLS

No. 772DC715

(Filed 11 July 1978)

Insurance § 2.3— alleged failure to procure insurance—insufficiency of evidence

The trial court properly directed a verdict for plaintiff on defendant's counterclaim which alleged breach of contract by plaintiff and negligence in failing to insure a Franklin Logger owned by defendant which was destroyed by fire, since defendant's evidence was insufficient with respect to the risk

insured against (whether fire, liability, or comprehensive), the duration of the risk (whether six months or one year), and the premium consideration to be paid for the proposed insurance contract.

APPEAL by defendant from *Ward, Judge.* Judgment entered 17 May 1977 in District Court, BEAUFORT County. Heard in the Court of Appeals 30 May 1978.

Plaintiff instituted this civil action by filing a complaint on 27 November 1974 alleging that defendant was indebted to him in the amount of $2,882.65 with interest for certain insurance coverage sold by plaintiff to defendant. Defendant filed answer denying liability for the premiums due and counterclaimed, alleging that plaintiff failed to insure a Franklin Logger, which was later destroyed by fire; and further, that plaintiff negligently breached his contract with defendant to procure physical damage coverage on the Franklin Logger, and by reason of such, defendant was damaged in the amount of $12,500.00. Plaintiff replied to the counterclaim and denied liability.

Plaintiff testified that he provided policies of insurance for defendant on motor vehicles of defendant from 25 July 1972 through 1 November 1973. "I made demand on Mr. Wells for payment by going to see him back in the woods where he was working and went over this statement with him item by item. . . . the coverage . . . was basically motor vehicles, trucks, a Toyota, and a Volkswagen, and I believe one liability and a health and accident insurance policy . . ."

Defendant's evidence tended to show that he ". . . was in the logging business . . ." and had ". . . some tractor trailers, some tractors in the woods, chainsaws, hydraulic loader, two pick-up trucks, and a couple of cars." He had insurance on the vehicles with plaintiff, but had coverage elsewhere on "the woods equipment."

On 10 September 1973, defendant went to see plaintiff with reference to insuring his Franklin Logger. He inquired about the rates on the logger with coverage of $16,000.00 and coverage of $12,500.00; plaintiff quoted the rates, and defendant decided upon coverage of $12,500.00 and asked plaintiff to "place insurance coverage on it." He gave plaintiff the serial number of the logger. Plaintiff assured him that the logger was insured, and he did not

try to obtain any other insurance for the logger. After 10 September 1973, the logger caught on fire and burned—"I don't recall the date." The loss was reported to the plaintiff, but plaintiff did not have coverage on the logger. Defendant never offered to pay plaintiff any or all of the $2,882.65 debt.

Plaintiff's evidence in rebuttal tended to show that he did not have any conversation with defendant concerning a Franklin Logger on 10 September 1973. Plaintiff had correspondence with the Department of Insurance in June 1974, and in reply to the letter he wrote: "As to the Franklin logger I can only say that it was discussed, that I did make notations as to serial numbers, amounts, etc. We did discuss possible premiums, but to say that I was instructed to insure the piece of equipment, I cannot." In the same letter he wrote, "He did tell me later that he had asked me if I had the tractor insured and I advised him I did, but I do not think of a Franklin Logger as a tractor."

At the close of all the evidence, the plaintiff moved for directed verdict on defendant's counterclaim, and the motion was allowed. The jury answered the issue and returned a verdict in favor of the plaintiff against the defendant in the amount of $2,882.65. The defendant appealed.

Rodman, Rodman, Holscher & Francisco, by Edward N. Rodman; and William P. Mayo, for plaintiff appellee.

McCotter & Mayo, by Hiram J. Mayo, Jr., for defendant appellant.

ERWIN, Judge.

Defendant assigns as error the granting of the plaintiff's motion for a directed verdict on the defendant's counterclaim by the trial court. We hold that this motion was properly allowed pursuant to Rule 50(a).

On motion by plaintiff for a directed verdict on a counterclaim of defendant, the trial court must determine the preliminary question of whether all of the evidence which tends to support defendant's case on the counterclaim, taken as true and considered in the light most favorable to the defendant, giving him the benefit of every fact and inference of fact pertaining to the issue which may be reasonably deduced from the evidence,

is sufficient to submit to the jury. *Mann v. Transportation Co.* and *Tillett v. Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973).

> "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default." *Elam v. Realty Co.*, 182 N.C. 599, 602, 109 S.E. 632, 633 (1921).

Accord: Wiles v. Mullinax, 267 N.C. 392, 148 S.E. 2d 229 (1966), *Johnson v. Tenuta & Co.*, 13 N.C. App. 375, 185 S.E. 2d 732 (1972).

Defendant attempted to enforce liability on the part of the plaintiff on the theory of breach of contract and also on the theory of negligent default in the performance of his duty imposed by contract as permitted by Rule 13(a) of the Rules of Civil Procedure. In order for defendant to recover on either of the theories of his counterclaim, he must present some evidence to establish a contract of insurance as described in his counterclaim. The plaintiff relies on a decision of the Supreme Court of Oregon in *Rodgers Ins. v. Andersen Machinery*, 211 Or. 459, 469, 316 P. 2d 497, 501-2 (1957), which held,

> ". . . [W]e believe that a contract to procure insurance should be proved with the same certainty as an oral contract of insurance or agreement to insure. The essential elements of such an agreement were first stated by this court in *Cleveland Oil Co. v. Ins. Society*, 34 Or 228, 233, 55 P 435, in the following language:
>
>> 'In order to make a valid contract of insurance,' says Mr. Wood, in his work on Fire Insurance (2 ed.) § 5, 'several things must concur: First, the subject-matter to which the policy is to attach, must exist; second, the risk insured against; third, the amount of indemnity must be definitely fixed; fourth, the duration of the risk; and, fifth, the premium or consideration to be paid therefor must be agreed upon, and paid, or exist as a valid legal charge against the party insured where payment in ad-

> vance is not a part of the condition upon which the policy is to attach. The absence of either or any of these requisites is fatal in cases where a parol contract of insurance is relied upon.' . . ."

We conclude that defendant presented sufficient evidence to submit the following issues to the jury on the question of whether or not a proposed insurance contract was entered: (1) the subject matter to which the policy was to attach was a Franklin Logger, (2) the amount of indemnity or the proposed insurance contract was $12,500.00. However, defendant's evidence was fatal on the following issues: (1) the risk insured against (whether fire, liability, or comprehensive), (2) the duration of the risk (whether six months or one year), (3) the premium consideration to be paid for the proposed insurance contract. The evidence did not show that the premiums were paid or that the plaintiff charged the defendant for such insurance. In view of the record before us and the lack of evidence on the part of defendant, we are compelled to hold that the trial court properly granted plaintiff's motion for directed verdict of defendant's counterclaim under Rule 50(a) of the Rules of Civil Procedure.

The trial court allowed plaintiff's motion to strike defendant's answer: "No, I thought the tractor was insured." This assignment of error is without merit in view of our holding that the directed verdict was proper.

The evidence presented by plaintiff was sufficient for the jury to answer the issue submitted to it in favor of plaintiff.

In the trial below, we find

No error.

Judges BRITT and ARNOLD concur.

BANK OF NORTH CAROLINA, N.A. v. DAVID W. CRANFILL AND WIFE, MARY A. CRANFILL

No. 7721SC651

(Filed 11 July 1978)

1. Seals § 1— printed word "Seal"

The printed word "Seal" following a person's signature is sufficient to function as his seal only if he intended to adopt it as his seal.

2. Seals § 1— presumption of adoption of seal

When a seal or the word "Seal" appears beside the name of the maker of a note where the seal belongs, a presumption arises that the maker adopted the seal or the word "Seal" as his seal, and the burden falls on the maker to prove that he did not adopt the seal as his seal.

3. Seals § 1— adoption of seal—parol evidence—genuine issue of fact

Parol evidence was admissible to determine whether the maker of a note intended to adopt the printed word "SEAL" in parentheses as his seal, and where the maker offered evidence on a motion for summary judgment that he did not adopt the word "SEAL" as his seal, there was a genuine issue of fact as to whether the maker adopted that word as his seal and, thus, whether the note was a sealed instrument subject to the ten-year statute of limitation.

APPEAL by defendants from *Albright, Judge.* Judgment entered 11 May 1977, Superior Court, FORSYTH County. Heard in the Court of Appeals 4 May 1978.

Plaintiff commenced this action by the filing of a complaint on 11 August 1976. The complaint alleged *inter alia* that defendants "executed, signed and sealed as makers" a promissory note in the amount of $7,421.50 on or about 4 February 1972, and delivered the same to plaintiff's predecessor in interest; that the note was due and payable on or before 5 March 1972; and that defendants had not paid upon written demand. Plaintiff prayed judgment awarding it principal, interest, attorneys fees, and costs. Attached to the complaint was a copy of the form note which defendants had signed. Beside their respective names was the printed word "SEAL" in parentheses.

Defendants answered, admitting execution of the note. However, defendants denied that the instrument was under seal and pled the three-year statute of limitations in bar of the claim. Defendants filed an affidavit asserting that "at no time did we affix our seals to said notes or intend or realize that we were signing said notes under seal."

By written motion supported by affidavit, plaintiff moved the court for summary judgment. By order of 11 May 1977, the trial court granted summary judgment in plaintiff's favor. From that judgment defendants appeal.

House and Blanco, by Robert Tally, for plaintiff appellee.

Morrow, Fraser and Reavis, by John F. Morrow, for defendant appellants.

MORRIS, Judge.

This case is before us to review the entry of summary judgment. In so doing, we must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact" and that the plaintiff "is entitled to judgment as a matter of law." North Carolina Rules of Civil Procedure, Rule 56(c). The sole issue discussed in the brief and, therefore, the sole issue in this appeal is whether this action is barred by the three-year period of limitations of G.S. 1-52. North Carolina Rules of Appellate Procedure, Rule 28.

In their answer defendants plead the statute of limitations in bar of the action. The note was due and payable on 5 March 1972. This action was commenced on 11 August 1976, more than three years after the cause of action accrued. Plaintiff, on motion for summary judgment, argued that this action is an action upon a sealed instrument and is, therefore, governed by the ten-year statute of limitations of G.S. 1-47.

The crucial question, then, is whether the instrument is a "sealed instrument' within the meaning of G.S. 1-47. Defendants in their answer admitted execution of the note but denied that it was sealed. The note, incorporated into the complaint, displays the following:

"/s/ D. W. Cranfill (SEAL)

"/s/ Mary A. Cranfill (SEAL)"

Defendant David W. Cranfill stated in his sworn affidavit that "at no time did we affix our seals to said notes or intend or realize we were signing said notes under seal."

[1] Our courts have long held that the printed word "Seal" following a person's signature is sufficient to function as his seal if, but only if, he intended to adopt it as his seal. *E.g.*, *Pickens v. Rymer*, 90 N.C. 282 (1884). While the printed word "Seal" is legally sufficient to function as a seal, the question remains as to whether the signer intended to adopt the word as his seal.

[2] When a seal appears beside the name of the maker of a note where the seal belongs, there arises a presumption that the maker adopted the seal (or the word "Seal") as his seal. Thus, the burden falls upon the maker to prove that he did *not* adopt the seal as his seal. *McGowan v. Beach*, 242 N.C. 73, 86 S.E. 2d 763 (1955). Plaintiff contends that in this case that presumption entitles it to summary judgment. Citing *Bell v. Chadwick*, 226 N.C. 598, 39 S.E. 2d 743 (1946), as the sole authority, plaintiff contends that, since defendants have admitted execution of the note, the parol evidence rule prohibits their testimony that they did not intend to "adopt" the words "Seal" as their seals. Thus, since there is no evidence that they did not adopt the seal, plaintiff concludes that the presumption would control and summary judgment would be proper. We believe that plaintiff's reliance upon *Bell v. Chadwick* is unfounded since the holding in that case is contrary to the greater weight of authority.

As we have previously noted, where the word "Seal" appears after the signer's name, that word becomes his seal only if he adopts it as his seal. *Pickens v. Rymer, supra*. Adoption is a question of intention. *Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935). Our courts have long held that that question of intention is a question of fact for the jury.

> "Whether the scrawl affixed was in this state a seal certainly was a question of law to be determined by the court; but whether the defendant placed it there, or adopted it as his seal if placed there by the plaintiff or any other person, were questions for the jury." *Yarborough v. Monday*, 14 N.C. 420, 421 (1832).

This position has recently been reaffirmed. *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965); *see also Allsbrook v. Walston*, 212 N.C. 225, 193 S.E. 151 (1937). *Bank v. Insurance Co.* is the most recent pronouncement of our Supreme Court on this matter. There the Court stated:

> " '[O]ur Court has held that a seal appearing upon an instrument, opposite the name of the maker, in the place where the seal belongs, will in the absence of proof that the maker intended otherwise, be valid as a seal.' [Citations omitted.] . . . The burden is on plaintiff to prove that the action accrued within the time limited by the statute, and that defendant adopted the seal. [Citations omitted.] *Whether defendant adopted the seal is a question for the jury. Yarborough v. Monday, supra.*" (Emphasis added.) *Bank v. Insurance Co.*, 265 N.C. at 96, 143 S.E. 2d at 277.

We believe that *Bank v. Insurance Co.* is an implicit rejection of the language from *Bell v. Chadwick* upon which plaintiff relies. We also believe that *Bank v. Insurance Co.* controls the present case. In the present case, the court erred in granting summary judgment.

[3] The trier of the facts must consider defendant's testimony that he and his wife did not adopt the words "Seal" as their seals.

> "As between the original parties . . . agreements at variance with the strict terms of the writing may have been made, but omitted from the instrument in order to insure its negotiability or to adapt it to a printed form. These considerations may justify a liberality in the admission of parol evidence . . . . But whatever the reason, when the instrument is in the hands of a holder other than a holder in due course or one claiming under him the North Carolina Court has permitted variance . . . ." Stansbury, N.C. Evidence § 256 at 249 and 250 (Brandis Rev. 1973).

The position taken by Professor Brandis conforms with the general tenor of the Uniform Commercial Code which governs negotiable instruments. Article 3 of the Uniform Commercial Code recognizes the efficacy of seals upon negotiable instruments, G.S. 25-3-113, but the Code also is fairly liberal in allowing the admission of parol evidence. The Code allows the use of parol to identify the maker of a note. G.S. 25-3-401, Official Comment 2. Also, through its liberal definition of "signed" the Code invites the use of parol evidence to determine whether a party "intended" to "sign" an instrument. *See* G.S. 25-1-201(39) and G.S. 25-3-401(2). We believe that the question of whether a party intended to adopt a word as his seal should be treated in a like

manner. Therefore, we conclude that the trier of the facts must consider defendants' evidence that they did not adopt the words "Seal" as their seals.

Where the signer, by affidavit or otherwise, offers evidence that he did not adopt the word "Seal" as his seal, there is a genuine issue of fact as to whether he "adopted" that word as his seal. That issue of fact precludes the entry of summary judgment.

The judgment of the trial court is

Reversed and remanded.

Judges MARTIN and MITCHELL concur.

CITY OF WINSTON-SALEM v. HOOTS CONCRETE COMPANY, INC.

No. 7721SC578

(Filed 11 July 1978)

Municipal Corporations § 30.11— permitted use under zoning ordinance—determination by zoning officer

If a city zoning officer determined that a concrete mixing operation was a permitted use of premises zoned "limited industrial," the officer acted pursuant to authority specifically granted by the zoning ordinance to determine the listed use to which a proposed activity is most similar in those cases in which the proposed use is not specifically listed in the table of uses, and the city could not enjoin the use of the premises for a concrete mixing business; however, if no zoning officer made such a determination, the city could enforce its ordinance against the premises under an appropriate interpretation of the ordinance.

APPEAL by defendant from *Lupton, Judge*. Judgment entered 9 May 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 April 1978.

Ronald G. Seeber, City Attorney, and Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., for the plaintiff.

Deal, Hutchins & Minor, by Fred S. Hutchins, Jr., and Booe, Mitchell, Goodson & Shugart, by William S. Mitchell, for the defendant.

BROCK, Chief Judge.

This action was instituted 12 November 1976 to permanently enjoin defendant from conducting a concrete mixing business on the property located at 4520 Indiana Avenue, Winston-Salem. The property in question is zoned I-2 (Limited Industrial District).

The case was heard in the trial court on plaintiff's motion for summary judgment.

By his affidavit, defendant asserts that in 1970 he applied for and was issued a "building" permit for a building on the premises; that he advised a zoning officer of the nature of the business he proposed to conduct and advised that the construction of storage bins and a large hopper on the premises were necessary; that a zoning officer advised defendant the conduct of defendant's proposed concrete mixing business was a permitted use within the zone I-2; that it would not be necessary to obtain a building permit for the bins and hopper; that the bins and hopper were placed upon the premises before the building was constructed; that a zoning officer, building inspector and wiring inspector inspected the premises after the bins and hopper were erected; that he was again advised that his business was in compliance with the zoning ordinance; that defendant commenced his concrete mixing operations and thereafter sold mixed concrete to the plaintiff among others; and that no suggestion of non-compliance with the zoning ordinance was made until five and one-half years after the operation had begun.

Plaintiff's affidavits tended to contradict defendant's assertion that defendant had been issued a permit to construct a building for a mixed concrete operation, or that a zoning officer had advised defendant that his business was in compliance with the zoning ordinance.

Plaintiff, apparently relying upon the general principle that a municipality cannot be estopped to enforce its zoning laws,

stipulated for the purpose of the hearing on the motion for summary judgment "that His Honor can assume that the Defendant's version is accurate and can assume that the City did, in fact, permit the Defendant to go to this site and to carry on the operation that is now carried on at this site knowing that this operation would be carried on at that site."

His Honor, also apparently relying upon the general principle that a municipality cannot be estopped to enforce its zoning laws, rendered summary judgment for the plaintiff and permanently enjoined defendant from carrying on the concrete mixing operation at the site of 4520 Indiana Avenue, Winston-Salem.

Upon a motion for summary judgment the movant (plaintiff in the present case) has the burden to clearly establish the lack of any triable issue of fact by the record properly before the court. The papers of the moving party are carefully scrutinized, and those of the opposing party are, on the whole, indulgently treated. *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975).

Subsection G of Section 29-6, Article I, Chapter 29 of the City Code (City of Winston-Salem) provides a "Table of Permitted Uses." This table of permitted uses does not specifically describe a concrete mixing operation in any of the three types of districts zoned "Industrial"; *i.e.*, I-1 (Central Limited Industrial District), I-2 (Limited Industrial District), and I-3 (General Industrial District).

At the beginning of subsection G of the City Code provides in pertinent part as follows:

"G. *Table of Permitted Uses*

The following uses shall be permitted in the districts as indicated herein and shall comply with all regulations of the applicable district. Where a proposed use is covered by a specific permitted use provision, that provision shall apply, to the exclusion of any provision using general terminology. On receiving an application for a zoning permit for a use not specifically listed in this subsection, the Zoning Officer shall determine the listed use to which it is most similar and shall enforce for the requested use all requirements applicable to the similar use."

City Code section 29-19-A-2-a(2) provides in part as follows: "A building permit issued in accordance with the Building Code shall serve also as a zoning permit."

The City Code authorizes the zoning officer to determine the listed use to which an activity proposed in an application for zoning permit is most similar in those cases in which the requested use is not specifically listed in the table of uses. Defendant's affidavits tend to show that the zoning officer did make such a determination and advised defendant that the proposed concrete mixing operation was a permitted use of the premises zoned I-2. Defendant argues that the determination was a reasonable and justifiable determination because the concrete mixing operation is most similar to the following permitted uses of property zoned I-2:

- Fabrication or assembly of products from prestructured materials or components.
- Fabrication of wood, leather, paper, water or plastic products.
- Quarries or other extractive industries.
- Storage yard.
- Wholesale storage or sale, or storage services.

Plaintiff on the other hand argues that defendant's concrete mixing operation is most similar to, and can be classified only under the following permitted use which is restricted to property zoned I-1 or I-3:

- Any processing, or the manufacture of any products, from any material (including but not limited to animal or vegetable matter, chemicals or chemical compounds, glass, metals, minerals, stones, or earths).

We will not enter into a discussion of the varied definitions of some of the words used in describing the permitted uses. Suffice it to say that we are unable to say as a matter of law that defendant's concrete mixing operation is more similar to the permitted uses urged by defendant, or to the permitted use urged by plaintiff. Therefore a triable issue of fact remains as to whether plaintiff's zoning officer approved defendant's concrete mixing

operation as a permitted use under I-2. If not, the city cannot be estopped to enforce its zoning ordinance under an appropriate interpretation of the ordinance. If so, the question of estoppel does not arise because the zoning officer, acting under authority of the ordinance, made a reasonable, justifiable and lawful determination as to the classification of the use. Assuming the latter, if the city wishes to amend its ordinance to provide that a concrete mixing operation is a permitted use only under I-1 and/or I-3, then defendant's operation will be a non-conforming use which cannot, under the present circumstances, be enjoined.

We are not questioning the principle of law set out in *Helms v. Charlotte*, 255 N.C. 647, 122 S.E. 2d 817, 96 A.L.R. 2d 439 (1961) and *Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 897 (1950), upon which plaintiff relies. Those cases establish that a city cannot be estopped to enforce a zoning ordinance against a violator due to the conduct of a city official in encouraging or permitting the violation. The cited cases are distinguishable from the case *sub judice* in that they both involved uses clearly prohibited by the ordinances in question which city officials had no authority to encourage or permit. In the case at hand, if a zoning officer did indeed authorize the operation conducted by defendant, the zoning officer was acting pursuant to authority specifically granted by the zoning ordinance, as noted *supra.*

We have not overlooked defendant's argument that the mixing operation is not performed on the site, but is performed during delivery. However, in view of the above disposition we feel that a discussion of this argument is unnecessary.

The summary judgment for plaintiff is reversed and the cause is remanded for further appropriate proceedings.

Reversed and remanded.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. BENNIE BOWDEN

No. 788SC196

(Filed 11 July 1978)

1. **Criminal Law § 101— witness's contact with jurors—no prejudice from judge's actions**

Defendant was not prejudiced where two jurors were seen talking to a defense witness during the noon recess; after talking to the two jurors in chambers concerning their contact with the witness, the trial judge attempted to explain to the other jurors why he had called the two into his chambers; and the court thoroughly examined the jurors to determine that their finding of guilt or innocence would not be affected by the occurrence.

2. **Receiving Stolen Goods § 6— reasonable grounds to believe goods stolen—instructions proper**

The trial court did not err in instructing the jury to return a verdict of guilty if defendant, at the time of receiving the stolen goods, knew or had reasonable grounds to believe the goods had been stolen, since the 1975 amendment to G.S. 14-71, the statute upon which defendant was charged, makes it a crime to receive stolen goods which defendant has "reasonable grounds to believe" were feloniously stolen or taken.

APPEAL by defendant from *James, Judge*. Judgment entered 29 June 1977, in Superior Court, GREENE County. Heard in the Court of Appeals 21 June 1978.

Defendant was indicted for the felonious receipt of stolen goods, G.S. 14-71. From his conviction, and a prison sentence of six to eight years, he appeals.

Attorney General Edmisten, by Associate Attorney Robert L. Hillman, for the State.

Fred W. Harrison for defendant appellant.

ARNOLD, Judge.

[1] During a noon recess in the trial of this case, two jurors were seen talking to a defense witness. After talking to the two jurors in chambers, the trial judge attempted to explain to the other jurors why he had called the two into his chambers. We do not agree with defendant's contention that the trial court's remarks poisoned the minds of the jury against defendant in violation of G.S. 1-180, and that the trial court erred in denying

defendant's motion for a mistrial. The record discloses that the following occurred in the presence of the jury:

> "COURT: Ladies and Gentlemen, we are somewhat disturbed by a report that came to the Court that during the lunch hour sometime a man by the name of Streeter was seen talking with you two ladies and he happens to be a person who was first supposed to be a witness for the defendant and came over to Snow Hill today with the defendant and perhaps with Johnnie Boykin.
>
> "Do either of you ladies know—your name is . . .
>
> "(THE JURORS IDENTIFY THEMSELVES AS MRS. BARFIELD AND MRS. ARTIS.)
>
> "COURT: Did he talk with you during the lunch hour?
>
> "JUROR: Yes, he was down there. We were not talking anything concerning the court or anything. That is the first time I have seen him when he was in court. I don't know anything about him.
>
> "COURT: Are you previously acquainted with him?
>
> "JUROR: No, I don't know him. He knows my brother. He asked me about my brother.
>
> "COURT: Nothing was said about the case at all?
>
> "JUROR: No, sir.
>
> "COURT: The reason, as I have said, he was asked or subpoenaed to be here as a witness for the defendant and the fact he was seen talking to you two ladies and later seen in conversation with the defendant and Mr. Boykin gave the appearance of something improper. You can understand that because of course, I cautioned all of you to be very careful not to talk with anyone or permit anyone to talk to you about the case. That did not mean, of course, you could not say a word to anybody about anything, but it simply meant you were not to discuss the case with anyone, and really not talk with anyone directly connected with the case about anything."

Thereafter, out of the presence of the jury, defense counsel made known his objection to the trial court's explanation. This objection prompted the trial judge to make the following statements to the full jury:

> "COURT: Ladies and gentlemen, out of an abundance of caution I wish to say this. It is possible that calling you in a few minutes ago and telling you about the fact that a person was seen talking to Mrs. Artis and Mrs. Barfield and telling you that he was later seen talking to the defendant and others may possibly have affected some of you or created some suspicion in your mind that might affect your judgment when you come to deliberate upon a verdict in this case. The person who reported it to the court was the State Bureau of Investigation agent, Mr. Thompson. So I wish to inquire of each and every one of you—would you be able to go back and when this case is submitted to you to enter upon your deliberations in accordance with the instructions I later will give you and arrive at a decision of guilt or innocence based wholly upon the evidence and the law as I shall give it to you, without being in any way affected either for or against the defendant by reason of this occurrence?
>
> "Could you do that, lady?
>
> "JUROR: Yes.
>
> "COURT: And you?
>
> "(THE COURT ASKED EACH JUROR THIS QUESTION AND EACH JUROR ANSWERED YES.)
>
> "COURT: Let the record show that each of the jurors indicated affirmatively that he or she could deliberate and arrive at a verdict without being affected in any way by the occurrence which has been mentioned. . . .
>
> "Now, I want to say that if there is the slightest degree of feeling on the part of any of you that you might be affected by this, it is your duty to disclose it. There would not be anything improper about it on your part but if you had such a feeling and did not disclose it, it is possible that it might work an unfairness to either the defendant or to the state. So, please consider it carefully and if any of you has

any feeling there is any possibility that it would, let me know it now.

"Am I to understand by your silence that no one feels in the slightest degree that your deliberations and the verdict which you might arrive at would be in any way affected by this matter? Am I correct in my assumption?

"(ALL JURORS NOD THEIR HEADS).

"COURT: Let the record show all jurors nodded. All right, thank you."

We deem the trial court's handling of this matter to have been proper and without prejudice to defendant. Assuming, against our belief, that the statement by the trial court linking defendant with the man who spoke to the two jurors was error, we believe that the trial court took adequate precautions to assure that there was no prejudicial effect on any juror. The remarks of the trial court during trial do not entitle defendant to a new trial unless, when considered in light of the circumstances under which they were made, they tended to prejudice the defendant. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). The defendant, who has the burden of showing prejudice, *id.*, has failed to carry that burden.

[2] Defendant's second argument, that the court erred in instructing the jury to return a verdict of guilty if defendant, at the time of receiving the stolen goods, knew or had reasonable grounds to believe the goods had been stolen, is also without merit. The cases defendant relies on, *State v. Miller*, 212 N.C. 361, 193 S.E. 388 (1937); *State v. Hobbs*, 26 N.C. App. 588, 217 S.E. 2d 7 (1975); and *State v. St. Clair*, 17 N.C. App. 22, 193 S.E. 2d 404 (1972), were all decided before the effective date of the 1975 amendment of G.S. 14-71. Prior to that amendment, G.S. 14-71 made it a crime to receive goods that were *known* to be stolen. Hence, jury instructions allowing convictions for mere *belief* that the goods were stolen fell short of requiring the State to satisfy the jury beyond a reasonable doubt of all the elements of the statutory crime prior to the amendment. *State v. Hobbs, supra.*

The 1975 amendment to G.S. 14-71, however, makes it a crime to receive stolen goods which defendant has "reasonable grounds to believe" were feloniously stolen or taken:

"If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, 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, such person *knowing or having reasonable grounds to believe* the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted . . . ." [Emphasis added.]

The trial court's instructions to the jury, therefore, properly outlined the elements of the statutory offense.

In defendant's trial, we find

No error.

Judges BRITT and ERWIN concur.

BOBBY DALE JACKSON, BY HIS GUARDIAN AD LITEM, BOBBY WAYNE JACKSON v. DAVID WINDSOR FOWLER

No. 774SC707

(Filed 11 July 1978)

Automobiles § 63.1 — striking child — sufficient evidence of negligence

In an action to recover for injuries to a child who was struck by defendant motorist, plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to see the child moving toward the road so as to bring his vehicle under control and avoid the accident where it tended to show that the child was playing in his yard under a tree 49 feet from the center of the road, the child ran the 49 feet from the point in his yard to the place where the accident occurred, the road in the direction from which defendant traveled was straight for at least 300 feet, no obstructions blocked defendant's view of the plaintiff's yard, and the seat of the truck defendant was driving was high enough above the ground so that defendant could see into the yard.

APPEAL by plaintiff from *Bailey, Judge*. Judgment entered 12 April 1977 in Superior Court, SAMPSON County. Heard in the Court of Appeals 30 May 1978.

This case brings to the Court a question as to whether the plaintiff's evidence was sufficient to withstand a motion for a directed verdict. The plaintiff was eight years of age on 15 August 1975. At approximately 12:55 p.m. on that day, with the weather clear, the plaintiff was struck by a pickup truck being driven by the defendant. The accident occurred on Rural Paved Road 1300, at a point in front of the plaintiff's residence in Sampson County. The plaintiff's evidence showed that he was playing in his front yard with a friend when he saw the mail carrier deliver the mail to a box across the road. He ran to the side of the road, started across to the mailbox and was struck in the approximate center of the road by the truck driven by the defendant. The defendant's vehicle had been approaching the point of impact from a southerly direction of RPR 1300. The road was straight for at least 300 feet from the point of impact southward with no incline on the part of the road on which the defendant was driving. There was a soybean field to the south of plaintiff's home, with the soybeans approximately 18 inches in height. There was a row of bushes two or three feet high which lined the driveway to the plaintiff's home for a distance of approximately four feet and were between the defendant's vehicle and the plaintiff as the defendant approached the plaintiff's yard. There were two trees in the yard and the plaintiff was playing under one of them immediately before he ran into the road. The tree under which the plaintiff was playing was 49 feet from the center of the road. There was a power pole beside the driveway. The plaintiff was approximately 44 inches in height at the time of the accident. Lonnie Peacock, a registered surveyor, testified that the road varied from 7/10 of a foot to three feet below ground level from a point 300 feet south of the point of the accident to the place where the accident occurred. Mr. Peacock also testified that from ground level to the seat in the type of truck the defendant was driving was approximately 31 to 32 inches. Mr. Peacock also testified as to the angle of the tree from the center of the road, from various points 300 feet south of the place of the accident to within 50 feet of the place of the accident. Several witnesses testified that there were no obstructions that would limit their view of children playing in the yard in which the plaintiff was playing as they traveled the route defendant was traveling on 15 August 1975.

Doffermyre and Rizzo, P.A., by L. Randolph Doffermyre III, for plaintiff appellant.

Chambliss, Paderick, Warrick and Johnson, P.A., by Joseph B. Chambliss, for defendant appellee.

WEBB, Judge.

We reverse the judgment of the superior court. The statement of the law applicable to this case has been made many times by the Supreme Court of North Carolina and by this Court. It is as follows:

> ". . . the presence of children on or near a highway is a warning signal to a motorist, who must bear in mind that they have less capacity to shun danger than adults and are prone to act on impulse. Therefore, 'the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury.'
>
> * * *
>
> However, no presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of his approaching vehicle.
>
> * * *
>
> 'A motorist is not, however, an insurer of the safety of children in the street or highway; nor is he bound to anticipate the sudden appearance of children in his pathway under ordinary circumstances. Accordingly, the mere occurrence of a collision between a motor vehicle and a minor on the street does not of itself establish the driver's negligence; and some evidence justifying men of ordinary reason and fairness in saying that the driver could have avoided the accident in the exercise of reasonable care must be shown. In the absence of such a situation, until an automobile driver has notice of presence or likelihood of children near line of travel, the rule as to the degree of care to be exercised as to children is the same as it is with respect to adults.' " *Winters v. Burch*, 284 N.C. 205, 209-10, 200 S.E. 2d 55, 58-9 (1973).

Applying the law to this case the question is whether under the evidence the jury could find from the evidence that the defendant should have seen the plaintiff playing in the yard and moving toward and into the road so as to bring his vehicle under such control as to have avoided the collision. We conclude that from the evidence offered in this case, the jury could so find.

The evidence is that the plaintiff was playing in his yard under a tree 49 feet from the center of this road. He ran from that spot to the center of the road while the defendant was approaching. There was evidence that there were obstructions such as a hedge, a soybean field, and a pole blocking the defendant's view of the yard in which the plaintiff was playing, and that the road was at a lower level than the yard. There was also evidence that the hedge, the soybean field and the pole should not have blocked defendant's view and that the seat of the truck which defendant was driving was high enough above the ground so that the defendant could see into the plaintiff's yard. We hold that it is a question for the jury whether the defendant should have seen plaintiff running toward the road and brought his truck to a halt so as to avoid the collision.

The defendant relies on *Daniels v. Johnson*, 25 N.C. App. 68, 212 S.E. 2d 245 (1975). That was a case in which the Court affirmed the granting of defendant's motion for directed verdict after the defendant's vehicle had struck a minor plaintiff who was running across the street. The Court held there was not sufficient evidence as to where the defendant was when she could have first seen the plaintiff.

In this case there is evidence that the defendant was on RPR 1300 approaching the point of collision when the plaintiff ran the 49 feet from the point in his yard to the place where the accident occurred. We believe this distinguishes this case from *Daniels*.

New trial.

Chief Judge BROCK and Judge CLARK concur.

IRIS SUE APPERSON SELF, PLAINTIFF v. JOHN BURTON SELF, JR., DEFENDANT

No. 7721DC765

(Filed 11 July 1978)

1. **Divorce and Alimony § 17.3— indignities no bar to alimony—award of reduced alimony proper**

In an action for alimony where plaintiff alleged abandonment and defendant's adultery as grounds for alimony and the defendant counterclaimed for divorce from bed and board based on plaintiff's constructive abandonment of him and her indignities against him over a period of time, the trial court did not abuse its discretion in reducing the amount of alimony awarded plaintiff, rather than denying her alimony altogether, and the court was not required to set out the amount of the reduction in alimony in its judgment. G.S. 50-16.5(b).

2. **Divorce and Alimony § 17.3— alimony action—attorney fees—findings required**

The trial court erred in failing to set out findings of fact upon which it could base an award of attorney fees.

APPEAL by defendant from *Tash, Judge*. Judgment entered 22 April 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 20 June 1978.

Plaintiff brought this action for alimony, child custody and support, and attorney fees after defendant moved out of the family home on 6 April 1975. She alleged abandonment and the defendant's adultery as grounds for alimony. The defendant counterclaimed for divorce from bed and board based on the plaintiff's constructive abandonment of him and her indignities against him over a period of time. One of the parties' children is still a minor; both lived in the family home with their mother at the time of the trial. Evidence at the trial detailed a badly deteriorated relationship between the parties, with conditions worsening over a period of many years. There was evidence that defendant was seldom home, that plaintiff quarrelled with him and refused to sleep with him when he was at home. There was also evidence that defendant had committed adultery. One Phoebe Walton admitted that she carried on an adulterous relationship with defendant but said that she did not commit an act of adultery with defendant until shortly after plaintiff and defendant separated early in April of 1975. There was evidence, however,

that she had been acquainted with defendant since 1970. There was also evidence that, several years before plaintiff and defendant separated, Phoebe Walton and two other women spent a weekend in defendant's beach home. Mrs. Walton testified that the women occupied a separate apartment in the house from the one occupied by defendant. Defendant did, however, entertain the women by taking them flying, on boat rides, and on dining excursions.

The jury found that the parties were married in 1949, that the defendant did commit adultery, and that the plaintiff offered such indignities to the defendant as to render his condition intolerable. After further hearing on the needs and means of the parties, the judge made findings of fact and conclusions of law. He then ordered that possession of the family home be awarded to plaintiff during the minority of her daughter, that plaintiff be given custody of the child, that defendant pay $200.00 per month in "reduced" alimony and that he pay $300.00 per month for support of the child. Defendant was ordered to pay $1,500.00 toward plaintiff's counsel fees.

Frye, Booth & Porter, by Leslie G. Frye and R. Michael Wells, for plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr., and Michael J. Lewis, for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns as error the court's failure to find that plaintiff's indignities to him constituted a bar to alimony. G.S. 50-16.5(b) provides that "the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony *or* reduction in the amount of alimony when pleaded in defense by the supporting spouse" (emphasis added). After the jury found that the plaintiff, without provocation, offered such indignities to the defendant as to render his condition intolerable and his life burdensome and also found that defendant had committed adultery, then the court in its discretion could bar plaintiff's right to alimony or merely reduce the amount of her alimony. The court concluded that "the conduct of the plaintiff was not such as should bar her right to alimony, but will

be considered by the Court in allowing reduced alimony." This option is clearly provided for by the statute. Defendant's reliance on the case of *Parker v. Parker*, 261 N.C. 176, 134 S.E. 2d 174 (1964) is misplaced. In that case the trial court had refused to allow the husband to be heard on the cause of the separation and entered an order allowing alimony. The Supreme Court reversed the order and remanded the case for a rehearing. Moreover, the then applicable G.S. 50-15 did not contain a provision for "reduced" alimony. We are not persuaded by defendant's argument that we should hold that the indignities committed by the wife prior to the separation should absolutely bar her right to alimony arising out of her husband's adultery. The Legislature has seen fit to leave that question for resolution by the trial judge in the exercise of his discretion on a case by case basis. The record before us discloses no abuse of discretion. Defendant also contends that where reduced alimony is appropriate the court should set out the amount of the reduction in its judgment. We do not agree. The amount of alimony to be awarded lies in the sound discretion of the trial judge. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). In the absence of abuse of that discretion, the award will not be disturbed. The same should be true for reduced alimony. The alimony awarded plaintiff was significantly less than the amount found to be her reasonably necessary monthly expenses. The court specifically concluded that her alimony should be reduced. There is no evidence that the court abused its discretion in finding the amount of reduced alimony.

[2] We have reviewed defendant's further assignments of error and find that, with one exception, they fail to disclose prejudicial error. Defendant correctly argues that the court failed to set out findings of fact upon which it could base the award of attorney fees. The facts that were found clearly support an award in some reasonable amount. Plaintiff's counsel did submit an affidavit which would certainly support an award of fees in the amount requested. Our Court has held, however, that the trial court must set out the findings of fact upon which the award is made. *See Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977); *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 204 S.E. 2d 198 (1974); *Austin v. Austin*, 12 N.C. App. 286, 183 S.E. 2d 420 (1971). Plaintiff will, most likely, be entitled to an additional amount for

reasonable counsel fees for services rendered since the entry of the judgment. That part of the order awarding attorney fees is, therefore, vacated and remanded for further proceedings in accordance with this opinion. In all other respects, the judgment is affirmed.

Affirmed in part; vacated in part.

Judges MORRIS and MARTIN concur.

STATE OF NORTH CAROLINA v. RODELL PHILLIPS

No. 788SC95

(Filed 11 July 1978)

1. Searches and Seizures § 14— defendant in custody—consent to search residence

In a prosecution for an attempt to commit a crime against nature and taking indecent liberties with a minor, the trial court did not err in finding that defendant validly consented to a search of his residence during which an officer found a pair of undershorts belonging to the victim where the officer testified on voir dire that defendant, while in custody, consented to a search of his residence after the officer asked for permission to search the residence for some evidence which had supposedly been left there and told defendant that he had a right to refuse such consent.

2. Criminal Law § 75.7— inquiry as to "what was going on"—no custodial interrogation

An officer's inquiry as to whether defendant knew "what was going on" did not constitute custodial interrogation so as to require the *Miranda* warnings.

3. Crime Against Nature § 3— crime against nature—indecent liberties with minor

The State's evidence was sufficient for the jury in a prosecution for crime against nature and taking indecent liberties with a minor.

APPEAL by defendant from *Hobgood, Judge.* Judgments entered 14 September 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 25 May 1978.

Defendant was charged in a two-count bill of indictment (proper in form) of the offenses of attempting to commit crime

against nature against one Keith Peten and taking indecent liberties with Keith Peten, a minor child under the age of 16, and defendant being more than 16 years of age and at least five years older than the child. Defendant was found guilty on both counts by a jury and was given an active sentence of imprisonment by the trial court of ten years on each count to run concurrently.

The State's evidence tended to show that defendant met Keith Peten, age twelve, who lived with his mother, on 23 July 1977 in Goldsboro; defendant took the boy to his house and removed his pants and underpants, and threw him face down on a bed and attempted to have anal intercourse with him against his will; someone came to the door, the boy grabbed his pants and ran from the house leaving his red underpants; Keith related the events to his mother and police officers of the Goldsboro Police Department; defendant was arrested on 25 July 1977 and was taken to the Police Department. Sergeant Jones of the department advised defendant of his *Miranda* rights, then he asked defendant for permission to go to his house and look for some evidence that was supposed to have been left there. Defendant gave permission. At the house, Sergeant Jones found Keith Peten's red underpants near a bed.

Defendant testified that he was elsewhere at the time of the incident and did not see Keith on 23 July 1977.

In rebuttal, the State presented a witness who testified he saw defendant and Keith Peten together about dusk on 23 July 1977.

Prior to the trial of the case, defendant moved the court to suppress the evidence, to wit: a pair of red shorts, boy's size 16, on the grounds that the evidence was taken without a search warrant, and the said search was not based upon proper consent of defendant. The motion was supported by affidavits of defendant and his attorney. The trial judge entered an order allowing the State to introduce the underpants into evidence as State's Exhibit No. 3. Defendant appealed.

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

Donald M. Wright, for defendant appellant.

ERWIN, Judge.

[1] Defendant contends that the trial court erred in denying his motion to suppress the evidence of a pair of red shorts, known as State's Exhibit No. 3, on the grounds that the consent given by defendant was insufficient and invalid. We do not agree.

The rule is well settled in this State that findings of fact made by the trial judge, and conclusions drawn therefrom on the voir dire examination, are binding on the appellate courts if supported by evidence. *State v. Austin*, 276 N.C. 391, 172 S.E. 2d 507 (1970), *cert. denied*, 400 U.S. 842, 27 L.Ed. 2d 78, 91 S.Ct. 85 (1970); *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897 (1968); *State v. Wilson*, 262 N.C. 419, 137 S.E. 2d 109 (1964). The trial judge entered his findings as follows:

> "However, in this particular case, the Court finds as a fact that the search of the front room of the defendant Phillips' house was in all respects a legal and valid search in that it was made by Officer Jones after a free and voluntary consent on the part of the defendant which was made without coercion or duress or fraud and that the State is allowed to offer the evidence the red underclothes, State's Exhibit 3, as evidence in this case. To the ruling of the Court, the State will be allowed to offer the testimony, the facts surrounding the finding of said red pants, State's Exhibit Number 3."

Keith Peten testified on voir dire examination:

> ". . . While I was at Mr. Phillips' house I did not leave all my underclothes there but just my bottom underclothes I had my undershirt on.
>
> * * *
>
> I am a hundred percent sure those are the same shorts I was wearing. I wear size 14 to 16 shorts, and those are my shorts because they have the same tag on it."

Sergeant Jones of the Goldsboro Police Department testified on voir dire that after defendant received his *Miranda* warnings from him:

> ". . . I asked Mr. Phillips if I could have permission to go to his residence and look in the front room of his house and I

told him I wanted to look for some evidence that was supposely (sic) had been left there. I told him that he could refuse or allow me to do this, and I told him it was up to him that he could authorize me to go and not to go. He stood there for a minute and sat down and thought for a minute and he said that he didn't have anything to hide and that I had his permission to go; at that point he was sitting in the detective office and Sergeant Spain was in the presence of both him and I and at that point I asked Sergeant Spain if he would sit with Mr. Phillips while I went to the residence."

Defendant testified on voir dire examination as follows:

"When I went in the room he told me to sit down and have a seat and he went and got a bluecoat man and came back. When he brought the bluecoat man back he asked me could he go to my house. I did not kill James Buckram on June 7, 1952. That is the first thing he said and I told him he could go to my house, but I don't know why he wanted to go to my house. I didn't hear him say he wanted to go inside the house; he said that he wanted to go in the house; that is, he just said could he go to the house."

The findings and conclusions of the trial court are supported by the evidence in the record before us, and they are conclusive on appeal and must be upheld. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

[2] Defendant contends that the trial court committed error in permitting Sergeant Spain of the Goldsboro Police Department to testify to a conversation he had with defendant on the grounds that Sergeant Spain did not know whether or not the defendant had been given his *Miranda* warnings. Sergeant Spain testified on voir dire examination:

"At the time I was with Mr. Phillips I had a firearm upon my person and it was in full view of Mr. Phillips. I asked Mr. Phillips if he knew what was going on and he said that Sergeant Jones was going to his house to search his house. I did not personally give the defendant any Miranda warnings and I did not have any personal knowledge that the Miranda warnings had been given to the defendant."

We hold this question, "what was going on" does not constitute custodial interrogation. *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971).

[3] From the evidence presented at the trial of the case, the trial judge correctly overruled defendant's motion for judgment as of nonsuit on the charges of "Crime Against Nature" and "Taking Indecent Liberties with a Minor." Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Where there is sufficient evidence, direct or circumstantial, by which a jury could find the defendant had committed the offenses charged, then the motion should be denied. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976), 4 Strong's N.C. Index 3d, Criminal Law, § 106 at 547. We hold that the evidence in this case was sufficient to submit the charges to the jury and sufficient for the conviction of such charges. In the trial below, the defendant has failed to show prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM BROOKS

No. 786SC79

(Filed 11 July 1978)

Assault and Battery § 15.7— self-defense—instruction not required

In a prosecution for assault with a deadly weapon with intent to kill where the evidence tended to show that defendant was armed with a deadly weapon and voluntarily moved nearly the entire length of the dormitory-type prison cell in which he was confined in order to place himself along the path the victim must take in leaving the showers, the mere act of the victim in placing his hand in a pocket containing a knife when he emerged from the shower and saw defendant waiting for him was insufficient evidence of provocation to require the trial court to give an instruction upon the doctrine of self-defense.

APPEAL by defendant from *Smith (Donald L.), Judge*. Judgment entered 1 September 1977 in Superior Court, HALIFAX County. Heard in the Court of Appeals 24 May 1978.

The defendant was indicted for the felony of assault with a deadly weapon with intent to kill inflicting serious bodily injury and entered a plea of not guilty. The jury returned a verdict of guilty as charged. From judgment sentencing him to imprisonment for a term of twenty years, defendant appealed.

The State offered evidence tending to show that on 20 June 1977 James T. Williams and the defendant, William Brooks, were both housed as inmates in a dormitory cell at Caledonia Prison Farm. They had a disagreement on that morning and exchanged unpleasant words. That evening Williams went to the bathroom area of the dormitory and took a shower. As he emerged from the bathroom area into the dormitory, he was approached by the defendant who stabbed him with a "shank" or homemade knife without provocation. Williams then attempted to flee from the defendant. He was then pursued by the defendant and stabbed in the back four times. Some of these blows were struck after Williams had been felled and rendered helpless. As a result of serious injuries from his wounds inflicted by the defendant, Williams was required to undergo surgery and was kept hospitalized in intensive care for a period of time.

The defendant offered evidence tending to show that he was serving a sentence for murder and was confined at Caledonia Prison Farm on 20 June 1977. He and Williams had an argument during the morning hours on that date. That night the defendant was standing by his bunk and saw Williams go to his locker, take a knife from within and put it in his right pants pocket. Williams then went to the bathroom area of the dormitory-type cell in which they were housed and took a shower. The bathroom area was at the opposite end of the dormitory from the defendant's bunk. The defendant followed Williams to the bathroom area at the other end of the dormitory and waited between the bunks immediately adjacent to that area. When Williams emerged from the shower and saw the defendant, he put his hand in his right pocket. The defendant pulled his knife from his right pocket and stabbed Williams. Williams then pulled his knife from his pocket, and the defendant stabbed him several more times. The defend-

ant stabbed Williams the second time by a corner of a sink in the bathroom. He could not recall where Williams was when he stabbed him the third time or whether he stabbed Williams more than three times.

The defendant in apt time moved that the trial court instruct the jury as to the law of self-defense. This motion was denied.

Attorney General Edmisten, by Assistant Attorney General James L. Stuart, for the State.

A. S. Godwin, Jr., for defendant appellant.

MITCHELL, Judge.

The defendant's sole assignment of error is directed to the trial court's refusal to instruct the jury on the law of self-defense. In support of this assignment, the defendant argues that his evidence tended to show self-defense as a matter of law. We do not agree.

The defendant refers us, *inter alia*, to *State v. Hickman*, 21 N.C. App. 421, 204 S.E. 2d 718 (1974) and *State v. Evans*, 19 N.C. App. 731, 200 S.E. 2d 213 (1973). He contends that the holdings in those cases are controlling here and, based upon the evidence presented, required the trial court to give an instruction on self-defense. We find that the fact situations presented by each of the cases relied upon by the defendant distinguishable from the present case. In both *Evans* and *Hickman* there was some evidence tending to show that the prosecuting witness or victim clearly made a first overt act of aggression toward the defendant before the defendant attacked. Here, however, the defendant was armed with a deadly weapon and voluntarily moved nearly the entire length of the dormitory-type cell in order to place himself along the path the victim must take in leaving the showers. We cannot say upon these facts that the mere act of the victim in placing his hand in a pocket containing a knife, when he emerged from the shower and saw the defendant waiting for him, was sufficient to require the trial court to give an instruction upon the doctrine of self-defense.

The evidence, when taken in the light most favorable to the defendant, indicates that he was not without fault and voluntarily and aggressively took himself into a situation in which he well

knew that he or the other man would probably use deadly force. The doctrine of self-defense is not available unless the defendant is without fault and did not voluntarily enter into the fight or abandons the fight and withdraws from it giving notice to his adversary that he has so withdrawn. *State v. Watkins*, 283 N.C. 504, 511, 196 S.E. 2d 750, 755 (1973).

The evidence did not require an instruction on self-defense upon a theory of either real or apparent necessity. The defendant was required to show that there was some evidence indicating he acted in self-defense before the trial court would have been required to instruct the jury on that defense. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). Rules such as ours, which do not require the prosecution to negate self-defense or the trial court to charge thereon until the defendant has produced "some evidence" that he in fact acted in self-defense, have been approved by the Supreme Court of the United States. *Mullaney v. Wilbur*, 421 U.S. 684, 701-702, 44 L.Ed. 2d 508, 521, 95 S.Ct. 1881, 1891, nn. 28 & 30 (1975). Here, the defendant failed to present "some evidence" indicating that he acted in self-defense, and he was not entitled to a jury instruction on that defense.

As the defendant totally failed to produce any evidence of one or more of the factors which would have entitled him to invoke the doctrine of self-defense, the trial court quite correctly declined to instruct the jury with regard to the doctrine. For the trial court to have ruled otherwise would have constituted error. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E. 2d 750, 754 (1973).

The defendant received a fair trial free from prejudicial error in every respect, and we find

No error.

Judges PARKER and HEDRICK concur.

EARL R. CALLICUTT v. AMERICAN HONDA MOTOR COMPANY, INC.

No. 7718SC780

(Filed 11 July 1978)

Pleadings § 34; Rules of Civil Procedure § 15.1— refusal to allow amendment to add party defendant

In an action against a corporation to recover damages based on the negligent manufacture of a motorcycle, the trial court did not abuse its discretion in refusing to allow plaintiff to amend his complaint to add a second corporation as a party defendant where plaintiff's claim against the second corporation would not "relate back" to the original pleading under G.S. 1A-1, Rule 15(c) and would be barred by the statute of limitations.

APPEAL by plaintiff from *Albright, Judge.* Order entered 15 July 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 June 1978.

Plaintiff filed this civil action on 23 November 1976 alleging that he was injured on 2 March 1974 while operating a 1973 Honda motorcycle owned by one James R. Cline; that the defendant, American Honda Motor Company, Inc. ("American Honda"), manufactured and sold the motorcycle and was responsible for negligent design, negligent manufacture and assembly, negligent inspection, negligent testing, and negligent failure to warn plaintiff of the danger of said motorcycle. Plaintiff further alleged a cause of action based upon breach of warranty. Defendant answered admitting that it had manufactured and sold the motorcycle but denied negligence and breach of warranty. On 9 March 1977, partial summary judgment was allowed dismissing plaintiff's claim based upon breach of warranty. Plaintiff did not object or except to this order dismissing his cause of action based on breach of warranty. On 13 May 1977, after the statute of limitations had expired, defendant, American Honda, moved to amend its answer in order to admit that it had sold the motorcycle, but to deny that it had manufactured it. Defendant asserted that its counsel had recently discovered that the motorcycle was manufactured by Honda Motor Company, Ltd. ("Honda, Ltd."). Judge Walker (Hal H.) allowed defendant's motion to amend its answer on 16 May 1977. On 3 June 1977, Judge Walker denied plaintiff's motion to reconsider his order of 16 May 1977 allowing defendant's motion to amend its answer. Plaintiff did not object

or except to either of the two orders of Judge Walker. On 7 June 1977, plaintiff moved the court to add Honda, Ltd. as a party defendant. Judge Albright entered order denying plaintiff's motion on 15 July 1977. From this order, plaintiff appealed.

William N. Martin, for plaintiff appellant.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Joseph E. Elrod III and Kenneth R. Keller, for defendant appellee.

ERWIN, Judge.

This case presents one question for our determination: Did the trial court err in denying plaintiff appellant's motion to add Honda, Ltd. as a party defendant? From the record before us, we are compelled to answer the question in the negative and affirm the order entered by the trial court.

In essence, plaintiff sought leave of court to amend his complaint pursuant to G.S. 1A-1, Rule 15(a) to add Honda, Ltd. as a party defendant. At the point amendment was sought, plaintiff's right to amend as a matter of course under Rule 15(a) had expired in that defendant had previously answered. Under Rule 15(a), ". . . leave shall be freely given when justice so requires." The discretion of the trial court is not absolute. *See Foman v. Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962). However, leave to amend is not to be granted automatically, but rather only "when justice so requires."

Here we find no abuse of discretion. Both parties submitted memoranda on the issue, which were considered by the trial court. The United States Supreme Court in *Foman v. Davis, supra*, held that outright denial of leave to amend constitutes an abuse of discretion unless a justifying reason appears for such denial. The Court observed that futility of amendment is such a reason. It appears that the statute of limitations would be a valid defense to plaintiff's action against Honda, Ltd., unless "relation back" would obtain under Rule 15(c), which reads:

> "(c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the tranactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

This Court held in *Teague v. Motor Co.*, 14 N.C. App. 736, 739, 189 S.E. 2d 671, 673 (1972), with Judge Campbell speaking for the Court:

> "Plaintiff's argument is without merit. Not only was a misnomer used for appellee's name, but, more importantly, the complaint was served on the wrong party. Appellee Rabb & York, Inc., had no notice of the action until the amended complaint was filed on 7 December 1970. Rule 15(c) provides that a claim asserted in an amended pleading relates back to the original pleading, 'unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.' To whom must notice be given? The obvious answer is that the claim asserted in the amendment must be against one given notice in the original pleading of the transactions to be proved. Such notice was not given in this case and we believe that the clear words of the statute prevent the amended complaint from relating back to the original complaint.
>
> While we find no North Carolina cases under the Rules of Civil Procedure on this point, we find a number of Federal cases to which we look for guidance. The established rule is that,
>
> > 'If the effect of the proposed amendment is merely to correct the name of a party already in court, clearly there is no prejudice in allowing the amendment, even though it relates back to the date of the original complaint. (Citations omitted.)
> >
> > On the other hand, if the effect of the amendment is to substitute for the defendant a new party, or add another party, such amendment amounts to a new and independent clause (sic) of action and cannot be permitted when the statute of limitations has run. (Citations omitted) * * *' *Kerner v. Rockmill*, 111 F. Supp. 150 (1953). See also *Sanders v. Metzger*, 66 F. Supp. 262 (1946)."

We have carefully reviewed the record before us which does not reveal any evidence from which the trial court could have con-

cluded that Honda, Ltd. had notice of this action prior to plaintiff's motion to add it as a party defendant on 7 June 1977. Nor does the record reflect any relationship between defendant American Honda and Honda, Ltd. to allow us to infer that notice on American Honda was tantamount to notice on Honda, Ltd. The trial court in this context was correct in viewing Rule 15(a) and (c) together in determining whether or not to grant plaintiff's motion.

The order of the trial court is

Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WALLACE D. RILEY

No. 789SC138

(Filed 11 July 1978)

1. **Criminal Law § 162— failure to object or make motion to strike**

Defendant's assignment of error to his cross-examination which allegedly violated his right to remain silent is overruled since defendant neither objected nor moved to strike evidence at trial, and he therefore cannot complain for the first time on appeal.

2. **Criminal Law § 169.2— objection sustained—defendant not prejudiced**

Defendant was not prejudiced by the prosecutor's asking, during cross-examination of defendant, when he first advised his attorney of his exculpatory explanation, since defendant's objection to such questioning was sustained.

APPEAL by defendant from *Baley, Judge*. Judgment entered 15 September 1977 in Superior Court, GRANVILLE County. Heard in the Court of Appeals 1 June 1978.

Defendant was indicted and tried for first degree murder, convicted by a jury of voluntary manslaughter, and received a ten-year sentence.

At trial, the State presented evidence which tended to show that on the night of 17 November 1974, defendant entered a pool

hall in Stem and was approached by Jackie Strange, who was slapped by defendant and knocked against a pool table. Shortly thereafter, defendant went to the back room, and after a comment, Allen Grissom stood up; defendant produced a gun and shot Grissom, who later died. Two witnesses saw defendant with a gun shortly after the shooting approximately three feet from the deceased. Tests made on defendant's hands indicated he had fired a gun from his right hand.

Defendant testified that on the night in question, he slapped Strange after Strange told him he had damaged defendant's property, but he apologized and they shook hands. Defendant testified that after this incident every time he went to the back room, decedent "would pick at" him. Finally, decedent got up and approached defendant with an open knife, and when he did not stop his advance upon being warned, defendant shot him. An open pocket knife was found under a pool table by Thomas Crabtree after the incident.

On cross-examination, defendant was asked about certain statements he made after he had been given his *Miranda* warning and was in custody. One of these questions concerned when he told his attorney the story he testified to at trial. Counsel objected, and the trial court did not require defendant to answer that question. The questions that were allowed were in reference to his responses to certain of the officers' questions at the time of investigation.

Defendant appealed.

Attorney General Edmisten, by Associate Attorney Norman M. York, Jr., for the State.

Watkins, Finch & Hopper, by William T. Watkins, and Vann & Vann, by Arthur Vann, Sr., for defendant appellant.

ERWIN, Judge.

[1] Defendant presents two questions for our resolution. He first contends that his right to remain silent was violated when defendant was cross-examined in an effort to impeach his contention of self-defense, which was asserted for the first time at trial. Defendant was questioned by the prosecution as to why he did not give his exculpatory version of the incident to the officers after being

arrested and after he had been given his *Miranda* warnings. In support of this argument, defendant relies primarily on *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976), *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975), and *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974).

Defendant has noted four exceptions which, he asserts, support this first assignment of error. Three relate to the cross-examination of defendant, and the fourth is noted in the cross-examination of one of defendant's witnesses. In three of the instances complained of, defendant neither made an objection nor a motion to strike. (The fourth exception is noted following defendant's objection to a question which sought to determine when defendant first told his attorney that he had acted in self-defense; defendant's objection was sustained as to his conversation with his counsel.)

In *Doyle, supra*, the U.S. Supreme Court noted that defendant had made timely objections to the questions asked. As Justice Lake wrote for our Supreme Court in *State v. Mitchell*, 276 N.C. 404, 409-10, 172 S.E. 2d 527, 530 (1970):

> "It is elementary that, 'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' . . . An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule."

See also State v. Lowery, 286 N.C. 698, 213 S.E. 2d 255 (1975), *modified on other grounds*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3203 (1976); *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1972). We note also that in the case of *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1977), defendant sought to raise the same issues as defendant herein does. In *Foddrell*, Chief Justice Sharp cited the above rule with approval and observed:

> "To this contention there are several answers, each sufficient to overrule Assignment No. 16. One is that defendant neither objected to the questions at the time they were asked nor moved to strike the answers which were made.

The final question, to which objection was made and sustained, was not answered." 291 N.C. at 557, 231 S.E. 2d at 625-6.

This assignment of error is, therefore, overruled.

[2] Defendant's remaining argument is that he was prejudiced by the prosecutor's asking, during cross-examination of defendant, when he first advised his attorney of his exculpatory explanation. Defendant asserts that this was an improper inquiry into a matter covered by attorney-client privilege.

Two exceptions are noted in support of this argument. As to the first exception, again no objection was made and, in any event, the line of questioning at that point pertained to what defendant did or did not tell Deputy Brame, not his attorney. In the other instance, defendant's objection to the question was sustained. (There was an earlier question pertaining to communications between defendant and his attorney, to which defendant had his objection sustained. And in any event, no exception appears in the record as to that question.) Defendant's remaining assignment of error is overruled.

In the trial below, we find

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES DOUGLAS JOYNER

No. 787SC184

(Filed 11 July 1978)

1. Narcotics § 1.3— possession and sale of same drugs—two separate offenses

Defendant could be convicted of both possession with intent to deliver and sale and delivery of the same controlled substances, since possession and sale are separate and distinct offenses.

2. Criminal Law § 169.7— evidence excluded—similar evidence subsequently admitted

In a prosecution for possession with intent to deliver and sale and delivery of controlled substances where defendant claimed entrapment, defendant was not prejudiced by the trial court's exclusion of his testimony as to a conversation between himself and an undercover agent since the substance of that testimony excluded by the trial court was admitted at other times.

3. Criminal Law § 112.1— reasonable doubt—definition not required

The trial court is not required to define reasonable doubt in the absence of a specific request by defendant to do so.

ON certiorari to review the trial of defendant before *Cowper, Judge*. Judgment entered 11 May 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 20 June 1978.

The defendant was charged in bills of indictment, proper in form, with possession with intent to deliver and with delivery and sale of controlled substances, to wit: Placidyl, Dalmane, and Ionamine. The defendant pled not guilty to each charge, and the State offered evidence tending to show the following:

On 22 December 1975 J. G. Prillaman, an undercover agent of the State Bureau of Investigation, went to the defendant's home in Wilson, North Carolina, and purchased from the defendant 1000 yellow capsules for $350. On the afternoon of 29 December Agent Prillaman called the defendant and asked him to sell some more drugs. The two men later scheduled a meeting at 8:30 p.m. at a local bar. Prillaman and two other agents arrived at the bar at the prescribed time and the defendant arrived a short time later. Almost immediately upon the defendant's arrival he and the three agents left in his automobile. When they reached the highway the defendant told Prillaman to take a paper bag from under the seat. Inside the bag Prillaman found a plastic bag containing 500 yellow capsules, a plastic bag containing 500 red and yellow capsules and two bags containing red gelatin capsules. Prillaman paid the defendant $430 for the capsules, and the defendant drove the car back to the bar. The capsules were later determined by an S.B.I. chemist to be Placidyl, Dalmane, and Ionamine, the possession and sale of which are barred by the Controlled Substances Act, G.S. 90-95(a)(1).

The defendant produced evidence tending to show that Agent Prillaman who claimed to be a drug dealer had telephoned

him frequently and had requested that the defendant sell him drugs, and that the defendant acted only upon the inducement of Agent Prillaman.

The jury found the defendant guilty of all charges, whereupon judgment was entered imposing two consecutive prison terms of five years each. The defendant gave notice of appeal. When the defendant's former attorney failed to perfect his appeal this Court granted his petition for a writ of certiorari.

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

Fitch and Butterfield, by Milton F. Fitch, Jr., for the defendant appellant.

HEDRICK, Judge.

[1] The defendant first contends that the trial court erred in its denial of his several motions for judgment as of nonsuit as to the three charges of possession with intent to deliver controlled substances. Specifically, the defendant, citing *State v. Thornton*, 17 N.C. App. 225, 193 S.E. 2d 373 (1972), argues that since the sale and delivery of the controlled substances necessarily included the possession of the same, he could be convicted only of the former offense with respect to each drug.

The defendant, as well as the State, overlooks the fact that the rule which he extracts from *State v. Thornton, supra*, was overturned by our Supreme Court in its decision in the same case. *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701 (1973). In that case, as in a line of cases which followed, the Supreme Court re-affirmed the principle set forth in *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), that possession and sale are separate and distinct offenses. *See also State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Lewis*, 32 N.C. App. 298, 231 S.E. 2d 693 (1977). We hold that the evidence viewed in the light favorable to the State was sufficient to submit each case to the jury and to support the verdicts.

[2] The defendant also contends that the trial court erred in excluding the testimony of the defendant as to a conversation between himself and one of the undercover agents. In the pertinent testimony, which was offered to bolster the defendant's defense

of entrapment, the defendant testified that Agent Kelley of the S.B.I. had contacted him three times a week for several weeks before he met Agent Prillaman, urging him to supply drugs for Kelley to sell to truckdrivers and offering the defendant a pound of marijuana if he would do so. The trial judge excluded this testimony because Kelley was not available for cross-examination.

Prior to offering the foregoing testimony the defendant was allowed to testify that Kelley had called him often and had come to his residence "about three or four times a week" and had "talked to me about getting some speed for truck driving and I didn't want to do it at first because . . . I was afraid of getting caught." After the subject testimony was excluded the defendant was allowed to testify as follows:

> I had never dealt in drugs before I met Agent Kelley. On December 22, Agent Kelley had set up a deal. He came to my house and Agent Prillaman was with him. Agent Kelley introduced Agent Prillaman as a friend and said he was not going to be in town and that he was leaving and that Agent Prillaman would be handling his connection and that I should treat him as I treated him, meaning Agent Kelley. . . . They painted a pretty picture about the money that I would make and they said at no risk to me, that I would be the middle man and no one would know my name.

The foregoing demonstrates that the defendant was allowed to testify to the nature of his relationship with Agent Kelley and Agent Kelley's overtures to the defendant to persuade him to sell drugs. Thus, the substance of that testimony excluded by the trial court was admitted at other times. In view of the law of entrapment, *see State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975), we think the defendant has failed to show any prejudicial error in the trial judge's ruling. This assignment is overruled.

[3] Finally, the defendant contends that the trial court erred in its charge to the jury in failing to define "reasonable doubt." The trial court is not required to define reasonable doubt in the absence of a specific request by the defendant to do so. *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974). The record reveals and the defendant admits that no such request was tendered. Therefore, this assignment is without merit.

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

No error.

Judges PARKER and MITCHELL concur.

IN THE MATTER OF THE SUSPENSION OF THE RIGHT TO PRACTICE LAW OF WILLIAM CORNELIUS PALMER

No. 7725SC742

(Filed 11 July 1978)

Attorneys at Law § 11— judicial disbarment proceeding—no review for State by appeal or certiorari

Since the State has no right to appeal from an adverse decision in a judicial disbarment proceeding, the State cannot obtain appellate review of such a decision by a writ of certiorari, because to allow the State to raise the matter by petition for certiorari would be to allow by indirect means that which is forbidden by direct means.

ON certiorari to review order of *Snepp, Judge*. Order entered 5 May 1977 in Superior Court, CATAWBA County. Heard in the Court of Appeals 2 June 1978.

This judicial disbarment proceeding was before this Court on respondent's appeal in February of 1977. In the earlier appeal this Court vacated an order of the Superior Court suspending the respondent indefinitely from the practice of law and remanded the cause to the Superior Court for a new hearing. *See Matter of Palmer*, 32 N.C. App. 449, 232 S.E. 2d 497 (1977).

Upon remand a hearing was conducted before Judge Snepp. On 5 May 1977 Judge Snepp entered an order in which he made detailed findings of fact, concluded that "the Court is not satisfied by clear and convincing evidence that Palmer willfully and intentionally violated Disciplinary Rule 7-102" of the Code of Professional Responsibility, and dismissed the proceeding. By petition for writ of certiorari dated 7 June 1977 the State sought review of Judge Snepp's order. On 22 June 1977 the writ of certiorari was granted by this Court.

Attorney General Edmisten, by Special Deputy Attorney General James L. Blackburn and Assistant Attorney General Joan H. Byers, for the State.

McElwee, Hall & McElwee, by William H. McElwee III; and Robert A. Melott for the defendant appellee.

HEDRICK, Judge.

Our initial inquiry is directed to the question of whether the State can obtain by appeal or writ of certiorari appellate review of a judicial disbarment proceeding.

As frequently stated by the courts of this State, appellate review is not an inherent right but is derived from statute. *In re Assessment of Sales Tax*, 259 N.C. 589, 131 S.E. 2d 441 (1963). Furthermore, the State as a party in a civil or criminal case has no right to appeal an adverse decision of the trial court in the absence of *express* statutory authorization. *In re Assessment of Sales Tax, supra; State v. Mitchell*, 225 N.C. 42, 33 S.E. 2d 134 (1945); *State v. McCollum*, 216 N.C. 737, 6 S.E. 2d 503 (1940).

The case of *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933), presented the issue with which we are concerned in a factual setting similar to that of the present case. There, an attorney who had entered a plea of nolo contendere to a felony charge was disbarred in the United States District Court. On the basis of his disbarment in federal court the State instituted judicial disbarment proceedings in North Carolina Superior Court. The proceeding was dismissed when the trial judge determined that a plea of nolo contendere was not equivalent to a confession to a felony. Upon the State's appeal our Supreme Court reasoned as follows:

> It is an elementary proposition of law that the State cannot appeal either in civil or criminal actions unless such right is given by the lawmaking power of the State. It is apprehended that the reason for such a policy is built upon the idea that when the State in its sovereign capacity brings a citizen into its own tribunals, before its own officers, and in obedience to its own processes, and loses, that its avenging hand should be stayed except in unusual cases where the power to appeal is expressly conferred.

204 N.C. at 49, 167 S.E. at 383. The court discussed the relevant statutes and noted that while the statutes governing statutory disbarment granted the right of appeal to the State, *see* C.S. § 215 (1919), those pertaining to judicial disbarment, C.S. §§ 204-7 (1919), were silent in that regard. The court held that the State had no right to appeal from the judgment of the trial court.

Soon after the *Stiers* decision C.S. §§ 204-15, encompassing both judicial and statutory disbarment were repealed. *See* Ch. 210, § 20, Public Laws of N.C. (1933). The repeal of C.S. §§ 204-7 left the responsibility for judicial disbarment totally in the hands of the courts. *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938). The repeal of §§ 208-15 was followed by the enactment of a new set of statutes governing statutory disbarment which presently appear in Chapter 84 of the General Statutes. However, the express authority of the State to appeal in a statutory disbarment proceeding was deleted in its most recent amendment. *See* G.S. 84-28 (Supp. 1977). Thus, at present the State has no right to appeal from an adverse decision in either a judicial or statutory disbarment proceeding.

In the present case the State gave no notice of appeal, apparently recognizing that it had no such right. Instead, the State petitioned this Court for a writ of certiorari which was ultimately granted. In *State v. Todd*, 224 N.C. 776, 32 S.E. 2d 313 (1944), the State appealed and petitioned for a writ of certiorari to review an order of the trial court granting a convicted defendant a new trial on the basis of newly-discovered evidence. After noting that the relevant statute enumerated those instances in which the State could appeal and that the matter before the court was not included therein, the Supreme Court reasoned that to allow the State to raise the matter by petition of certiorari would be to allow by indirect means that which is forbidden by direct means. *But see In re Stokley*, 240 N.C. 658, 83 S.E. 2d 703 (1954), where the Supreme Court distinguished *Todd* and held that when error appears on the face of the record the appellate court can in the exercise of its supervisory powers over the courts review a nonappealable order. The reasoning in *Todd* is clearly applicable to the present case. Therefore, in our opinion since the State had no right to appeal from the order dismissing the disbarment proceeding, its petition for writ of certiorari should not have been allowed by this Court. Accordingly, we hold that the State's peti-

tion for writ of certiorari was improvidently granted and this proceeding must be dismissed.

Dismissed.

Judges PARKER and MITCHELL concur.

STATE OF NORTH CAROLINA v. CLIFFORD B. GOINS

No. 7827SC205

(Filed 11 July 1978)

Criminal Law § 76.2— drunken driving—incriminating in-custody statements—failure to hold voir dire

In this prosecution for driving under the influence of intoxicants, the trial court erred in the admission over objection of defendant's incriminating answers to an officer's questions after his arrest where the court conducted no voir dire on the admissibility of defendant's statements and made no determination that the statements were made voluntarily and understandingly after defendant had been given the *Miranda* warnings.

APPEAL by defendant from *Baley, Judge*. Judgment entered 6 December 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 22 June 1978.

Defendant was charged with operating a motor vehicle on a public highway while under the influence of an intoxicating beverage. Upon his plea of not guilty, the State offered evidence tending to show the following:

At 4 a.m. on 15 September 1977, Officer Anthony Lee Robinson of the Gaston County Police Department was traveling in a northerly direction on Highway 321 when he noticed a 1964 Cadillac traveling in the same direction approximately one tenth of a mile ahead of him. The Cadillac, driven by the defendant, was proceeding at a slow rate of speed and was swerving from one lane to the other. Officer Robinson pulled directly behind the defendant and turned on his blue light, and the defendant pulled into an adjacent parking lot. When the defendant got out of his automobile, Officer Robinson noticed an odor of alcohol. While he was examining the defendant's driver's license he observed that

the defendant was swaying on his feet. Officer Robinson arrested the defendant and took him to the Gaston County Courthouse. At the courthouse Officer Robinson asked the defendant if he had consumed any alcoholic beverages, and the defendant responded that he had drunk four or five beers at his brother's house earlier that night. The defendant then told Officer Robinson that he would not submit to the breathalyzer test, explaining that "he only wanted to lose his license for six months." Officer Robinson and Officer R. B. Stacy, who was present when the defendant was brought to the courthouse, testified at trial that the defendant's mental and physical faculties were appreciably impaired by an intoxicant.

The defendant offered no evidence. The jury found the defendant guilty as charged, and the trial judge entered judgment imposing a three month prison sentence, suspended upon the conditions that defendant pay a $250 fine; that he surrender his driver's license and not operate a motor vehicle for one year or until his license is restored, whichever is later; and that he not violate any law of this State. The defendant appealed.

Attorney General Edmisten, by Associate Attorney David Roy Blackwell and Assistant Attorney General Isaac T. Avery III, for the State.

Steve Dolley, Jr. for the defendant appellant.

HEDRICK, Judge.

The defendant first assigns as error the trial court's denial of his motion for judgment as of nonsuit. In our opinion the evidence viewed in the light favorable to the State was sufficient to submit the case to the jury.

The defendant also assigns as error the admission of Officer Robinson's testimony recalling the defendant's incriminating answers to questions asked subsequent to his arrest. On direct examination the District Attorney asked Officer Robinson what the defendant said to him "regarding what intoxicating beverages . . . he had consumed." Over the defendant's objection Officer Robinson was permitted to answer as follows:

> When I was questioning him, I asked him what he had been drinking and he said beer. I asked how many and he advised me four or five.

. . .

> He said that he consumed them at his brother's house. He started drinking about 12:00 Midnight and he didn't know what time that he stopped.

It is now familiar law that an admission of a defendant in a criminal trial is admissible in evidence against him only if it is accompanied by a finding by the trial court that it was made voluntarily and understandingly. 2 Stansbury's N.C. Evidence, § 183 (Brandis Rev. 1973). Such a finding necessarily comprehends a finding that the defendant was given his *Miranda* warnings before responding to in-custody interrogation. *State v. Miley*, 291 N.C. 431, 230 S.E. 2d 537 (1976); *State v. Thompson*, 19 N.C. App. 693, 200 S.E. 2d 208 (1973). This rule has been held expressly applicable to defendants charged with driving under the influence of intoxicants. *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974). The proper procedure for determining the admissibility of a defendant's admissions is to conduct a voir dire hearing in the absence of the jury at which the State must carry the burden of showing that the admissions were made voluntarily and understandingly. *State v. Pollock*, 22 N.C. App. 214, 206 S.E. 2d 382 (1974); *State v. Thompson, supra*; 2 Stansbury, *supra*, § 187. At the conclusion of the hearing if the trial judge overrules the defendant's objection, he must make findings of fact to resolve any conflicts in the evidence. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975).

The record in the present case reveals that no hearing was conducted upon the defendant's objection and no foundation was established by the State prior to the introduction of the defendant's incriminating statements. We are unable to say that the trial court's error in the admission of the statements was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

The defendant has brought forward other assignments of error which we need not discuss at this time since they are not likely to arise upon a new trial.

New trial.

Judges PARKER and MITCHELL concur.

AUDREY F. GOODMAN v. WILKES COUNTY BOARD OF COMMISSIONERS

No. 7723DC779

(Filed 11 July 1978)

Counties § 3.1— executive secretary to board of elections—compensation—authority of board of commissioners

In an action by plaintiff, Executive Secretary to the Wilkes County Board of Elections, to recover sums allegedly owed to her by defendant for overtime worked in 1976, defendant was entitled to summary judgment since defendant had set plaintiff's salary at $675 per month, which was more than the minimum required by G.S. 163-35, and the authority to determine the level of compensation above the statutory minimum was in the county board of commissioners.

APPEAL by plaintiff from *Davis, Judge.* Judgment entered 16 August 1977, in District Court, WILKES County. Heard in the Court of Appeals 21 June 1978.

Plaintiff, who is the Executive Secretary to the Wilkes County Board of Elections, instituted this action to recover sums allegedly owed to her by the Wilkes County Board of Commissioners for overtime worked during 1976. Defendant's answer denied plaintiff's claim and averred, *inter alia,* that (1) plaintiff, as a department head or supervisor, was not entitled to overtime pay under the Wilkes County Personnel Resolution adopted by defendant on 5 April 1976, and (2) plaintiff did not obtain approval of the County Manager prior to her overtime work.

Thereafter, defendant, pursuant to G.S. 1A-1, Rule 56, moved for summary judgment and, in support of its motion, submitted affidavits as well as a copy of pertinent portions of the Personnel Resolution. Plaintiff, in opposition to the motion, submitted an affidavit. The district court filed an order on 24 August 1977, finding no genuine issue of material fact and granting defendant judgment as a matter of law. Plaintiff excepted and appealed to this Court.

Moore & Willardson, by Larry S. Moore and John S. Willardson, for plaintiff appellant.

Brewer & Bryan, by Joe O. Brewer and Paul W. Freeman, for defendant appellee.

ARNOLD, Judge.

The issue in the case *sub judice* is whether summary judgment was properly entered for defendant. It was.

Logical arguments can be made in support of the functions of a responsible executive secretary of a county board of elections and the necessity of having competent and conscientious secretaries to insure the integrity of our process of elections. Indeed, it appears likely, from the face of the record, that plaintiff performed her duties well and that, in fairness, perhaps she should receive the compensation requested by the Wilkes County Board of Elections. Since the board of elections determines the necessity for the amount of time and work required of its executive secretary, it may be urged that the board of elections should also fix the amount of compensation. However, in the absence of express language, we do not determine the intent of the legislature to effect such a result.

G.S. 163-35 outlines the duties as well as the manner of appointment, dismissal, and compensation of executive secretaries of county boards of elections. (All references to G.S. 163-35 are to 1975 amendments which were in effect during the case at bar.) As to compensation, G.S. 163-35(c) reads:

> "The executive secretary shall be paid compensation as recommended by the county board of elections and approved by the respective boards of county commissioners. Beginning July 1, 1975, the board of county commissioners in every county shall compensate the executive secretary of the county board of elections with a minimum payment of twenty dollars ($20.00) per day for each day the executive secretary is in attendance to her prescribed duties. For the purposes of this section not less than four hours nor more than eight hours shall constitute one day. In addition to the minimum compensation required herein, the executive secretary of the county board of elections shall be granted the same vacation leave, sick leave and petty leave as granted to all other county employees in similar positions. It shall also be the responsibility of the board of county commissioners to appropriate sufficient funds to compensate a replacement for the executive secretary when authorized leave is taken."

This statute does not specifically provide for compensation for overtime work. By its scheme, however, we conclude that the legislative intent of G.S. 163-35(c), once the minimum payment of twenty dollars per day is attained, requires that additional compensation or employment benefits, if any, be determined by the respective boards of county commissioners.

The pleadings and affidavits of both parties show that plaintiff was required to work seven and one-half hour days and that her compensation was $675 per month. The latter figure represents more than the $20 per day minimum which defendant must pay pursuant to G.S. 163-35. The authority to determine the level of compensation above that statutory minimum is in the board of county commissioners, not the board of elections which had only the power to recommend. Hence, as a matter of law, defendant was entitled to judgment in the case at bar.

Arguments by plaintiff and defendant as to whether plaintiff is to be classified as a department head or as an employee under a Wilkes County Personnel Resolution are immaterial to this appeal, especially since it is undisputed that neither the county manager nor defendant approved overtime work for plaintiff as is required by that resolution.

Summary judgment for defendant is

Affirmed.

Judges BRITT and ERWIN concur.

STATE OF NORTH CAROLINA v. JIMMY WADE CARLIN

No. 7720SC1058

(Filed 11 July 1978)

Automobiles § 134; Receiving Stolen Goods § 2— possession of stolen vehicle—receiving stolen goods—separate offenses

Defendant could not be convicted of feloniously receiving stolen goods in violation of G.S. 14-71 when tried on an indictment charging the felonious possession of a motor vehicle in violation of G.S. 20-106.

APPEAL by defendant from *Walker (Ralph A.), Judge*. Judgment entered 16 August 1977 in Superior Court, UNION County. Heard in the Court of Appeals 25 April 1978.

Defendant was tried on a bill of indictment, proper in form, charging him with felonious possession of a motor vehicle which he knew or had reason to believe had been stolen or unlawfully taken, defendant not being an officer of the law engaged at the time in the performance of his duties as such officer. (G.S. 20-106)

The trial judge charged the jury as to the crime of feloniously receiving stolen goods; the jury found defendant guilty of feloniously receiving stolen goods. (G.S. 14-71)

Defendant has appealed from judgment imposing a prison sentence of four to five years.

Attorney General Edmisten, by Associate Attorney D. Grimes, for the State.

L. K. Biedler, Jr. for defendant.

BROCK, Chief Judge.

Defendant was charged in the bill of indictment with possession of a stolen motor vehicle, a statutory offense, G.S. 20-106. (The indictment might also have been sufficient to charge an offense under G.S. 14-71.1, except that the alleged crime occurred prior to the effective date of that statute.) The jury was instructed on, and it found defendant guilty of, receiving stolen goods, also a statutory offense, G.S. 14-71. The two offenses are, however, separate offenses. The latter is not a lesser included offense under the former.

"The defendant has not been found guilty of the offense with which he was charged, and he was found guilty of an offense for which he was not charged. It therefore follows that the judgment imposed was incorrect." *State v. Rush*, 19 N.C. App. 109, 110, 197 S.E. 2d 891, 892 (1973).

Judgment arrested.

Judges HEDRICK and MITCHELL concur.

STATE OF NORTH CAROLINA v. JOHN WESLEY McCLENDON

No. 7826SC116

(Filed 11 July 1978)

Criminal Law § 101.4— status of deliberations—statement by jury foreman—mistrial not required

Defendant was not entitled to a mistrial when the jury foreman advised the court that the jury then stood 11 to 1 for guilty, since defendant failed to show that one juror voting for acquittal was being placed under undue pressure.

APPEAL by defendant from *Friday, Judge.* Judgment entered 30 September 1977, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 May 1978.

Defendant was charged with and convicted of armed robbery.

Attorney General Edmisten, by Associate Attorney Kaye Webb, for the State.

Keith M. Stroud, former Assistant Public Defender, for defendant appellant.

MORRIS, Judge.

The evidence was plenary to support the jury verdict. Defendant does not contend otherwise, although he has included in the record the evidence and the charge of the court to the jury. Neither of these is necessary for an understanding of the arguments presented. The two exceptions taken are to occurrences after the court had instructed the jury and they had begun their deliberation.

The first assignment of error is based on defendant's exception to the court's failure to declare a mistrial on its own motion when the jury foreman advised the court that the jury then stood 11 to 1 for guilty. After the jury had deliberated for some time, the jury returned to the courtroom and the court, in asking for their numerical position, said, "Mr. Foreman, sir, now, please follow the Court's instruction explicitly. The Court would like to know just the number now, one way or the other, how the jury stands; that's all now. Please, just the number, one way or the other." The foreman responded: "We have a vote of eleven for guilty, and one for not guilty."

Defendant contends that the court should then, on its own motion, have declared a mistrial because the one juror voting for acquittal was being placed under undue pressure. In *State v. Barnes*, 243 N.C. 174, 90 S.E. 2d 321 (1955), the Court said: "The spontaneous statement of one of the jurors when the jury returned to the courtroom that the jury stood ten for conviction and two for acquittal was innocuous." Defendant has shown no prejudice. This assignment of error is overruled.

By his remaining assignment of error defendant contends that the court committed prejudicial error in its subsequent instructions to the jury relating to their duty to reach a verdict. The instructions are in accord with those approved by our Supreme Court. *See State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977). Defendant's contention that they placed undue pressure on the one juror is without merit.

No error.

Judges VAUGHN and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 11 JULY 1978

Case	County	Disposition
AUSTIN v. AUSTIN No. 7720DC574	Stanly (73CVD472)	Affirmed
BENNETT v. BENNETT No. 7721DC803	Forsyth (75CVD3816)	No Error
BOST v. POWELL No. 7727SC792	Gaston (76CVS74)	Affirmed
BRASWELL v. COMR. OF MOTOR VEHICLES No. 778SC755	Wayne (75CVS555)	Affirmed
DORSETT v. LaGRANGE No. 7713SC691	Bladen (73CVS710)	No Error
FOREMAN v. COWELL No. 772SC581	Beaufort (75CVS288)	No Error
GRAGG v. POULTRY INDUSTRIES No. 7723DC778	Wilkes (76CVD0295)	Vacated and Remanded
HAYMORE v. HAYMORE No. 7717DC745	Surry (73CVD79)	Affirmed
IN RE DEW No. 773SC669	Carteret (76CVS381)	Affirmed
IN RE FLEMING No. 7824DC187	Madison (75J2)	Affirmed
LEONHARDT v. RHODES No. 7710SC733	Wake (72CVS1256)	Affirmed
MANGUM v. PERRY No. 7710DC808	Wake (76CVD527)	Affirmed
MIRROR CORP. v. LEMON TREE INNS No. 7723DC613	Wilkes (75CVD979)	Affirmed
MORAN v. SLUSS No. 7719DC787	Randolph (75CVD325)	Affirmed
RIDDLE v. RIDDLE No. 7725SC807	Burke (74CVS618)	Affirmed
STATE v. BLACKLEY No. 7815SC168	Orange (77CRS9570)	No Error
STATE v. BRYANT No. 788SC200	Wayne (77CR14550)	No Error

STATE v. DEESE No. 7816SC246	Robeson (77CR2768) (77CR2769)	No Error
STATE v. FAISON No. 784SC226	Duplin (77CRS1304) (77CRS1305)	Dismissed
STATE v. JOYNER No. 7810SC161	Wake (77CRS23601)	No Error
STATE v. LEWIS No. 788SC208	Wayne (77CR9765)	No Error
STATE v. McCOY No. 787SC25	Nash (76CRS9664)	New Trial
STATE v. MACKEY No. 7829SC215	Transylvania (77CRS694)	No Error
STATE v. MARTIN No. 7830SC10	Swain (77CRS1188)	No Error
STATE v. MILLER No. 7826SC251	Mecklenburg (76CRS72415)	Writ of Certiorari Dismissed
STATE v. MONTGOMERY No. 7726SC1040	Mecklenburg (75CR60937)	No Error
STATE v. PEEBLES No. 786SC133	Halifax (74CR3921)	Affirmed
STATE v. PETTUS No. 7826SC243	Mecklenburg (77CR38731)	No Error
STATE v. SCOTT No. 781SC220	Pasquotank (77CRS1412)	No Error
STATE v. SMITH No. 7817SC167	Caswell (77CR997)	No Error
STATE v. THOMAS No. 784SC191	Onslow (77CRS12670)	No Error
STATE v. THOMPSON No. 7826SC177	Mecklenburg (77CR24184)	No Error
STATE v. WARDSWORTH No. 7814SC140	Durham (77CR12380) (77CR12381)	No Error
TOWN OF SPINDALE v. MORROW No. 7729SC652	Rutherford (75CV391)	Reversed and Remanded
TYREE v. HUGGINS No. 778SC621	Wayne (75CVS981)	Affirmed
WEATHERWAX v. WEATHERWAX No. 7721DC837	Forsyth (76CVD613)	Affirmed

STATE OF NORTH CAROLINA v. MICHAEL LYNN KILLIAN

No. 7825SC132

(Filed 18 July 1978)

1. **Constitutional Law § 28; Burglary and Unlawful Breakings § 1; Larceny § 1— due process—equal protection—constitutionality of statutes**

G.S. 14-54, which makes it a felony to break or enter any building with intent to commit any felony or larceny therein, and G.S. 14-72, which makes larceny of property of the value of $200 or less a misdemeanor except in three instances, do not violate the equal protection or due process provisions of either the State or Federal Constitutions, since equal protection of the law 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, and these statutes meet this test because all persons who fall under the terms of the statutes are subject to the same sentence; and the challenged statutes are reasonably related to valid legislative goals and therefore meet the test of due process.

2. **Criminal Law § 142.3— conditions for work release—restitution—supporting evidence required**

G.S. 148-33.2(c) and G.S. 15A-1343(b)(6) together require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence, and the sum ordered or recommended must be reasonably related to the damages incurred; in this prosecution for breaking or entering and larceny where the evidence tended to show that the victims' home was totally ransacked, dresser drawers were broken, and a gun and hunting knife were not recovered, such evidence supported restitution in the amount of $500 ordered by the court.

3. **Criminal Law § 142.3— conditions for parole—sentencing court's recommendations not mandatory**

The Parole Commission may, but is not required to, implement the recommendation of the sentencing court for restitution as a condition of parole. G.S. 148-33.2(b).

4. **Criminal Law § 142.3; Constitutional Law § 40— parole—condition that defendant reimburse State for court-appointed counsel**

Under the provisions of G.S. 148-33.1 the Department of Corrections may, but is not required to, make deductions from the earnings of a prisoner on work-release and pay to the sentencing court for reimbursement to the State the amount so ordered by the court to reimburse the State for attorney fees paid on behalf of said prisoner, and under the provisions of G.S. 15A-1374 the Parole Commission may, but is not required to, implement the recommendation of the sentencing court and impose as a condition of parole that the prisoner reimburse the State for counsel fees.

APPEAL by defendant from *Baley, Judge*. Judgment entered 8 November, 1977, in Superior Court, CALDWELL County. Heard in the Court of Appeals 1 June 1978.

Defendant was convicted of (1) breaking or entering the dwelling of Anderson Dula on 10 February 1977, and (2) larceny of property pursuant thereto having a value of $535.00.

At trial defendant, by motion to dismiss under G.S. 15A-954, raised the constitutionality of G.S. 14-72(b)(2) and G.S. 14-54(a), the statutes he was charged with violating. The motion was denied.

For the State, Barbara Ann Killian testified that she was with defendant and Doyle Crisp on the morning of 10 February 1977, and saw them open a window, enter the Dula home, and bring out two pistols, a hunting knife and a pair of riding boots. Anderson Dula and his wife testified that their home was ransacked and identified a pair of boots and a pistol as their property which was missing after the break-in.

Defendant testified that he was not with Ms. Killian on the morning of 10 February, but did ride with her in her car that afternoon, and he saw the boots with a pistol in one of them.

Defendant appeals from judgment imposing concurrent sentences of three years as a regular youthful offender.

Attorney General Edmisten by Special Deputy Attorney General W. A. Raney, Jr. for the State.

Tuttle and Thomas by Bryce O. Thomas, Jr. for defendant appellant.

CLARK, Judge.

[1] The defendant attacks the constitutionality of G.S. 14-54(a) and G.S. 14-72(b)(2) on the ground that these statutes "allow a misdemeanor conviction under each Statute separately to bootstrap the other misdemeanor into a felony, the result being that two misdemeanors committed in concert bootstrap each other into two felony charges."

G.S. 14-54(a) makes it a felony to break or enter "any building with intent to commit any felony or larceny therein."

Under the 1969 amendment to G.S. 14-72 larceny of property of the value of two hundred dollars or less is a misdemeanor unless it is (1) from the person, or (2) from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or (3) the property is an explosive or incendiary device or substance.

At common law larceny was divided into two grades, both felonies: Grand larceny, which consisted of stealing goods above the value of twelve pence; and petit larceny, which was the theft of goods of less than that value. By statute North Carolina abolished the common law distinctions between grand and petit larceny. For a history of the larceny statute in this State, see *State v. Cooper*, 256 N.C. 372, 124 S.E. 2d 91 (1962).

Except as limited by the State and Federal Constitutions, the General Assembly has the inherent power to define and punish any act as a crime, including the power to declare an act criminal irrespective of the intent of the doer thereof. *State v. Graham*, 32 N.C. App. 601, 233 S.E. 2d 615 (1977).

G.S. 14-54 and G.S. 14-72 do not violate the equal protection or due process provisions of either the State or Federal Constitutions, as contended by the defendant.

Equal protection of the law 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). The challenged statutes meet this test because all persons who fall under the terms of the statutes are subject to the same sentence.

Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary, or capricious, and that the law be substantially related to the valid object sought to be obtained. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975). We find that G.S. 14-54 and G.S. 14-72 are reasonably related to valid legislative goals. The legislature has determined that breaking or entering with intent to commit larceny is a more serious crime than breaking or entering without the intent to commit larceny or any felony, and that larceny committed pursuant to breaking or entering is more serious than sim-

ple larceny. The legislature was acting within its authority in designating these crimes as felonies and in fixing punishment commensurate with their serious nature.

We have examined and considered defendant's remaining assignments of error in light of the rule that a new trial will be granted only if the error is prejudicial or harmful, and not mere technical error which could not have affected the result. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977); *State v. Cottingham*, 30 N.C. App. 67, 226 S.E. 2d 387 (1976). We find no merit in these assignments of error.

The trial court, after imposing sentence, added in the judgment the following provision:

> "It is recommended in each of these counts, that at any time the defendant is considered for Work Release, Parole or any benefit the prison authorities impose or shall deem appropriate, that he pay into the office of the Clerk of Superior Court of Caldwell County the sum of $500.00 as restitution to Anderson Dula, Route 5 Box 94, Lenoir, N. C. and that he pay the sum of $250.00 as reimbursement to the State of North Carolina for Attorneys fee for the defendant's Court appointed Attorney."

The sentencing court is not only authorized but is required by G.S. 148-33.2(c), when an active sentence is imposed, to consider whether, as a further rehabilitative measure, restitution or restoration should be ordered or recommended to the Parole Commission and the Secretary of Correction to be imposed as a condition of attaining work-release privileges. If not ordered or recommended the court shall so indicate on the commitment. If so ordered or recommended, "it shall make its order or recommendation a part of the order committing the defendant to custody."

Further, the above statute requires that the order or recommendation shall be "in accordance with the applicable provisions of G.S. 15-199(10)." G.S. 15A-1343(b)(6) has supplanted G.S. 15-199(10), relates to one of the authorized conditions of probation, and in pertinent part, provides:

> "Make restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted. When restitution or reparation is a condition of the

> sentence, the amount must be limited to that supported by the evidence. . . ."

[2] Together the two statutes require that any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence. The purpose of the provisions is rehabilitation and not additional penalty or punishment, and the sum ordered or recommended must be reasonably related to the damages incurred. If the trial evidence does not support the amount ordered or recommended, then supporting evidence should be required in the sentencing hearing. In the case *sub judice*, there was evidence that the Anderson Dula home was "totally ransacked", dresser drawers were broken, and a gun and hunting knife were not recovered. We find that the evidence supports the restitution amount of $500.00 as found by the court.

[3] It is noted that G.S. 148-33.2(b) provides that the Secretary and the Parole Commission are not bound by the recommendation of the sentencing court for restitution, "but if they elect not to implement the recommendation, they shall state in writing the reasons therefor, and shall forward the same to the sentencing court."

The trial court also recommended that restitution be made a condition of parole. The conditions of parole are set out in G.S. 15A-1374 which, in pertinent part, provides:

> "(a) In General.—The Parole Commission may in its discretion impose conditions of parole it believes reasonably necessary to insure that the parolee will lead a law-abiding life or to assist him to do so. The Commission must provide as an express condition of every parole that the parolee not commit another crime during the period for which the parole remains subject to revocation. When the Commission releases a person on parole, it must give him a written statement of the conditions on which he is being released.
>
> (b) Appropriate Conditions.—As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:
>
> * * * *

(12) Satisfy other conditions reasonably related to his rehabilitation."

In the "Official Commentary" following this statute the following statement appears: "The provisions on conditions of parole are parallel to those on conditions of probation . . . ."

We conclude that the Parole Commission may, but is not required to, implement the recommendation of the sentencing court for restitution as a condition of parole.

The trial court further recommended as a condition for work-release or parole that the defendant reimburse the State for counsel fees in the sum of $250.00. Under the provisions of G.S. 148-33.1 the Department of Corrections is required to deduct from the earnings of a prisoner on work-release the cost of the prisoner's keep, retain to his credit such amount as seems necessary to accumulate a reasonable sum to be paid to him when he is paroled or discharged from prison, and make disbursements from any balance of his earnings "as may be found necessary" for the purpose, among others [subsection (f)(4)], "To comply with an order from any court of competent jurisdiction regarding the payment of an obligation of the prisoner in connection with any case before such court."

In *State v. Foust*, 13 N.C. App. 382, 185 S.E. 2d 718 (1972), it was held that a condition of probation requiring the defendant to reimburse the State for cost of court-appointed counsel does not infringe defendant's constitutional right to counsel. The same constitutional principles applied in that case to probation are also applicable to work-release and parole.

[4] We conclude that under the provisions of G.S. 148-33.1 the Department of Corrections may, but is not required to, make deductions from the earnings of a prisoner on work-release and pay to the sentencing court for reimbursement to the State the amount so ordered by the court to reimburse the State for attorney fees paid on behalf of said prisoner.

And we conclude that under the provisions of G.S. 15A-1374 the Parole Commission may, but is not required to, implement the recommendation of the sentencing court and impose as a condition of parole that the prisoner reimburse the State for counsel fees.

We find that the defendant had a fair trial free from prejudicial error, and that the court had the authority to include in its judgment the recommendations for restitution to the aggrieved party and for reimbursement to the State for counsel fees.

No error.

Chief Judge BROCK and Judge WEBB concur.

THE MUNCHAK CORPORATION (DELAWARE) AND RDG CORPORATION, A JOINT VENTURE D/B/A/ THE CAROLINA COUGARS AND THE MUNCHAK CORPORATION (GEORGIA) v. JOE L. CALDWELL

No. 7718SC841

(Filed 18 July 1978)

1. Pleadings § 33.3— denial of amendment to conform to proof—no implied consent for amendment

In an action to reform a provision of the contract of a professional basketball player based on an alleged mutual mistake, plaintiffs' motion to amend their complaint to conform to evidence of fraud was properly denied where (1) there was no evidence from which an inference of fraud could be drawn, and (2) defendant's failure to object to the evidence plaintiffs contend supports the issue of fraud did not amount to his implied consent to amend the pleadings to allow the issue of fraud since the evidence went to the issue of mutual mistake which was raised by the pleadings. G.S. 1A-1, Rule 15(b).

2. Contracts § 26; Reformation of Instruments § 6— reformation of contract—testimony as to "agreement"

In an action to reform a provision of a written contract for mutual mistake, the trial court did not err in refusing to allow plaintiffs' witnesses to testify that an "agreement" other than the written contract had been reached and in instructing the jury to consider the word "agreement" only as it related to preparation of a final draft for adoption of the parties since whether an agreement was reached was an ultimate issue to be determined by the court and jury.

3. Appeal and Error § 49— exclusion of evidence—similar evidence admitted—harmless error

In an action to reform the pension provision in the contract of a professional basketball player, error, if any, in the exclusion of the notes of defendant's negotiating agent purportedly showing that defendant's pension was to be equivalent to the NBA pension plan then in effect was harmless where the same evidence was presented to the jury in the deposition of another witness.

APPEAL by plaintiffs from *Kivett, Judge*. Judgment entered 14 January 1977, in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 June 1978.

On 30 October 1970, Southern Sports Corporation, predecessor in interest to the plaintiffs, and defendant Caldwell entered into a contract whereby Caldwell agreed to provide professional services as a basketball player for the Carolina Cougars of the American Basketball Association (ABA). The contract provided in part:

> "5. At the time of the rendering of services to Club by Player, Player shall be eligible for and shall receive entitlement to pension benefits from an insurance carrier acceptable to Player at least equal to the following:
>
> "(a) The sum of Six Hundred Dollars ($600.00) per month for each year of services as a professional basketball player, which sum shall be paid at age fifty-five (55) . . . ."

In the spring of 1972, a dispute arose regarding the above quoted portion of the contract. Plaintiffs contended that the intention of the parties to the contract was that Caldwell be provided a retirement pension equivalent to that of the National Basketball Association (NBA). The NBA pension then in effect was $60.00 per month for each year a player performed basketball services as a professional player. Caldwell contended that the contract provision expressed the agreement of the parties. After attempts to resolve the dispute failed, plaintiffs filed this action to reform the contract.

At trial, plaintiffs put on evidence tending to show that in the fall of 1970 plaintiffs' predecessor in interest wanted to sign a "superstar" with the Cougar team. During the 1969-70 basketball season, Caldwell had been an outstanding all-star player for the Atlanta Hawks of the NBA. Robert Gorham, one of the principal owners of Southern Sports, initiated efforts to induce Caldwell to play for the Carolina Cougars during the 1970-71 season. Gorham testified concerning the intricate negotiations with Caldwell and Marshall Boyar, Caldwell's friend and agent. The negotiations were conducted in secrecy due to the fact that the Atlanta team had an option to extend Caldwell's contract and had made attempts to sign Caldwell for the next year. Despite his extensive

note-taking during the negotiations, Gorham testified that he had no notation at any point concerning a pension for Caldwell.

Charles Dameron, attorney for Southern Sports who participated in drafting the contract signed by Southern Sports and defendant, testified that the consensus during the negotiations was to equalize Caldwell's pension with that of the NBA. Dameron also stated that the language of clause 5 of the contract was copied verbatim from the contract of another player, Zelmo Beatty. He explained the alleged error in clause 5 of the contract in question by pointing out that the parties anticipated that defendant would play ten years and would, therefore, receive a total of $600 per month.

Defendant put on evidence tending to show that the pension clause was a major inducement to his entering into the contract. Defendant himself pointed out that for two basketball seasons, 1970-71 and 1971-72, defendant and his representatives made efforts to have the pension plan funded. It was not until 15 May 1972, that Jerome Ehrlich, an attorney for defendant, was informed by plaintiffs that they considered the $600 per month figure to be a typographical error.

At the close of all the evidence, the trial judge gave his charge to the jury and submitted the following issues. The jury's verdict is noted in parentheses.

"ISSUES

"1. Was the following underlined language included in paragraph 5(a) of the contract included by mutual mistake of the parties?

'(a) The sum of Six Hundred Dollars ($600.00) per month for each year of services as a professional basketball player, which sum shall be paid at age fifty-five (55)'?

"ANSWER: (No.)

"2. Was the above paragraph as written in the contract executed by the parties on October 30, 1970, in accord with the intention of Joe L. Caldwell at the time he signed the contract?

"ANSWER: (Yes)

"3. Was the above paragraph as written in the contract executed by the parties on October 30, 1970 in accord with the intention of Southern Sports Corporation d/b/a The Carolina Cougars at the time its representative, Carl Scheer, signed the contract?

"ANSWER: (Yes)"

From this verdict and the court's judgment, plaintiffs appeal.

Forman and Zuckerman, by William Zuckerman, and Powell, Goldstein, Frazier & Murphy, for plaintiff appellants.

Smith, Moore, Smith, Schell & Hunter, by Bynum M. Hunter and James L. Gale, for defendant appellee.

ARNOLD, Judge.

I.

[1] The plaintiffs' first contention is that the trial court erred (1) in denying plaintiffs' motion to amend their complaint to allege fraud, (2) in instructing the jury that fraud was not an issue, and (3) in refusing to instruct the jury that fraud of an agent is chargeable to a principal with knowledge.

Plaintiffs made their motion to amend pursuant to G.S. 1A-1, Rule 15 which reads in pertinent part:

"(a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

"(b) *Amendments to conform to the evidence.*—When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues

may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues."

Although it is difficult to determine from the record exactly when plaintiffs made their motion to amend, it is clear that the motion came at some point during the trial. Under Rule 15(a), the ruling on such a motion is left to the discretion of the trial judge with the mandate, however, that where justice so requires, leave to amend *shall* be freely granted. Plaintiffs do not argue that the trial judge abused his discretion in refusing to grant leave. Instead they argue that the amendment to allege fraud should have been allowed in order that the amended pleadings would conform to the evidence at trial. See Rule 15(b). We cannot find, however, that the pleadings were amended by the doctrine of implied consent. In *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975), the Supreme Court, in applying Rule 15(b), accepted the analysis of the Sixth Circuit:

> " 'We think it clear that if a theory of recovery is tried fully by the parties, the court may base its decision on that theory and may deem the pleadings amended accordingly, even though the theory was not set forth in the pleadings or in the pretrial order. *See Wallin v. Fuller*, 476 F. 2d 1204, (5th Cir. 1973); *Monod v. Futura, Inc.*, 415 F. 2d 1170 (10th Cir. 1969); *Dering v. Williams*, 378 F. 2d 417 (9th Cir. 1967); Fed. R. Civ. P. 15(b). However, the implication of Rule 15(b) and of our decision in *Jackson v. Crockarell* [475 F. 2d 746 (6th Cir.)] is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue. *See Bettes v. Stonewall Ins. Co.*, 480 F. 2d 92 (5th Cir. 1973); *Standard Title Ins. Co. v. Roberts*, 349 F. 2d 613, 620 (8th Cir. 1965); *Niedland v. United States*, 338 F. 2d 254, 258 (3d Cir. 1964).' " *Id.* at 77, 215 S.E. 2d at 786-87, quoting *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F. 2d 709 (6th Cir. 1974).

The evidence which plaintiffs contend should have led to an amendment under Rule 15(b), included testimony of Ehrlich,

Boyar and Caldwell that the erroneous provision in the contract was known to them on 28 October 1970, two days before the contract was signed. Moreover, according to plaintiffs' position, despite an "ambiguity" in subparagraph (c) of Paragraph 5, Ehrlich, Boyar and Caldwell elected not to mention the "ambiguity" for fear of drawing attention to the erroneous pension provision.

First of all, we disagree with plaintiffs' interpretation of the testimony they cite. Ehrlich, a witness of plaintiffs, testified:

> ". . . I pointed out that I didn't like Paragraph (c) because I thought it was ambiguous and should be clarified, and I explained it to Mr. Caldwell and Mr. Boyar, and Mr. Caldwell and Boyar both read it over and Boyar ventured the opinion that we should leave the paragraph alone because it was an item of great consideration and that if we tried to delineate or carefully define subparagraph (c), they might think the rest of the paragraph was subject to renegotiation, and he did not want to renegotiate it."

In addition, both Boyar and Caldwell testified that they did not want to renegotiate Paragraph 5 and, therefore, elected not to call attention to subparagraph (c). We see no evidence of fraud in this record, and no evidence from which an inference of fraud can be drawn.

Secondly, we believe that the evidence cited by plaintiffs as supporting the issue of fraud went to the issue of mutual mistake which was properly raised by the pleadings. Defendant, under the reasoning of the *Eudy* case, was not required to object to evidence properly raised by the pleadings. His failure to do so, therefore, did not amount to his implied consent to amend the pleadings to allow the issue of fraud.

It is our conclusion that the motion to amend the pleadings was properly denied, and we find no error in the trial court's failure to charge the jury on the issue of fraud.

II.

[2] Plaintiffs' next contention is that the trial court erred in striking the testimony of plaintiffs' witnesses Scheer and Gorham, and in instructing the jury on the interpretation of the word

"agreement" as contained in testimony by deposition of Kenneth Goldman. In essence, the trial court refused to allow testimony by three of plaintiffs' witnesses that an agreement—other than the written contract—had been reached; the court further instructed the jury at one point during the presentation of evidence that it would consider the word "agreement" only as it was used pertaining to preparation of a final draft for adoption by the parties. It is plaintiffs' argument that since plaintiffs must prove the terms of an oral agreement as one prerequisite for reformation, testimony that an agreement, or meeting of the minds, was reached is competent. We cannot agree with this argument. Whether an agreement was reached is a mixed question of law and fact. In the instant case, this question was an ultimate issue to be determined by the court and the jury, not a conclusion to be drawn by a witness. *See* 1 Stansbury § 130 (Brandis Rev. Ed. 1973). *See also, Moye v. Eure*, 21 N.C. App. 261, 204 S.E. 2d 221, *cert. denied* 285 N.C. 590, 205 S.E. 2d 723 (1974). We also point out that plaintiffs were in no way restricted in testifying as to the details of the negotiations. Thereafter it was for the jury to determine whether an agreement was reached.

Moreover, even if it be assumed that the court's instruction to the jury to consider the word "agreement" only as it related to preparation of a final draft for adoption of the parties was error, any error was harmless in view of the court's final charge to the jury:

> "A court has the power to reform an instrument for the mutual mistake of the parties in order to make the instrument express their true intent, but I further instruct you that a court may not reform an instrument or one of its provisions unless the mistake is mutual. Where the parties agree as to the provisions which should be inserted in an instrument, but through inadvertence or mistake of the draftsman, the instrument fails to express the intent of the parties, the instrument or a provision therein may be reformed, but an instrument or one of its provisions may not be reformed for inadvertence of the draftsman if the instrument as drawn is in accord with the understanding of one of the parties, the remedy of reformation being available only in instances of mutual mistake."

III.

[3] Finally, plaintiffs assign error to the ruling by the court which disallowed the introduction of plaintiffs' Exhibit No. 7 into evidence. The result of this ruling, in plaintiffs' view, deprived the jury from considering notes made by Caldwell's own negotiating agent, Kenneth Goldman, which notes, according to plaintiffs, reflect that Caldwell's pension was to be equivalent to the NBA pension plan then in effect.

The handwritten notes contained in the exhibit are, for the most part, illegible. Nor is there any date on the notes. Both sides present authority relating to the introduction of business records made at or near the time of the transaction and authenticated by a witness who is familiar with such records and with the method by which the records were made. Defendant's position is that no basis was shown from which to infer that Exhibit No. 7 actually was made at or near the time of the transaction.

We conclude that it is unnecessary to decide whether the exhibit should have been admitted as a business record. Any error in the exclusion of the exhibit was harmless to plaintiffs. The very same evidence which plaintiffs contend the exhibit reflected, *i.e.*, that Caldwell was to receive the equivalent pension plan as was in effect in the NBA, was contained in the deposition of Kenneth Goldman which plaintiffs presented to the jury. *See Rome v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474 (1959).

We can find no error sufficiently prejudicial to warrant a new trial.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. THOMAS P. MOORE AND TYRONE JAMES

No. 7818SC242

(Filed 18 July 1978)

1. **Criminal Law § 112— erroneous instruction on burden of proof—no prejudicial error**

Though the trial court, in a preliminary statement made to a group of prospective jurors before the trial began and before a jury was impaneled, erred in stating that the State had the burden of proving the defendants' guilt "by the greater weight of the evidence," defendants were not prejudiced, since neither defendant objected to the incorrect statement, and the court's subsequent correct instruction on the State's burden of proof in the charge to the jury was sufficient to overcome any possible prejudice caused by the earlier incorrect statement.

2. **Criminal Law § 99.5— court's questioning of counsel—no expression of opinion**

The trial judge did not express an opinion on the evidence during trial when he asked defense counsel questions aimed at clarifying a question which defense counsel had put to a witness.

3. **Criminal Law § 113.7— acting in concert—jury instruction proper**

Where the trial judge instructed the jury that a guilty verdict could be returned as to a particular defendant only upon a finding that that defendant "and those acting in concert with him" had committed each element of the offense, the instructions made it clear that whether defendants were acting in concert was for the jury to decide, and the instructions placed the burden of proof regarding acting in concert on the State and did not amount to an opinion regarding either defendant's participation.

4. **Criminal Law § 118.2— defendant's contentions—jury instructions adequate**

The trial judge's instruction that the State contended that a verdict of guilty should be returned and one defendant contended that the verdict should be not guilty was not inadequate because it gave no explanation as to what defendant was pleading not guilty to, since defendant's not guilty plea applied to all charges included in the indictment for armed robbery.

5. **Criminal Law § 99.5— conversation between witness and counsel—admonition by court**

The trial judge's direction that there be no conversation between defense counsel and the prosecuting witness did not limit defendant's cross-examination of the witness but instead amounted only to a direction to counsel and the witness to speak louder.

6. **Robbery § 4.6— armed robbery—acting in concert—sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for armed robbery and the trial court did not err in failing to submit to the jury the lesser included offense of larceny where it tended to show that the complaining witness walked up to a group of men, including defendant, on a city street to ask direc-

tions; defendant pushed at the witness whose watch then fell off; defendant picked up the watch; another man endangered the witness's life by cutting him with a razor; evidence was sufficient to show that defendant was acting in concert with the man who used the razor; and the evidence disclosed that, if any offense was committed, such offense was armed robbery and not larceny.

7. **Criminal Law § 93— evidence not presented by defendant—no denial of right to present evidence**

Defendant was not denied an opportunity to present evidence where his attorney requested permission to present his testimony later in the trial; the judge did not respond directly to the request but directed another defendant to present his evidence; after presentation of that evidence, defendant's attorney announced that the defendant rested; and the attorney made no request or attempt to present evidence.

8. **Criminal Law § 122.1— instructions after retirement of jury—instructions proper**

Where a juror, after the jury had begun deliberations, asked the judge to "restate the State's position on robbery as it relates to two or more persons," the judge properly explained the law of acting in concert and thereby answered the juror's question.

APPEAL by defendants from *Seay, Judge*. Judgments entered 21 October 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 June 1978.

Defendants were tried on their pleas of not guilty to indictments charging them with armed robbery of Willard R. Jackson. The cases were consolidated for trial.

The State presented evidence to show that on 28 April 1977 at approximately 9:30 or 10:00 p.m., Willard R. Jackson became lost while driving to his motel room in Greensboro. He saw a group of men standing outside a Pic-n-Pay store drinking beer and wine, and he approached the group to ask for directions. Following a brief verbal exchange, defendant Moore cut Jackson with a razor. Jackson received cuts on his left hand, his chest, and his back, requiring a total of 128 or 130 sutures. Defendant James took Jackson's watch, and another person in the group took Jackson's wallet. Jackson was unarmed at the time.

Defendant Moore presented evidence to show that Jackson precipitated the attack by attempting to start a fight with Moore. Moore testified that he was defending himself when he cut Jackson with the razor.

The jury found both defendants guilty as charged. Defendants appeal from judgments imposing prison sentences.

Attorney General Edmisten by Associate Attorney Thomas H. Davis, Jr., for the State.

Lee & Lee by Michael E. Lee and Charles R. Coleman for defendant appellant Thomas P. Moore, Jr.

John F. Comer for defendant appellant Tyrone James.

PARKER, Judge.

I.

[1] We consider first the questions raised by both defendants on this appeal. Before the trial began and before a jury was impaneled, the trial judge made a preliminary statement to a group of prospective jurors. In this statement the judge identified the defendants and their attorneys, briefly described the charges, and explained the process of jury selection. He also stated that the State has the burden of proving the defendants' guilt "by the greater weight of the evidence." Defendants assign error to this statement by the judge regarding the State's burden of proof.

The State must, of course, prove a defendant's guilt beyond a reasonable doubt, and the judge's statement to the contrary was clearly erroneous. However, we fail to see how this misstatement could have been prejudicial to defendants. The misstatement occurred before the trial began and before a jury was impaneled. Neither defendant objected to the incorrect statement, and the judge correctly instructed on and defined reasonable doubt in his final charge to the jury.

We are aware of cases holding that an erroneous instruction on a material aspect of the case must be held prejudicial even though the particular point is later instructed upon correctly. *E.g., State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976). "Moreover, an erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point." *State v. Harris*, 289 N.C. 275, 280, 221 S.E. 2d 343, 347 (1976). In each of those cases, the erroneous instruction occurred during the judge's final charge to the jury. In the present case, the error occurred before any evidence was presented and before

a jury was impaneled to hear the case. Under these circumstances, we conclude that the correct instruction on the State's burden of proof in the charge to the jury was sufficient to overcome any possible prejudice caused by the earlier incorrect statement. Therefore, this assignment of error is overruled.

[2] Defendants next contend that the trial judge committed error by expressing an opinion on the evidence during the trial and in charging the jury. First, defendants complain of the following, which occurred during trial while defense counsel was cross-examining Jackson, the complaining witness:

> MR. LEE: Q. Do you recall, Mr. Jackson, saying to any one of the individuals that were on that parking lot that night that you would give somebody some money if they would give you some directions?
>
> WITNESS: [Jackson] A. No, sir.
>
> MR. LEE: Q. You don't recall saying that?
>
> WITNESS: A. No, sir.
>
> MR. LEE: Q. Do you recall offering to fight these gentlemen one at a time to get your directions?
>
> WITNESS: A. No, sir.
>
> THE COURT: Did you ask him if he was going to fight these people to get directions?
>
> MR. LEE: Yes, sir.
>
> THE COURT: Maybe I misunderstood that. Do you want to ask it again?
>
> MR. LEE: No, sir, I believe he understood it. The jury heard it.

We find no expression of opinion prohibited by G.S. 1-180 (now G.S. 15A-1222 and -1232) in the judge's questions. The judge's questions were directed to an attorney rather than a witness, and they were simply aimed at clarifying a question. The judge's questions did not cast doubt upon the credibility of any witness and did not amount to an opinion on the facts.

[3] Defendants also complain of portions of the judge's charge to the jury defining the elements of armed robbery and common law robbery. The State had presented evidence that the criminal acts were committed by various persons acting in concert, and the judge instructed the jury that a guilty verdict could be returned as to a particular defendant only upon a finding that that defendant "and those acting in concert with him" had committed each element of the offense. Defendants contend that this method of instructing the jury amounted to an opinion that the defendants and others were acting in concert. We do not agree. The judge had previously defined acting in concert, and his instructions made it clear that whether defendants were acting in concert was for the jury to decide. These instructions placed the burden of proof regarding acting in concert on the State and did not amount to an opinion regarding either defendant's participation. Consequently, this assignment of error is overruled.

II.

[4] The preceding discussion disposes of all but one of the questions raised by defendant Moore. Moore's final contention is that the trial judge failed to properly submit his contentions to the jury. The judge instructed the jury that the State contended that a verdict of guilty should be returned and the defendant contended that the verdict should be not guilty. Moore argues that this charge is inadequate "in that it conveyed to the jury that defendant's plea was not guilty without an explanation as to what defendant was pleading not guilty to." This contention is without merit. Defendant pled not guilty before trial, and that plea applied to all charges included in the indictment for armed robbery, including common law robbery and assault. Defendant admitted that it was he who cut the prosecuting witness, but at no time did he change his plea of not guilty. This assignment of error is overruled.

III.

[5] The remaining assignments of error pertain only to the appeal of defendant James. He contends that the trial court improperly limited his cross-examination of the prosecuting witness during the following exchange:

MR. COMER: You were cut from the center of your left hand downward toward the crotch of your thumb and first finger, is that correct?

WITNESS: [Jackson] Yes, with a small one here.

MR. COMER: Would you let me see that one?

THE COURT: Let's not have any conversation up there that we don't all hear.

MR. COMER: I'm sorry. I was trying to describe for the jury and the record.

THE COURT: There will be no conversation between you and the witness.

Contrary to James's contention, the judge's intervention did not limit his cross-examination of the witness. Although the judge's direction that there be no conversation between defense counsel and the witness could have been phrased more carefully, it is clear that the judge was merely telling counsel and the witness to speak louder.

[6] Defendant James next assigns error to the denial of his motions for nonsuit. This assignment of error cannot be sustained. The essential elements of the offense of armed robbery set forth in G.S. 14-87 are "(1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of 'firearms or other dangerous weapon, implement, or means'; and (3) danger or threat to the life of the victim." *State v. Joyner*, 295 N.C. 55, 63, 243 S.E. 2d 367, 373 (1978).

The State's evidence showed that when Jackson, the complaining witness, walked up to the group of men at the Pic-n-Pay store, "James pushed at him and his watch fell off and he picked it up. . . . Tyrone James picked the watch up off the ground." This evidence shows that James unlawfully took the personal property of another. The State's evidence also showed that defendant Moore endangered the life of the victim by the use of a dangerous weapon. While there was no evidence that James actually cut or threatened to cut the victim, the evidence was sufficient to show that James was acting in concert with Moore. Although no express agreement was shown, the evidence supports a finding that

James and Moore were jointly taking advantage of an unexpected criminal opportunity. Thus, the State presented substantial evidence of each element of the offense of armed robbery.

Defendant James also contends that even if the State presented sufficient evidence of armed robbery, the court erred in failing to submit to the jury the lesser included offense of larceny. James accurately points out that the court must instruct on lesser included offenses if there is evidence from which the jury could find the lesser crime was committed. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971). However, neither the defendants' nor the State's evidence shows that James committed the offense of larceny.

The nature of Moore's attack upon Jackson is crucial in determining the offense or offenses committed by James. Although the court gave Moore the benefit of a jury instruction on self-defense, the evidence was insufficient to support a plea of self-defense. Moore's testimony shows that his attack upon Jackson with a razor was in response only to Jackson's actions in removing his vest and approaching, alone and unarmed, a group of men. These actions were insufficient to put Moore in real or apparent danger of bodily injury or offensive bodily contact. Thus, Moore's own testimony establishes that he was, at the least, guilty of an assault upon Jackson with a deadly weapon.

The evidence then shows that James joined in the criminal activities begun by Moore, taking advantage of Jackson's position as the victim of Moore's attack with a dangerous weapon to steal Jackson's watch. Although no advance plans were made to rob Jackson, this evidence clearly tends to show that James was acting in concert with Moore to accomplish the taking of personal property by the use of a dangerous weapon, accompanied by danger or threat to the victim's life. This evidence amounts to armed robbery, and it does not show the offense of larceny. Therefore, the court properly declined to instruct the jury on larceny, and this assignment of error must be overruled.

[7] When the judge asked defendant James if he had any evidence to present, James's attorney requested permission to present his testimony later in the trial. The judge did not respond directly to the request but directed another defendant, Cornelius, who is not involved in this appeal, to present his evidence. James

now contends that he was denied a proper opportunity to present his evidence. We disagree. The sequence of introducing evidence rests largely in the discretion of the trial judge, subject to the necessity of allowing each party a fair opportunity to present evidence. 1 Stansbury's N.C. Evidence (Brandis Rev.) § 22. After defendant Cornelius presented his evidence, James's attorney announced that "[t]he defendant, Tyrone James, rests." He made no request or attempt to present evidence. Therefore, the record shows that he was not denied an opportunity to present evidence later in the trial.

[8] The final assignment of error presented by defendant James is directed to supplementary instructions the judge gave the jury after deliberations had begun. A juror asked the judge to "restate the State's position on robbery as it relates to two or more persons." James contends that the judge's answer was not responsive to the juror's question. The record does not support this contention. The judge explained the law of acting in concert, and after giving the explanation, the juror indicated that the judge had properly answered the question. The judge's answer was a fair and accurate statement of the law of acting in concert and was consistent with his instructions in the main portion of the charge. This assignment of error must be overruled.

We conclude that both defendants received a fair trial, free from prejudicial error.

No error.

Judges CLARK and ERWIN concur.

SHIRLEY S. BEASLEY v. DWIGHT R. BEASLEY

No. 771DC771

(Filed 18 July 1978)

Divorce and Alimony § 24.9— child support—ability of father to pay—findings supported by evidence

Evidence was sufficient to support the trial court's finding that defendant's income and assets after expenses were sufficient to enable him to pay increased child support and plaintiff's attorney's fee, though defendant of-

fered evidence that his net income was $760 per month and his expenses were $968.50 per month, since all of defendant's expenses were not necessary expenses, and the needs of the children of defendant's first marriage could not be subservient to the needs of his second family.

Judge MARTIN dissenting.

APPEAL by defendant from *Beaman, Judge.* Order entered 22 July 1977 in District Court, DARE County. Heard in the Court of Appeals 20 June 1978.

This proceeding arises out of a divorce action instituted by plaintiff wife against defendant husband. Plaintiff was granted an absolute divorce in 1972 and awarded child support for the two minor children of the marriage in the amount of $35 per week.

In February 1977, plaintiff filed a motion in the cause to increase the amount of the child support payments. Following a hearing, of which defendant was properly served notice but failed to appear, the court increased the child support payment to $50 per week plus medical and dental expenses. In addition, defendant was ordered to pay plaintiff's attorney $130 in attorney's fees.

In June 1977, plaintiff obtained an order requiring defendant to appear and show cause why he should not be held as for contempt for failing to comply with the order of 8 February 1977. Defendant was in arrears $75 in child support and $65 on the attorney's fees. At the hearing, plaintiff introduced into evidence the February 1977 order which included findings that defendant's income had increased since the last hearing, that the necessary expenses of the two minor children had increased, that defendant is paying nothing toward their medical and dental expense, that defendant has purchased a home for his family in New York, and that plaintiff could manage to take care of the children's needs upon payment by defendant of $50 per week for their maintenance and support. The court concluded "[t]hat the defendant's primary responsibility is to these two children and the Court cannot allow their needs to be subservient to the needs of the remarriage and other children", and ordered that defendant pay $50 per week for the support of the two minor children, that defendant pay all medical and dental expenses with the exception that he be required to pay only one-half of the orthodontic expense for one child estimated to amount to a total of $1450 over a

four-year period, and that defendant pay plaintiff's attorney the sum of $130.

Defendant testified that when he was paying $35 per week his weekly net income was $90; that his present net income is $760 per month. He further testified that he had purchased a three bedroom home for him, his wife and child to occupy in New York; that the home cost $40,000, and he acquired the $5,000 down payment by the sale of his residence in North Carolina; that his current monthly expenses amounted to $968.50 per month including child support payments to plaintiff of $140; that his present wife has to work part time to help meet expenses of the family.

The trial court found that defendant's income and assets, after consideration of his expenses, were sufficient to enable him to pay the arrearages. Based on this finding and defendant's admission of his noncompliance, the court concluded that defendant had willfully refused to comply with the February 1977 order, currently possessing the means to do so and, therefore, was in willful contempt of court. Defendant appealed.

Aldridge and Seawell, by Christopher L. Seawell and Daniel D. Khoury, for plaintiff appellee.

LeRoy, Wells, Shaw, Hornthal, Riley and Shearin, by John G. Gaw, Jr., for defendant appellant.

MORRIS, Judge.

Defendant contends that the evidence presented is not sufficient to support the court's finding that defendant's income and assets after expenses are sufficient to enable him to pay the increased child support and attorney's fee. We disagree.

Unquestionably, in determining defendant's ability to meet the required payments for the support of his children, some reasonable allowance must be made for his living expenses, *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), and for the fact that he has a second family. However, we agree with the court that the needs of children of his first marriage cannot be made subservient to the needs of his second family.

Included among the monthly expenses to which defendant testified were house payment of $305, utility bill of $105, and food for himself only of $200. We find it difficult to believe that these are *necessary* living expenses of the defendant. Obviously, there is some equity in the house. Defendant testified he drove a two-year-old car on which he made monthly payments of $145. There was no evidence with respect to how long those payments would continue. In the judgment before us, the court found as a fact that the defendant had the expenses to which he testified. There was no finding that these, or any of them, were *necessary* expenses. Nor was such a finding required. Finding of fact No. 17 clearly shows that the court did not consider all of the expenses listed necessary expenses. That finding is as follows:

> "That the defendant's income and assets, *after consideration of his expenses*, is sufficient to enable the defendant to have paid the arrearages as provided in said Order of February 8, 1977 as well as the attorney fees also provided in said Order." (Emphasis supplied.)

A case strikingly similar to the case *sub judice* is *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977). There the father testified that his monthly expenses were in excess of $900 and his net monthly income was $589.45; and that his present wife had to work to help meet expenses. There was also testimony that he was buying a home; that he was paying on an automobile for his wife as well as one for himself; and that he owned golf equipment and maintained membership in a golf club. The court, in its order, set out all the expenses to which the father testified but found that he had the ability to pay the support ordered, which was a substantial increase over that provided for in a separation agreement. The father appealed contending that the evidence did not support a finding of the father's ability to pay. We said, in an opinion by Chief Judge Brock, "The finding of the trial court that the plaintiff had the ability to pay the support ordered is supported in the record by competent evidence." 32 N.C. App. at 165, 231 S.E. 2d at 43. So it is in the case *sub judice*.

Defendant further contends that the findings of fact were insufficient to support the court's conclusion that defendant has willfully refused to comply with the February 1977 order and currently possesses the means to do so. In order for defendant's

failure to comply to be contumacious, he must possess the means to comply and deliberately refuse to do so. *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E. 2d 554 (1974). Here defendant admitted noncompliance and his only excuse, as the court found, was that he did not feel that he could afford to pay the increase of $15 per week. As we have previously pointed out, the court's finding of ability to pay was supported by the evidence. This assignment of error is overruled.

Affirmed.

Judge VAUGHN concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

An order awarding or increasing child support must be based not only on the needs of the child, but also *on the ability of the father to meet these needs. Holt v. Holt*, 29 N.C. App. 124, 223 S.E. 2d 542 (1976). Thus, paramount to the validity of any child support order is the trial court's finding, from the evidence presented, that the father currently possesses the ability to pay the amount awarded. This Court is bound by such a finding only if it is supported by competent evidence in the record. *Sawyer v. Sawyer*, 21 N.C. App. 293, 204 S.E. 2d 224 (1974).

Within the framework of these principles, the majority holds that the evidence presented at the hearing below was sufficient to support the trial court's finding that defendant's income and assets after expenses are sufficient to enable him to pay the increased child support and attorney's fee. With this I cannot agree.

At the hearing, defendant presented evidence of his monthly expenses as follows: mortgage payment, including taxes and insurance—$305.00; car payment—$145.00; utility bill—$105.00; child support payments to plaintiff—$140.00; life and accident insurance—$11.50; car insurance—$30.00; telephone bill—$12.00; clothing (self only)—$10.00; food (self only)—$200.00; medical and dental—$10.00. This evidence was expressly found as fact by the trial court and establishes that defendant had *personal* expenses, exclusive of the additional expenses of his second wife and a child

of that marriage, totaling $968.50 per month. Defendant's evidence further shows and the court found as fact that defendant's net monthly income is $760.00, and his only assets include a mortgaged house—which defendant purchased only a year prior to the hearing, deriving the down payment from the sale of his home in North Carolina—and a two-year-old car on which he is still making payments. None of these assets is income producing and there is no evidence that defendant has income from any other source.

Plaintiff's evidence at the hearing consisted of the February 1977 order which, pertinent to defendant's ability to comply, states only that defendant has increased his income and has purchased a home.

In the face of this evidence, the majority justifies the challenged finding by asserting that certain expenses testified to by defendant—specifically, the house payment and utility and food bills—were not *necessary* living expenses, and that the trial court intimated the same by stating that defendant's income and assets, *after consideration of his expenses*, were sufficient to enable him to meet the increased payments. Taking judicial notice of the expenses essential to maintaining even a minimum standard of living in today's society, I am unable to concur in the reasoning employed by the majority in its efforts to disregard the significance of the expenses testified to by defendant and found as fact by the court.

Furthermore, I cannot acquiesce in the majority's reliance on *Wyatt v. Wyatt, supra,* as supportive of the position it has taken in the case at bar. Although not included in this Court's reported opinion of that case, the record on appeal in *Wyatt* discloses, as the majority states, that the father had monthly expenses in excess of $900.00—specifically, $911.00—and personal net income of $589.45 per month. However, a further look at that record on appeal reveals that the father's second wife brought home an additional $235.00 per month and received $80.00 per month support for a child of a prior marriage. These additional sources of income were significant to a determination of his ability to pay the increased support when one considers that the expenses listed by the father in *Wyatt,* unlike the instant case, included those expenses incurred by the father in maintaining his present family

unit—his second wife, her child from a prior marriage and their twin daughters. Finally the father in *Wyatt* testified that he was a member of a golf club with an annual membership fee of $125.00 and owned golf clubs worth $500.00. These facts in mind, I cannot say that this Court's decision in *Wyatt* compels or even strongly supports an identical result in the instant case.

On the evidence presented at the hearing below, I strongly believe that the trial court's finding that defendant possessed sufficient income to comply with the support order was error.

STATE OF NORTH CAROLINA v. WILLIS REGINALD CREECH

No. 7712SC1070

(Filed 18 July 1978)

1. **Criminal Law § 92.4— multiple charges against same defendant—consolidation proper**

   In a prosecution for rape, aggravated kidnapping and crime against nature defendant's argument that he was prejudiced by consolidation of the cases because, had they not been consolidated, he could have elected to testify in one case if he so desired without being forced to testify in the others is without merit since the offenses joined for trial were based on a series of acts or transactions connected together and constituted a continuing criminal episode; evidence of one offense would certainly be admissible in trials on the other offenses; defendant failed to show the manner in which his right against self-incrimination was violated; and defendant failed to move for severance at the close of all the evidence. G.S. 15A-927(a)(2).

2. **Criminal Law § 127.1— motion in arrest of judgment—improper method for raising jurisdictional question**

   Defendant's motion in arrest of judgment made on the ground that the court lacked jurisdiction because the crime occurred on a military reservation was properly denied, since the question of jurisdiction, as to the place of the commission of the crime, is to be proved as a part of the general issue and cannot be raised on a motion in arrest of judgment.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 5 August 1977, Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 April 1978.

Defendant was charged with rape, aggravated kidnapping, and crime against nature. To each charge defendant pled not guil-

ty. The jury returned verdicts of not guilty to the charges of rape and kidnapping but found defendant guilty of the charge of crime against nature. From the judgment entered on this verdict, defendant appealed. Facts necessary for decision are set out in the opinion.

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

James R. Nance, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the court's allowing the State's motion to consolidate for trial all three charges against defendant. He argues that consolidation violated "his constitutional right against self-incrimination provided by the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States and Article 1, Section 23 of the Constitution of the State of North Carolina" because he did not intend to testify in the kidnapping and crime against nature case but did intend to testify in the rape case.

G.S. 15A-926(a) provides that "[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . ."

Evidence for the State tended to show that the prosecuting witness, on her way to her dormitory room at the Veterans Administration Hospital in Fayetteville from a date, realized that her car was out of gas. She pulled over to the side of the road and sat for a few moments looking around the area to determine where she could find help. As she opened her car door preparatory to going to an unlighted house across the street, a car, driven by defendant, came up and stopped. He opened the door, asked her what was wrong, and, upon being told that she was out of gas, asked whether she had some type of container he could use to get some gas. She had nothing, and he offered to take her to a service station to get a container and some gas. They went to one station which was closed, another which was open but had no container, and another which was closed. Miss

Propst then felt that she was imposing on defendant and asked him to take her to the house of a friend who she knew would help her. However, when he got to the road leading to the friend's house, defendant went past. When she told him she would show him exactly where the road was, he suddenly thought of a place she could get gas and did not turn in the road. Instead he reached over and put his hand on her leg. She asked him not to do that. Then he reached over and touched her breast. Again she remonstrated with him but was told to get down in the floor. At first she refused but did get on the floor, and he kept pushing her head down when she tried to look up. When he stopped the car, he told her to get up out of the floor and sit on the seat and that she could "go back if she did what he said do." She began to cry because she thought he was going to kill her. He told her he was not going to kill her. She asked if he were going to rape her and he said, "No, I just want to kiss you and I want to take your clothes off." Miss Propst testified she struggled as long as she could but he was a lot larger and stronger than she. She was 5′2″ tall and weighed 125 pounds. After he got her clothes off, he attempted to perform oral sex on her, made her perform oral sex, and then had intercourse with her. She testified that she prayed aloud, and he stopped, put his clothes on and told her to put her clothes on. He then carried her to her friend's house. Before he drove off, she got the number from the license plate on his car. Her friend called the police. She was taken to the hospital where she stayed several hours. Defendant was arrested the next morning.

Defendant testified that he offered to help her find gas, that he took her to one station which was closed, to another which had no container, and to a third which was closed; that they engaged in conversation; that she was attractive, and he asked if she would like to park with him; that she responded in the affirmative; that he did engage in oral sex with her and she with him not once but twice but that it was all done with her consent; that she refused to allow him to have intercourse with her but got mad when he attempted to; that he then dressed, told her to dress, and brought her to her friend's house.

It is obvious that the offenses joined for trial were based on "a series of acts or transactions connected together" and constituted a continuing criminal episode. In *State v. Davis*, 289 N.C.

500, 223 S.E. 2d 296, *vacated on other grounds* 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976), Justice Branch, speaking for the Court, said:

> "It is true that in ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; *Dunaway v. United States*, 205 F. 2d 23. Nevertheless it is well established that the motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Jarrette, supra* [284 N.C. 625, 202 S.E. 2d 721]; *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386; *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44; *Dunaway v. United States, supra.*" 289 N.C. at 508, 223 S.E. 2d at 301.

There, as here, the defendant argued that he was prejudiced by the consolidation because, had the case not been consolidated, he could have elected to testify in one case if he so desired without being forced to testify in the other. The Court found no error in the consolidation. In the case before us, the prejudice to defendant is no more easily discernible than in *Davis*, and defendant has not clarified for us the manner in which defendant's right against self-incrimination has been violated. The charges were continuing criminal acts. Evidence of one would certainly be admissible in the others. He denied the rape and kidnapping and testified that the crime against nature was consensual. Defendant has shown no abuse of discretion.

Additionally, defendant failed to move for severance at the close of all the evidence. G.S. 15A-927(a)(2) provides that "[i]f a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Any right to severance is waived by failure to renew the motion." That this section is applicable here is indicated by this explanation appearing in the official commentary to the section: "Prior to trial the defendant may object to joinder. Once the trial is begun it is more appropriate to speak in terms of 'severance'." *See also State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649 (1977), *cert. den.* 292 N.C. 733, 235 S.E. 2d 787 (1977).

Defendant's first assignment of error is overruled.

After the jury returned its verdict of guilty of crime against nature, defendant moved in arrest of judgment. One motion was grounded on his position that the court lacked jurisdiction because the crime was committed on the military reservation. The other was on the ground of selective prosecution. Defendant was allowed to put on evidence as to each motion. The court denied each motion and defendant excepted. These exceptions form the basis of his second and third assignments of error. We find no merit in either assignment of error.

[2] The motion in arrest of judgment[1] on the ground that the court lacked jurisdiction was based on defendant's contention that the crime occurred on the military reservation. This position of defendant was placed before the court too late. If the defendant wished to rely upon a defect in jurisdiction because the offense occurred in a jurisdiction other than the one in which he was being tried, he should have proved it as a part of the general issue. *State v. Long*, 143 N.C. 670, 57 S.E. 349 (1907), where the Court said: "If the defendant wishes to rely upon the fact that the offense was committed outside the State, he cannot move to quash or in arrest, but must prove the fact in defense under his plea of not guilty." (Citations omitted.) 143 N.C. at 674, 57 S.E. at 350. *See also State v. Lea*, 203 N.C. 13, 164 S.E. 737, *cert. den.* 287 U.S. 649, 53 S.Ct. 95, 77 L.Ed. 561 (1932). In the recent case of *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977), our Supreme Court adopted the majority rule which places the burden of proof as to the place of the commission of the crime on the State rather than the defendant. This case did not, however, change the rule that the question of jurisdiction, as to place of the commission of the crime, is to be proved as a part of the general issue and cannot be raised on a motion in arrest of judgment.

> "A motion in arrest of judgment is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. McCollum*, 216 N.C. 737, 6 S.E. 2d 503 (1940). Judgment may be arrested in a criminal prosecution when, and only when, some fatal error or defect ap-

1. We note that defendant elected to file a motion in arrest of judgment in lieu of a motion to dismiss under G.S. 15A-954. We, therefore, treat it as a motion in arrest of judgment.

pears on the face of the record proper. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966)." *State v. McKenna,* 289 N.C. 668, 689, 224 S.E. 2d 537, 551, *vacated on other grounds* 429 U.S. 912, 97 S.Ct. 301, 50 L.Ed. 2d 278 (1976).

Here defendant produced evidence by which he attempted to show discriminatory enforcement of the law. The District Attorney testified that he was not aware of any case prosecuted by his office charging crime against nature where two consenting adults had engaged in an act of oral sex, one adult being a male and the other being a female. Obviously, since the evidence is not a part of the record proper, this purported defect could not properly be the subject of a motion in arrest of judgment. The record in this case does not reveal any fatal defect. The motions in arrest of judgment should have been denied. The fact that the court erroneously heard evidence is harmless.

Defendant has shown no reason in law to disturb the verdict and judgment entered thereon.

No error.

Judges MARTIN and ARNOLD concur.

ALARICK RIGGS AND ROSA E. RIGGS PETITIONERS v. J. HOWARD COBLE, SECRETARY OF REVENUE RESPONDENT

No. 7710SC749

(Filed 18 July 1978)

Trusts § 19; Taxation § 28— sale of farm—no parol trust in lot received as consideration—income not reportable on installment basis

No parol trust for the benefit of petitioners' son was created by an agreement by petitioners that, if a sale of their farm was consummated, their son would receive one of the three lots which the purchaser was to convey as partial consideration for the farm or the money derived from the sale of one of the lots if the purchaser sold the lots pursuant to the planned purchase contract, since the agreement merely expressed a vague, general intent by petitioners to make an unspecified gift in the future to their son; nor was a trust created when or after the lots were acquired from the purchaser of the farm where petitioners did not manifest any intent to create a trust for the benefit

of their son when or after the lots were acquired. Therefore, petitioners received all three of the lots as partial consideration for their farm, and when the three lots are so considered, petitioners received more than 30% of the selling price in the year of sale and are not permitted by G.S. 105-142(f)(2) to report the income from the sale of their farm on the installment basis.

APPEAL by petitioners from *Clark, Judge*. Judgment entered 21 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 2 June 1978.

The petitioners, Alarick Riggs and Rosa E. Riggs, initiated this action on 4 February 1976 seeking judicial review of a final determination of their North Carolina individual income tax liabilities for the taxable year 1970 by the Tax Review Board. The petitioners do not dispute the findings of fact of the Secretary of Revenue which were adopted by the Tax Review Board [hereinafter the "Board"]. Those findings are as follows:

(1) The applicants are legal residents of North Carolina and were legal residents of the State at all times material to this hearing, including the taxable year 1970.

(2) The applicant, Alarick Riggs, filed a timely North Carolina individual income tax return for the taxable year 1970, on which he reported the sale of a home and lot at a sales price of $10,386.68, a cost basis of $9,050.00, and a gain of $1,336.68.

(3) The applicant, Rosa E. Riggs, did not file a North Carolina individual income tax return for the taxable year 1970.

(4) Instead of the sale of a home and lot in the taxable year 1970, the applicants actually sold a farm at a gross sales price of $75,000.00, which farm also included the applicants' residence and another house on the farm property which had been built and occupied by one of the applicants' sons, which property is more fully described below.

(5) Alarick Riggs and wife, Rosa E. Riggs, the applicants herein, acquired the farm as tenants by the entirety in 1945, on which they thereafter had their residence.

(6) The applicants agreed to convey a lot within the farm area to a son in 1958 and acting in reliance on their promise,

the son built a house on the lot, but the lot was never conveyed to him.

(7) In 1970, prior to the sale of the farm, and recognizing that the son had increased the value of the land by building a house on it, the applicants and their son agreed that "if the sale of the farm tract was consummated, that our son would get one of the three lots" which were to form part of the consideration to be paid by the purchaser for the farm, or in the alternative he would get the money derived on the sale of one of the lots "when and if the potential purchaser (of the farm tract) sold the said lot" under an agreement with the applicants.

(8) The sale of the entire farm for $75,000.00 was consummated in August 1970 when the buyer paid the applicants $10,000.00 cash, gave them a note for $50,000.00 secured by a deed of trust on the farm, and conveyed three lots in a subdivision to them, each lot having a value of $5,000.00.

(9) In 1971, another lot was substituted for one of the aforesaid three lots, the new lot was sold for $5,000.00 and the applicants assigned the purchase money note and deed of trust for $5,000.00 which they received for the lot, to their son.

(10) After examining Alarick Riggs' 1970 North Carolina individual income tax return, Notices of Tax Assessment taxing each applicant on one-half of the gain realized in 1970 from the sale of the subject property were mailed to each applicant by the Individual Income Tax Division on April 11, 1974.

(11) One-half of said gain was determined to be $25,394.25.

(12) On April 11, 1974, Alarick Riggs was assessed $2,024.46, representing tax and interest upon said gain.

(13) On April 11, 1974, Rosa E. Riggs was assessed $1,781.17, representing tax and interest upon said gain.

The petitioners at all times contended that the foregoing facts, as a matter of law, require the recognition of a trust in one lot for the benefit of their son. Upon a hearing before the

Secretary of Revenue [hereinafter the "Secretary"] pursuant to G.S. 105-241.1, the Secretary concluded "that the Riggses did not create a trust." Upon appeal to the Tax Review Board, the Board held "that the petitioners have not established a trust with respect to the property in question." The petitioners then sought and obtained judicial review of the Board's decision. The trial court found that the record supported the findings, conclusions and holding of the Board and entered judgment affirming its decision. From this judgment the petitioners appealed.

Willis A. Talton for petitioner appellants.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for respondent appellee.

MITCHELL, Judge.

The petitioners contend that the trial court erred in affirming the Tax Review Board and, thereby, the Secretary of Revenue. They argue that the agreement between them and their son, as set forth in the uncontested findings of fact of the Secretary adopted by the Board, required the recognition as a matter of law of a trust in one lot for the benefit of their son. The petitioners further contend that the establishment of this trust in favor of the son entitled them to reduce the sum they received for their farm by the value of the lot held in trust for the son, and entitled them thereby to pay income tax for 1970 only upon the amount actually paid them as an installment on the total purchase price. They contend this result is required by G.S. 105-142(f)(2), which provides:

> "Income from a sale or other disposition of real property . . . for a price exceeding one thousand dollars ($1,000), may be returned on the basis and in the manner prescribed in subdivision (1) [installment payments], provided, however, that such income may be so returned only if in the taxable year of the sale or other disposition there are no payments or the payments (exclusive of evidence of indebtedness of the purchaser which are not readily marketable) do not exceed thirty percent (30%) of the selling price. . . ."

Based upon the admitted facts, it is clear that the petitioners sold their farm for $75,000 in 1970 and received a note for

$50,000, $10,000 in currency, and either two or three lots of a value of $5,000 apiece. If their agreement with their son created a trust for his benefit in one of the lots, they must be viewed as having received, for purposes of establishing their tax liabilities, $10,000 in currency and two lots worth $10,000. As the total value received by them in that year would amount to less than 30% of the selling price, the statute would permit them to report the income from the sale of their farm on the installment basis and result in a reduction of their tax liability. If, on the other hand, their agreement with their son is not viewed as creating a trust for his benefit, the petitioners received $10,000 in currency and three lots worth $15,000 or 33⅓% of the selling price during the year in question, and the statute is inapplicable. The Secretary adopted the latter view and found the petitioners were not eligible to report the income from the sale of their farm on the installment basis.

We agree with the conclusion of the Secretary, affirmed by the Board and the trial court, that the agreement between the petitioners and their son did not create a trust for the benefit of the son. In support of their contention that a trust was created, the petitioners rely upon the language of their agreement with their son as set forth in an affidavit which was, in substance, incorporated in the Secretary's findings. The petitioners' affidavit, as set forth in the record on appeal, indicates that they entered an agreement with their son that: "[I]f the sale of the farm tract was consummated that our son would get one of the three lots, or the sale price of same when and if the potential purchaser (of the farm tract) sold the said lot under the planned agreement. . . ." This language, relied upon by the petitioners, in itself points out the uncertainties involved as to whether there would ever be a sale and, if there was a sale, precisely what property was to constitute the res of the alleged trust. The agreement as set forth in the petitioners' affidavit merely expressed a vague general intent to make an unspecified gift in the future to their son. Such an intent does not require or support the creation of a trust.

The burden was upon the petitioners to prove the creation and existence of a parol trust on behalf of their son by clear, strong, and convincing proof and not by a mere preponderance of the evidence. 13 Strong, N.C. Index 3d, Trusts, § 17, p. 76. The weight to be given their evidence was a question for the

Secretary as the finder of fact. *See Martin v. Underhill,* 265 N.C. 669, 144 S.E. 2d 872 (1965). The Secretary's conclusions were legitimately drawn from his findings which were supported by the evidence and are not contested. His findings of fact and conclusions were adopted by the Board and affirmed by the trial court. It is a fundamental principle of law that tax assessments are presumed correct. *In re Appeal of Amp, Inc.,* 287 N.C. 547, 215 S.E. 2d 752 (1975). Based upon the evidence and findings in this case, we find the Secretary, the Board and the trial court did not err in concluding that the petitioners had failed to carry their burden of overcoming the presumption.

Further, as pointed out in the decision of the Secretary, the evidence and findings of fact do not indicate that the petitioners manifested any intent to create a trust for the benefit of their son when or after the lots were acquired in August of 1970. The fact that a person declares a trust in property which may be acquired in the future does not automatically create a trust in the property when it is later acquired. However, where one declares a trust in property to be later acquired, and upon or after acquiring the property confirms his prior manifested intent to create the trust or repeatedly manifests such an intent, a trust is then created in the property. Annot., 3 A.L.R. 3d 1430 (1965).

The record does not indicate that the petitioners manifested an intent to create a trust upon or after acquiring the property in question or repeatedly manifested such an intent. The Secretary properly concluded, therefore, that a parol trust had not been established and that the petitioners were not entitled to report income from the sale of their farm on an installment basis pursuant to G.S. 105-142(f)(2). Therefore, the Board correctly affirmed the Secretary's decision.

The judgment of the trial court affirming the decision of the Board was without error and is

Affirmed.

Judges PARKER and HEDRICK concur.

NANCY ELAINE CLEARY v. CHARLES D. CLEARY

No. 7722DC790

(Filed 18 July 1978)

1. **Husband and Wife § 11.2— indebtedness of husband—proceeds from sale of homeplace—construction of deed of separation**

The trial court properly concluded that an indebtedness secured by a second deed of trust on the parties' homeplace was defendant's obligation, since the manifest intention of the parties in a deed of separation and consent judgment was that the homeplace be sold and the proceeds be divided equally between the parties after the indebtedness secured by the first deed of trust on the property had been paid but before the indebtedness secured by the second deed of trust was paid.

2. **Evidence § 31— accounts with creditors—testimony by debtor—no violation of best evidence rule**

Defendant's contention that, when plaintiff in the course of her testimony testified to the amounts of the various debts of the parties to two lending institutions, she was testifying as to the contents of the records of those institutions in violation of the best evidence rule is without merit, since plaintiff was testifying about transactions to which she was a party; she did not testify directly to the contents of the creditors' records; and her testimony regarding the status of the parties' financial obligations was as acceptable in a legal sense as the records of her creditors.

3. **Witnesses § 8.3— writing used on direct examination—cross-examination proper**

A party should be allowed to cross-examine his opponent with respect to the contents of a writing upon which he relied on direct examination.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 10 May 1977 in District Court, DAVIDSON County. Heard in the Court of Appeals 22 June 1978.

Civil action wherein plaintiff seeks to recover $4,789.39 allegedly owed to plaintiff by defendant. At the conclusion of a trial without a jury the trial judge made findings of fact which are summarized and quoted as follows:

The defendant and the plaintiff who formerly lived together as husband and wife executed a deed of separation on 30 August 1974 whereby the parties agreed to a division of their personal property, the defendant agreed to assume the indebtedness on certain farm equipment and the house payments, and the plaintiff assumed responsibility for taxes and insurance on the homeplace.

On 7 May 1975 the parties entered into a consent judgment which provided among other things that the homeplace owned by the parties as tenants by the entirety should be appraised and sold at the appraised price.

> 7. It was further agreed that after the payment of all indebtedness against the homeplace, any excess funds would be divided between the parties hereto. The consent judgment further provided in paragraph number 6 that the deed of separation dated August 30, 1974 was hereby ratified and affirmed except as to child support, custody and visitation rights and possession of the homeplace and any other matters specifically spelled out in this judgment.

Pursuant to the consent judgment the homeplace was sold for $49,000. At the time of the sale there was outstanding a deed of trust on the land in favor of the Federal Land Bank to the extent of $24,293.80, and an indebtedness of $5,323.23 to Northwest Production Credit Association representing loans acquired for the purchase and repair of a bulldozer and a dump truck.

> 10. The defendant Charles D. Cleary did receive the bulldozer and dump truck as set forth in the separation agreement; that at the time of the closing of the real estate transaction whereby the homeplace was sold the defendant Charles D. Cleary did at that time refuse to pay the balance of the indebtedness due for the purchase of the truck and bulldozer and the repairs and refused to pay the interest due because of the deferment of the payment of a portion of the indebtedness. The plaintiff Nancy Cleary objected at that time, but she did execute the necessary legal documents to transfer the property to the purchaser because the defendant would not close the transaction unless all the foregoing debts were paid from the proceeds of the sale and at that time all the indebtedness was paid from the proceeds of the sale of the real property and the excess was divided between the parties.

Based upon the preceding findings the trial court concluded that the indebtedness to Northwest Production Credit Association "was an obligation of the defendant" and that the indebtedness to Federal Land Bank "was an obligation upon the real estate, the homeplace, and was to be shared equally by both

parties." The court then ordered that the plaintiff recover $2,796.50 from the defendant. Defendant appealed.

Brinkley, Walser, McGirt & Miller, by Walter F. Brinkley, for the plaintiff appellee.

Wilson, Biesecker, Tripp & Wall, by Joe E. Biesecker, for the defendant appellant.

HEDRICK, Judge.

[1] In his first, third, sixth, eighth, ninth, tenth, eleventh, and twelfth assignments of error the defendant raises the single question of whether the trial court erred in concluding that the indebtedness to Northwest Production Credit Association was his obligation. In substance the defendant argues that because the indebtedness to Northwest Production Credit Association was secured by a second deed of trust on the real property, it was an indebtedness "against the homeplace" which according to the consent judgment was to be paid from the proceeds of the sale.

A consent judgment is a contract between the parties thereto which is approved and sanctioned by a court of competent jurisdiction. *Bland v. Bland*, 21 N.C. App. 192, 203 S.E. 2d 639 (1974). The interpretation of any contract, including a consent judgment, must be guided by the perceived intent of the parties. *Martin v. Martin*, 26 N.C. App. 506, 216 S.E. 2d 456 (1975). The terms employed by the parties should be accorded their ordinary meanings unless a contrary intent is manifest. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 146 S.E. 2d 410 (1966).

In the present case the parties unequivocally incorporated the terms of the deed of separation into the consent judgment except as to specified matters with which we are not concerned and "any other matters *specifically spelled out* in this judgment." The deed of separation provides that the defendant shall have, among other things, the dump truck and bulldozer and "shall assume the indebtedness on any of the equipment transferred to him." While the provision in the consent judgment charging the responsibility for "indebtednesses against the homeplace" to both parties is susceptible of more than one interpretation, we do not think it "specifically spell[s] out" an intention of the parties to modify or alter the original obligation of the defendant to pay off the in-

debtedness on the dump truck and bulldozer. Indeed, it is our opinion that the manifest intention of the parties was that the homeplace be sold and the proceeds be divided equally between the parties after the indebtedness to Federal Land Bank had been paid. These assignments of error are overruled.

[2] In his second assignment of error the defendant challenges the admission of the plaintiff's testimony with respect to the various debts of the parties. On direct examination the plaintiff referring to handwritten notes which she had prepared prior to trial answered numerous questions over the defendant's objections. The defendant argues that when in the course of her testimony the plaintiff testified to the amounts of the various debts of the parties to Northwest Production Credit Association and Federal Land Bank, she was "necessarily testifying to the contents of the records" of those institutions in violation of the best evidence rule.

We disagree. The best evidence rule generally requires a party to produce the writing itself when its contents are directly in issue. 2 Stansbury's N.C. Evidence, § 190 (Brandis Rev. 1973). However, "if a fact has an existence independent of the terms of any writing, the best evidence rule does not prevent proof of such fact by the oral testimony of a witness having knowledge of it or by any other acceptable method of proof not involving use of the writing." 2 Stansbury, *supra*, § 191 at 103, n. 24. *See also State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975). The plaintiff's testimony revealed transactions to which she was a party. She did not testify directly to the contents of the creditors' records. Her testimony regarding the status of their financial obligations was as acceptable in a legal sense as the records of her creditors. *See Overby v. Overby*, 272 N.C. 636, 158 S.E. 2d 799 (1968). Furthermore, the use of notes which had been prepared by her prior to trial was properly allowed to refresh her recollection. 1 Stansbury, *supra*, § 32. Thus, this assignment is overruled.

The defendant's fourth and fifth assignments of error involve a letter from the Vice President of Northwest Production Credit Association to the plaintiff. The letter which was used by the defendant on direct examination listed "the balances due on each loan as of June 16, 1975." The defendant contends that testimony of the defendant elicited by the plaintiff on cross-examination was

inadmissible hearsay and violative of the best evidence rule. He also contends that the trial court erred in admitting a copy of the letter into evidence in the absence of proper authentication.

[3] North Carolina case law as well as basic principles of fairness dictates that a party should be allowed to cross-examine his opponent with respect to the contents of a writing upon which he relied on direct examination. *Warren v. Trucking Co.*, 259 N.C. 441, 130 S.E. 2d 885 (1963). Furthermore, we find nothing in the record to support the defendant's contention that the paper writing admitted into evidence was a copy of the subject letter. However, assuming that this contention is correct, it is settled that a copy of a writing is admissible in evidence without authentication when the opposing party admits to its authenticity. 2 Stansbury, *supra*, § 192 at 112. The defendant thus rendered authentication unnecessary when he relied on the copy of the letter during direct examination and testified that the paper to which he had referred was a letter from Northwest Production Credit Association. These assignments are totally without merit.

The defendant's remaining assignment challenges the entry of judgment for the plaintiff in the amount of $2,796.50. In light of our disposition of the defendant's foregoing assignments it is clear that there was ample evidence to support the trial court's findings as to the amount of the defendant's obligation to the plaintiff. The judgment appealed from is affirmed.

Affirmed.

Judges PARKER and MITCHELL concur.

STATE OF NORTH CAROLINA v. JESSE LEROY BATES

No. 784SC256

(Filed 18 July 1978)

1. Searches and Seizures § 35— search incident to arrest—formal arrest before search immaterial

Where officers had a warrant for defendant's arrest and went to the place where he was staying for the purpose of arresting him, seizure of a pistol from

under the pillow on which defendant was resting his head was incident to a lawful arrest whether defendant had been formally arrested at the time of the seizure or not.

2. Searches and Seizures § 17— trailer—consent to search given by owner

Officers properly seized a bag of money from a trailer where the owner of the trailer gave her consent to search, and it was not necessary that the officers obtain the consent of defendant who was staying in the trailer.

3. Criminal Law § 73.2— testimony not hearsay

An officer's testimony concerning remarks by a trailer owner about a bag of money and permission to enter the trailer was not hearsay and was competent to show authorization to enter the trailer, but even if such evidence was hearsay, any error in its admission would be harmless since the trailer owner herself testified under oath concerning the statements she made to the officer.

APPEAL by defendant from *Smith (David), Judge.* Judgment entered 22 November 1977, in Superior Court, ONSLOW County. Heard in the Court of Appeals 29 June 1978.

Defendant was indicted and tried for armed robbery. The State presented evidence tending to show that, at 11:00 p.m., on 4 September 1977, Jeffrey Fitzgerald was working at a Stop-N-Go in Jacksonville, North Carolina, when two black males entered the store. One of the men had a pistol which he pointed at Fitzgerald; he ordered Fitzgerald to give him the money in the cash register, and Fitzgerald complied. Although Fitzgerald identified John Jones as the man with the gun, he could not identify the second man. John Jones, however, testified for the State that defendant was the other man and that the pistol belonged to defendant. A Deputy Sheriff of the Jones County Sheriff's Department, Tony Provost, testified that on the same night as the robbery he arrested defendant on an unrelated charge, and he found a .32 calibre pistol and a bag of money.

Defendant put on evidence tending to show that on 4 September 1977, he was at a place called Joe's Place from 8:00 p.m. until 12:30 a.m. He explained the bag of money as being money he had saved to rent a house.

The jury found defendant guilty of armed robbery, and the court sentenced him to a prison sentence of not less than thirty nor more than forty years. He appeals.

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

Charles S. Lanier for defendant appellant.

ARNOLD, Judge.

Before the State offered evidence in this case, defendant made a motion, pursuant to G.S. 15A-975(b), to suppress the introduction into evidence of the pistol and the paper bag containing approximately $70. The trial court heard evidence by both the State and the defendant and found facts as follows:

"1. That on September 4, 1977, Deputy Sheriff Provost of the Jones County Sheriff's Department went to the residence of Mary Jones in Jones County at approximately three o'clock a.m.

"2. That at the time of arriving at the mobile home of Mary Jones, Deputy Sheriff Provost had three warrants for the arrest of the defendant, Jesse Bates. Said warrants being for assault on a minor, pointing a gun, and assault.

"3. That on said occasion Mary Jones was with Deputy Sheriff Provost.

* * * *

"5. That Mary Jones had informed Deputy Sheriff Provost that the defendant was in her trailer.

"6. That Deputy Provost obtained permission from Mary Jones to enter the trailer and arrest the defendant.

"7. That the defendant was sleeping on the couch in the living room area of Mary Jones' mobile home.

"8. That the defendant was staying with Mary Jones and had been there for some period of time . . . . Upon the arrest of the defendant, simultaneous with the arrest Deputy Provost saw a .32 caliber pistol lying under the pillow on which the defendant had been resting his head, at which time Deputy Provost took the pistol into custody.

"9. That Mary Jones informed Deputy Provost there was some money in . . . her mobile home and with her con-

sent Deputy Provost found the paper sack of money on Mary Jones' bed in the bedroom area of the mobile home."

The trial court thereafter concluded that the seizure of the pistol was incident to a lawful arrest and that the seizure of the bag of money resulted from Mary Jones's consent to have her home searched.

[1] The findings of fact made by the trial court are clearly supported by competent evidence offered at the hearing. Defendant concedes that Mary Jones gave permission to search and that Deputy Provost had an arrest warrant. Nevertheless, he contends that he was not under arrest when the Deputy lifted him from the couch and discovered the pistol. Hence, he contests the court's conclusion that the search was incident to a lawful arrest. We disagree.

In *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977), a case involving an arrest without a warrant, this Court held that where the 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 probable cause. Where law enforcement officials rely on an arrest warrant, as in the case *sub judice*, we believe that the question of whether the search occurred before or after the formal arrest is even less significant.

[2] Defendant next contends that the seizure of the bag of money was illegal since the search was illegal under the Fourth Amendment to the United States Constitution. Basically, defendant argues that his consent to search should have been obtained. Such is not the case. Consent by the owner of a home is sufficient. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). In the present case, therefore, the consent of Mary Jones, owner of the home, was sufficient.

[3] Finally, defendant contends that the court erred in permitting hearsay testimony by Deputy Provost concerning remarks by Mary Jones about the bag of money and permission to enter the trailer. While evidence of a statement made by a person other than the witness and offered to establish the truth of the matter contained in such statement is hearsay, where the evidence is

admitted not to show the truth of the matter contained therein, but to show simply that such statement was made, the evidence is not hearsay. *See e.g., Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967).

We agree with the State's position that the officer's testimony was not hearsay and that it was competent to show authorization to enter the trailer. Moreover, even if we found the evidence to be hearsay, and we do not, any error would be harmless since Mary Jones herself testified under oath concerning the statements she made to the deputy.

Defendant received a fair trial in which we find

No error.

Chief Judge BROCK and Judge BRITT concur.

BEVERLY A. STENHOUSE, ON BEHALF OF HERSELF AND ALL OTHER SIMILARLY SITUATED v. MARK G. LYNCH, SUCCESSOR IN OFFICE TO J. HOWARD COBLE, SECRETARY OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 7710SC646

(Filed 18 July 1978)

Taxation § 38— payment of tax—no timely request for refund

State income tax paid by plaintiff on unemployment compensation could not be recovered where plaintiff paid voluntarily and without compulsion, even if the taxes were levied unlawfully, in the absence of plaintiff's demand for refund within thirty days after payment, pursuant to G.S. 105-267.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 1 July 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 3 May 1978.

Class action brought on behalf of named plaintiff and others similarly situated who received and paid North Carolina income taxes on unemployment compensation during the years 1973, 1974 and 1975, seeking refund of said income taxes.

The case was submitted for trial on stipulated facts and briefs. The trial court, on its own motion, entered judgment

dismissing the action pursuant to Rules 12(b)(6) and 12(h) of the North Carolina Rules of Civil Procedure, for failure of plaintiffs to allege and prove compliance with G.S. 105-267.

Plaintiffs appealed.

Davis & Postlethwait, by Raymond W. Postlethwait, Jr. for plaintiffs.

Attorney General Edmisten, by Assistant Attorney General William H. Boone, for defendant.

BROCK, Chief Judge.

G.S. 105-267 is applicable to the tax collection of which plaintiffs complain, and provides (as written when this action was instituted) in pertinent part as follows:

> "Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue of the State, if a State tax, or if a county, city or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue or the county, city or town, as the case may be, in the courts of the State for the amount so demanded."

The Supreme Court, in *Kirkpatrick v. Currie*, Commissioner of Revenue, 250 N.C. 213, 108 S.E. 2d 209 (1959), interpreted the requirements of the statute as follows:

> "The right to sue to recover is a conditional right. The terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove demand for refund made within thirty days after payment. A failure to make such demand forfeits the right. (Citations omitted.)" 250 N.C. at 216, 108 S.E. 2d at 211.

Plaintiffs contend that equity would require the Court to look beyond the requirements set out above and reach the substance of plaintiffs' allegations as to the illegality of the tax. Plaintiffs argue that although an individual taxpayer would be required to make proper demand, it would be impractical to so require of a large class of taxpayers. Plaintiffs' argument is premised upon the possibility that a large number of the class might be able to sue for refund of taxes paid in 1973, 1974 and 1975. However, there is nothing in the record which so indicates.

There would appear to be no danger of a multiplicity of suits by members of the class represented by the individual plaintiff to recover taxes paid in 1973, 1974 and 1975, since it would appear that no member of the class made the requisite demand for refund. Thus *Gramling v. Maxwell*, 52 F. 2d 256 (W.D.N.C. 1931), upon which plaintiffs rely, is distinguishable. In that case, equitable jurisdiction was invoked to enjoin the collection of an unconstitutional tax from a class of plaintiffs where a refusal to enjoin the tax would necessarily have resulted in a multiplicity of suits at great burden and expense to the parties.

Without commenting upon the merits of plaintiffs' claims, we note that the taxes complained of cannot be recovered where paid voluntarily and without compulsion even though the taxes were levied unlawfully, in absence of demand for refund in compliance with the statute. *See Middleton v. R.R.*, 224 N.C. 309, 30 S.E. 2d 42 (1944). Even if plaintiffs paid their taxes under a mistaken belief that it was necessary, their payment is deemed voluntary and they cannot recover, absent timely demand for refund. 72 Am. Jur. 2d, State and Local Taxation, § 1087.

We find no abuse of discretion, as argued by plaintiffs, in the trial court's action, *ex mero motu*, dismissing plaintiffs' claim pursuant to Rules 12(b)(6) and 12(h)(2) of the North Carolina Rules of Civil Procedure. The judgment of the trial court dismissing the action is

Affirmed.

Judges CLARK and WEBB concur.

ESSIE LEE TRIPLETT v. ARLOW J. TRIPLETT

No. 7728DC690

(Filed 18 July 1978)

Appeal and Error §§ 38, 45— appellate rules mandatory

For failure of defendant to comply with the Rules of Appellate Procedure, which are mandatory, defendant's appeal is dismissed.

APPEAL by defendant from *Sluder, Judge*. Judgment entered 20 May 1977 in District Court, BUNCOMBE County. Heard in the Court of Appeals 24 May 1978.

Action by plaintiff wife seeking divorce from bed and board and alimony from her husband, defendant herein, on grounds of defendant's excessive use of alcohol and wilful failure to provide her with necessary subsistence.

After trial of the matter, the district court made findings of fact and conclusions of law, and based thereon granted plaintiff a divorce from bed and board from defendant, ordered the payment of alimony by defendant, and granted plaintiff possession of the house owned by the parties as tenants by the entireties and the furnishings located therein.

Defendant appealed.

Van Winkle, Buck, Wall, Starnes, Hyde and Davis, by Philip J. Smith, for the plaintiff.

Richard B. Ford and Loren D. Packer for the defendant.

BROCK, Chief Judge.

Defendant sets out 17 assignments of error in the record on appeal. In his brief, he has failed to state separately the questions presented, and has failed to refer to any of his assignments of error and exceptions, all in violation of App. R. 28(b)(3).

The transcript of the record on appeal was settled by agreement of the parties on 19 July 1977; it was certified by the Clerk of Superior Court on 17 August 1977. App. R. 11(e) requires that the record be certified within 10 days after it has been settled.

The Rules of Appellate Procedure are mandatory. *See Burkhimer v. Coble, Comr. of Revenue*, 35 N.C. App. 127, 239 S.E. 2d 852, *cert. denied*, 294 N.C. 441 (1978). For failure of defendant to comply with the Rules of Appellate Procedure, this appeal is dismissed.

Appeal dismissed.

Judges CLARK and WEBB concur.

HOUSING, INC.; MERHA, LTD.; CARL W. JOHNSON; AND JACKIE JOHNSON, PLAINTIFFS v. H. MICHAEL WEAVER; W. H. WEAVER CONSTRUCTION COMPANY; ALVIN R. BUTLER, TRUSTEE, DEFENDANTS, AND LANDIN, LTD., ADDITIONAL DEFENDANT.

No. 7718SC586

(Filed 1 August 1978)

1. Duress § 1; Cancellation and Rescission of Instruments § 3.1— breach of fiduciary duty as duress

A contract induced by the breach of a fiduciary duty is a contract induced by duress.

2. Duress § 1; Cancellation and Rescission of Instruments § 3.1— trustee's breach of fiduciary duty—inducement of contract by duress

In an action to recover restitution based on defendants' alleged procurement of a contract by economic duress, the evidence on motion for summary judgment was sufficient to raise issues of fact as to whether the individual defendant held title to land as trustee for plaintiffs and whether plaintiffs were induced to enter the contract by the individual defendant's threat to breach his fiduciary duty by refusing to convey the land to plaintiffs and threatening to destroy a low income housing project in which the parties were jointly engaged.

3. Duress § 1; Cancellation and Rescission of Instruments § 3.1— breach of contract—duress inducing subsequent contract

In an action to recover restitution based on defendants' alleged procurement of a 1972 contract by economic duress, the evidence on motion for summary judgment was sufficient to raise issues of fact as to whether (1) there was a breach or threat of breach by defendants of a 1971 agreement in which the parties agreed to engage jointly in a low income housing project, (2) the breach or threatened breach induced the 1972 agreement settling a dispute between the parties, and (3) the breach or threat of breach amounted to duress, where there was evidence tending to show that the individual defend-

ant obtained title to certain land through the 1971 agreement; defendants were to perform the construction work on the project; defendants breached the 1971 agreement by failing to provide working capital, refusing to pay engineering costs and a loan commitment fee, and trying to drain off all the profits by raising the construction costs; defendants threatened to use their interest in the project to destroy it if plaintiffs did not pay them $270,000; the government was threatening to cancel the project if plaintiffs did not begin construction; plaintiffs were forced with the choice of entering the 1972 agreement with defendant or losing the entire project; and plaintiffs signed the 1972 agreement agreeing to pay defendants $212,500 plus expenses for defendants' interest in the project in order to obtain the land and avoid losing the project.

4. **Duress § 1— contract procured by duress—restitution**

The remedy in an action on a contract procured by duress is restitution.

5. **Duress § 1— contract procured by duress—no ratification by retention of property**

In an action to recover restitution based on defendants' alleged procurement of a contract by economic duress, summary judgment for defendants was not proper on the ground that plaintiffs ratified the contract by retaining property transferred to them as a result of the contract where plaintiffs contended that they were in fact the equitable owners of the property and the individual defendant held legal title for them, and that defendants forced them to pay for property which was rightfully theirs, since the restitutionary remedy would award plaintiffs both the property and the return of their funds paid to defendant to obtain the property.

6. **Duress § 1— contracts procured by duress—no ratification by payments or passage of time**

In an action for restitution based on defendants' alleged procurement of a contract by economic duress, summary judgment was not proper for defendants on the ground that plaintiffs had ratified the contract by making payments to defendants under the contract and waiting 20 months to file suit where plaintiffs presented evidence that the individual defendant had record title to land obtained for a low income housing project but that plaintiffs had the equitable interest in the land; plaintiffs were forced to enter the contract by the individual defendant's refusal to transfer title to them and his threat to destroy the housing project through his control of the land; and although the individual defendant transferred title to the land to plaintiffs pursuant to the agreement, the duress continued because defendants in the same transaction demanded and received a deed of trust on the land securing notes given by plaintiffs pursuant to the contract.

Judge MARTIN dissents.

APPEAL by plaintiffs from *Collier, Judge*. Judgment entered 11 May 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 April 1978.

The plaintiffs filed suit 31 December 1973, alleging, *inter alia*, that an agreement dated 27 April 1972 (hereinafter referred to as the 27 April 1972 agreement)—one of two contracts underlying this suit—was procured by economic duress. They seek restitution plus consequential damages. They pray that a note for $122,500 given as part of the consideration for the 27 April 1972 agreement be declared null, void, and of no legal effect and that the deed of trust securing it be cancelled and that they recover of H. Michael Weaver and Weaver Construction Company the sum of $63,333 (the amount already paid to defendants in excess of defendants' actual expenses of $58,421). Plaintiffs further seek $500,000 in consequential damages due to a loss in cash flow. Plaintiffs either alternatively or in addition to the "inducement by economic duress" claim allege a breach of the initial 21 April 1971 agreement.

Defendants answered denying any wrongful acts in inducing the 27 April 1972 agreement and denying any breach of the 21 April 1971 agreement. Defendants counterclaimed seeking recovery of $122,500 on the note which was given as part of the consideration for the 27 April 1972 agreement and $76,667 (principal and interest) on the balance of the 27 April 1972 agreement. Defendants' further counterclaim for $150,000 damages for alleged abuse of process was dismissed, but that dismissal is not before this Court. Defendants also impleaded Landin, Inc., whom they allege to be the alter ego of plaintiffs.

Plaintiffs are a developer, his wife, and two corporations owned by him. Since there is an identity of interests, they will be hereafter referred to as plaintiff. Defendants are a developer, the corporation owned by him and his family, and the trustee of the deed of trust. Since the interests of these persons are identical, they will be referred to collectively as the defendant. The third-party defendant is a corporation owned by plaintiff Carl W. Johnson, and it is the present owner of the properties involved.

Prior to 21 April 1971 plaintiff had received a commitment from HUD to subsidize and guarantee the rental of low income housing projects in eastern North Carolina. The project, known as "Mid-East", involved construction in five counties on 11 different tracts of land. Plaintiff needed to associate with another developer to provide "bonding capacity" (the ability to acquire a

payment and performance bond) and capital for prefinancing expenses. After negotiations, plaintiff and defendant executed "a memoranda of understanding" 21 April 1971. The memorandum was in the form of a letter from defendant to plaintiff. It provided *inter alia* that:

(1) The parties intended to form a joint venture of some type.

(2) Defendant would provide capital until construction financing was obtained.

(3) Defendant would advance to plaintiff $50,000.

(4) Defendant would build the project and receive cost plus 4% prior to division of profits.

(5) "Profits" were defined to mean the difference in all development costs and the amount that could be borrowed on the completed project.

(6) "Profits" were to go 70% to plaintiff 30% to defendant.

(7) Losses were to be borne 50-50.

(8) Completed projects were to be owned 50-50 and, possibly, the properties could be divided with each party owning 100% of 1/2 of the total properties.

(9) Withdrawal prior to 15 May 1971 would leave each party to bear his own expenses except that plaintiff would reimburse defendant for land purchases.

(10) If there were a loss, plaintiff would repay the $50,000 advance to defendant.

In setting up the project, plaintiff had previously acquired options on certain lands (more than 20 tracts). The time approached for the expiration of these options. In June 1971, it became necessary to exercise certain of these options. Rather than have the property conveyed to plaintiff or to a Johnson-Weaver joint venture and then give a deed of trust for the purchase price to defendant (who was to furnish the money), the parties agreed that H. Michael Weaver (a named defendant) would take title in his individual name. Both parties agree that the reason was to simplify the transaction. Defendant also suggests the desire to avoid certain negative tax consequences.

During September and October of 1971 the relationship became less amicable. A dispute arose over construction costs. Plaintiff's evidence suggests the following:

(1) Defendant refused to co-operate on obtaining one financing package to provide a $4,250,000 loan (eventually a $3,920,000 loan was secured).

(2) Defendant would not pay the loan commitment fee on the loan eventually received.

(3) Defendant would not give a maximum on construction costs under the 21 April 1971 agreement except for a $3,920,000 maximum which would cut plaintiff out of all the "profits".

(4) Other companies offered to build the project for $3,300,000 or less.

(5) Defendant was attempting to drain all the profits off for itself by way of the construction process.

(6) Defendant became unreasonable and threatened to destroy the project through its record ownership of crucial lands.

(7) Defendants breached certain other duties.

(8) Defendant used its ownership of the lands to force plaintiff to enter another agreement.

Defendant vehemently disagrees and offers evidence tending to show the following:

(1) Plaintiff wanted all the profit once it became apparent that it would be profitable.

(2) Defendant did not breach any duties.

(3) Plaintiff has colored certain instances in which defendant acted reasonably to look like a breach.

(4) Defendant was not obligated to give a maximum price.

(5) $3,920,000 was a reasonable maximum since it really involved only $3,480,000 for construction.

(6) Plaintiff, as well as defendant, rejected the $4,250,000 loan offer for other reasons.

(7) Defendant was always entitled to 1/2 of the lands and did not hold the lands for anyone else's benefit.

(8) Defendant owned 1/2 of the whole project and sold it under the compulsion of plaintiff.

The parties continued negotiations. It became apparent to both parties that they could not work together. Plaintiff wanted to get the land back. Defendant demanded $225,000 plus expenses. Plaintiff offered $170,000 plus expenses. Some evidence indicates that defendant offered to buy plaintiff out for $225,000. By agreement of 27 April 1972, plaintiff bought out defendant for $212,500 plus expenses (total $270,921.94). Payment was made as follows:

(1) Reimbursement of expenses was due at the closing of the construction loan.

(2) $20,000 paid by assignment to the defendant of an obligation of the defendant held by plaintiff.

(3) $70,000 paid by a non-negotiable note, secured by a deed of trust on 1/2 the property, due upon closing of permanent financing.

(4) $122,500 paid by a non-negotiable note, secured by a deed of trust on the other 1/2 of the property, due upon closing of permanent financing.

(5) Interest began on the later of 1 June 1972 or the commencement of construction.

(6) If the permanent loan did not exceed the development costs, plaintiff was only obligated to pay at the rate of $3,000 per month.

Payments were made as follows:

(1) $20,000.00	July 14, 1972
(2) $18,421.94	September 12, 1972
(3) $70,000.00	October 3, 1972
(4) $13,333.00	October 3, 1972
Total paid $121,954.94	

Plaintiff's evidence suggests that the housing authority and HUD at all times from October 1971 until April 1972, were urging him to begin construction. Johnson testified that the housing authority and HUD threatened to withdraw their commitment and award the project to another developer. He further testified that the press of time and the danger of losing the project forced him into compliance. Further evidence suggests that the fear that defendant would foreclose on the two deeds of trust forced him to continue payments.

Plaintiff proceeded on his own after 27 April 1972. In June 1972, he sold 1/2 interest in the project for $250,000 to Merha, Limited, a limited partnership of which Housing, Inc., was the general partner. The savings and loan which furnished construction financing foreclosed during the fall of 1973. Landin, Ltd., a corporation wholly owned by Carl W. Johnson, purchased the project at the foreclosure sale. The process was completed in November or December of 1973. Landin still owns the property. After foreclosure, plaintiff ceased payments on the obligations to defendant and filed suit 31 December 1973 seeking a return of the monies paid and nullification of the notes not yet paid.

By written motion filed 21 March 1977, defendants moved for summary judgment as to both plaintiffs' claim and defendants' counterclaim. By order of 9 May 1977, the trial court granted summary judgment in favor of defendants. From that judgment, plaintiffs appeal.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd, for plaintiff appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Edward C. Winslow III, for defendant appellees H. Michael Weaver and W. H. Weaver Construction Company.

MORRIS, Judge.

Plaintiff appeals from the entry of summary judgment in favor of defendant as to both plaintiffs' claim and defendants' counterclaim. This case involves an exceedingly complicated series of business transactions between plaintiffs and defendants and a claim for relief in excess of one-half a million dollars. The

record reveals that well over 15 documents have been omitted. There are no transcripts from any hearings. However, the record contains 434 pages. Upon a motion for summary judgment, the trial court *first* must determine whether there is a genuine issue as to any material fact. Only *after* the trial court determines that there is no genuine issue as to any material fact, can it dispose of the matter. *Doggett v. Welborn*, 18 N.C. App. 105, 196 S.E. 2d 36, *cert. denied* 283 N.C. 665, 197 S.E. 2d 873 (1973).

> "Upon motion a summary judgment must be entered '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 judgment as a matter of law.' G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him. [Citations omitted.] *The court should never resolve an issue of fact. . . .*" (Emphasis added.) *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E. 2d 392, 399 (1976).

The record before this Court is so lengthy, the case so vigorously contested, the depositions so contradictory, and the issues so complex, that the case appears, even at first glance, to be an obviously inappropriate case for granting a motion for summary judgment.

> "Summary judgment is a drastic remedy. Its purpose is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only. [Citations omitted.]" *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E. 2d 683, 688 (1972).

Plaintiffs allege in the complaint that defendants induced the 1972 agreement by duress and that the agreement is, therefore, voidable. They seek restitution of monies paid pursuant to that agreement. Plaintiffs also are seeking damages resulting from defendants' alleged breach of the 1971 agreement. Defendants have denied liability, alleging that the 1972 agreement was a reasonable adjustment of the dispute arising out of the 1971 agreement. Defendants also, by way of a counterclaim, seek to

recover the amount due on notes given pursuant to the 1972 agreement. It is obvious that the issues as to both plaintiffs' claim and defendants' counterclaim are precisely the same. Also, since this case is before us to review the entry of summary judgment in favor of defendants, the defendants have the burden of establishing their right to summary judgment on both the claim and the counterclaim. Thus, since the issues and the burden of proof are the same, we shall discuss the claim and counterclaim as if there were only one claim.

Our review of the trial court's entry of summary judgment involves a two-part inquiry. First, does the record, taken in the light most favorable to the plaintiff, reveal sufficient evidence that the 1972 contract was induced by duress to raise a substantial issue of fact as to duress? Second, assuming that the 1972 contract was induced by duress, does the record, taken in the light most favorable to the plaintiff, reveal sufficient evidence that plaintiffs' payments and acquiescence did not amount to ratification of the 1972 agreement to raise a substantial issue of fact as to ratification?

I.

We will examine the "duress" issue first. This inquiry is two-fold: (1) Was the contract induced by the breach of a fiduciary duty? (2) If the defendant Michael Weaver did not hold title as trustee for plaintiffs or did not breach any fiduciary duties, did the threat of breach of the 1971 agreement amount to duress and induce the 1972 agreement?

Plaintiffs allege that they allowed defendants to exercise the options to purchase the real property in this case upon the understanding that defendant Michael Weaver, the record title holder, would reconvey the property to plaintiffs and that he, therefore, held the property as trustee for plaintiffs. Plaintiffs contend Weaver's breach or threat of breach of that fiduciary duty was the means by which plaintiffs were forced to enter into the 1972 agreement.

[2] Is there evidence of a fiduciary relationship between Michael Weaver and plaintiffs?

> "North Carolina has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in

land to be manifested in writing. [Citations omitted.] '[I]t is uniformly held to be the law in this State that where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement.' [Citations omitted.] Moreover, a parol trust 'does not require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even if in favor of a mere volunteer.' [Citations omitted.]. . . ." *Ketner v. Rouzer*, 11 N.C. App. 483, 489, 182 S.E. 2d 21, 25 (1971). *See also Avery v. Stewart*, 136 N.C. 426, 48 S.E. 775 (1904).

Plaintiff Carl Johnson testified that plaintiffs

". . . permitted Mike Weaver, individually, to take title to lands that were under option to Housing, Incorporated and—my impression—to hold in trust for Housing, Incorporated until such time as we reached a joint venture agreement or some agreement under our understanding of April 21, '71—

* * *

When I say 'held in trust,' we're talking about properties that were optioned by Housing, Incorporated on which we were to build units to be leased to the Mid East Regional Housing Authority. The reason the properties were titled to Weaver individually is because we had not at that time been able to agree to what vehicle or corporation, joint venture, partnership, or whatever, that we would use. . . . [I]t was discussed . . . that rather than to form a corporation or to put them in the name of Housing, Incorporated and to have to record the necessary deeds of trust and security for the Weaver interests, . . . that this step simply be simplified by putting the lots in Mike's name—and I speak of 'Mike' as H. M. Weaver; and this, of course, would simplify the legal work and recording of the security, and so forth."

He further testified that "we were to have a completed project before Weaver had any interest. . . ." Indeed, defendant Michael Weaver also acknowledged that he held the property in trust although the parties do not agree on what the terms were. We believe that this testimony, if found to be true, is sufficient

evidence of the existence of a fiduciary relationship for the purpose of reviewing a motion for summary judgment.

[1, 2] A contract induced by the breach of a fiduciary duty is a contract induced by duress.

> " 'Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.' [Citations omitted.] . . . [A]n essential element of duress is a *wrongful* act or threat. . . ." *Link v. Link*, 278 N.C. 181, 194, 179 S.E. 2d 697, 704 and 705 (1971).

It is abundantly clear that a breach (or threat of breach) of a fiduciary duty is a "wrongful" act within the meaning of that term in the law of duress. *See* Dobbs, Handbook on the Law of Remedies (1973), § 10.2 at 667. The sole remaining question is whether the breach or threat of breach of the fiduciary duty induced the 1972 agreement. Carl Johnson testified that he "signed under considerable duress, because at that time we had permitted Mike Weaver, individually, to take title to lands. . . ." He further stated that

> "after my agreeing to . . . H. Michael Weaver taking title to the land, and I believe that he took title . . . in June. It was after that time that I realized that we were no longer equal partners in a debate. He had the land and we no longer were . . . equals. . . ."

Johnson also testified that Michael Weaver's father threatened to destroy the project if Johnson didn't cooperate. This testimony, if believed, is clear and sufficient evidence that the threat of breach of the fiduciary duties was that which induced plaintiffs to enter into the 1972 agreement.[1]

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1. We note that, insofar as the result in this case is concerned, it does not matter whether one analyzes plaintiffs' claim for relief as one grounded simply upon breach of fiduciary duty or as one grounded upon duress through breach of fiduciary duty. The remedy for duress is restitution. Similarly, one who breaches his fiduciary duty can be forced to disgorge his ill-gotten gains. *See Bank v. Waggoner*, 185 N.C. 297, 117 S.E. 6 (1923).

[3] Alternatively,[2] the plaintiffs allege that the 1972 agreement was induced by the breach or threat of breach of the 1971 agreement[3] and that this breach or threat of breach amounted to duress. We confront three questions: (1) Is there substantial evidence of a breach or a threat of breach? (2) Is there substantial evidence that that breach or threat of breach induced the 1972 agreement? (3) Does that breach or threat of breach amount to duress?

Assuming that there was a binding contract, we believe that the record reveals substantial evidence of a breach of the 1971 agreement. The 1971 agreement committed Weaver to build the project. The agreement defined "profits" as the excess of the amount of the permanent loan over the costs. These profits were to be divided 70% to 30% in favor of plaintiffs. Johnson testified that Weaver tried to drain off all the profits by raising the construction costs. Johnson's testimony suggests that Weaver was trying to charge $600,000 in excess of the eventual costs. If one believes Johnson, this effort by Weaver was in violation of Weaver's duty under the agreement to work out problems incurred "to the mutual benefit of the parties" and also an anticipatory breach of his duty to build the project for "actual cost" plus 4%. Additionally, there is evidence that Weaver declined to pay a bill from an engineering company and a loan commitment fee. These refusals are evidence of Weaver's breach of his duty to contribute "working capital" prior to the closing of construction financing. We believe that this testimony, if believed, is sufficient to raise a genuine issue as to breach.

Next, there must be evidence that the breach was that which induced plaintiffs to enter into the 1972 agreement. *See* 13 S. Williston, A Treatise on the Law of Contracts, § 1617 (1970). It is obvious that if some factor other than the wrongful act of which plaintiffs complain motivated them to enter into the 1972 agree-

2. For the purposes of this discussion we will assume that there was no breach of a fiduciary duty. Michael Weaver testified that he held title not for Johnson but for the Weaver-Johnson joint venture. Since this position is not necessarily inconsistent with Johnson's testimony that Weaver was "to hold in trust for Housing, Incorporated until such time as we reached a joint venture agreement . . .", we will assume for the purposes of this discussion that Weaver held title in trust for a third-party Weaver-Johnson joint venture. Thus, Johnson's demand that Weaver transfer title to him would not have been a proper demand. Weaver, therefore, would not have been technically guilty of a breach of fiduciary duties, nor would there be evidence of a threat of breach.

3. Due to the nature of the record before us, it is not clear whether the 1971 "Agreement" was a binding contract. At some points both parties contend it was binding; at others, they deny that it was binding. For the purposes of this discussion we will assume that it was binding since there is some evidence to that effect.

ment, there was no duress. It is undisputed that Weaver came to hold title as a part of the 1971 agreement in partial fulfillment of his obligation to provide working capital. Johnson testified as follows:

> "The Johnson interests or, rather, the Housing, Incorporated and the Weaver interests had not been able to come to an agreement that was mutually satisfactory and acceptable in accordance with the agreement of April 21, 1971. After a period of time, it came to the point where it wasn't a negotiation under the intent and purpose of the April 21 agreement; it became a negotiation that was somewhat one-sided. And as far as Housing, Inc. was concerned, it was a matter of survival. . . .
>
> . . . I continued to try to work the thing out right on up to the point of finally signing an agreement that I felt that I signed under considerable duress, because at that time we had permitted Mike Weaver, individually, to take title to lands that were under option to Housing, Incorporated . . . ."

It is obvious from this testimony that there is substantial evidence that the breach of the 1971 agreement was the motivating factor behind the 1972 agreement. As one might well expect, Weaver testified that Johnson was motivated by his desire to realize all of the profits from the project. This recurring conflict in the evidence, however, makes this case inappropriate for summary judgment.

Finally, we determine whether the type of breach and threat of breach alleged in this case if found to exist would constitute "duress", as that term is defined, for the purposes of granting or denying restitution. Plaintiffs' evidence suggests that Michael Weaver got title to certain real estate through the 1971 agreement, that defendants breached the contract by failing to provide working capital, in refusing to pay engineering costs and a loan commitment fee, and by trying to drain off all the profits in failing to set a reasonable maximum cost, and that defendants threatened to use their interest in the project to destroy it if plaintiffs did not pay them $270,000. We do not have to determine whether the result would be the same if Michael Weaver had not acquired record title to the real estate. Both the complaint and

the testimony of Carl Johnson rely specifically upon the fact that Weaver held the record title to the property as the reason plaintiffs entered into the 1972 agreement.

In *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973), the Supreme Court confronted the question of whether a threat of breach of a contract could amount to duress. In that case defendant had contracted to supply stone to plaintiff at a set cost. Defendant later refused to furnish the stone unless plaintiff agreed to a price increase. Plaintiff needed the stone for his concrete business, and defendant was the sole local supplier. Plaintiff acquiesced, and, when he could otherwise obtain stone, sued for the return of the excess he had paid. The Court held that plaintiff was entitled to restitution. The Court discussed its decision as follows:

> "What are the essential characteristics of economic duress? 'A threatened violation of a contractual duty ordinarily is not in itself coercive, but if failure to receive the promised performance will result in irreparable injury to business, the threat may involve duress.' 13 Williston, Contracts, § 1617 (3d ed. 1970). 'Perhaps the cases would support, for some jurisdictions at least, the generalization that a threat to breach a contract, if it does create severe economic pressure upon the other party, can constitute duress where the threat is effective because of economic power not derived from the contract itself.' Dobbs, Remedies, § 10.2 (1973).
>
> * * *
>
> Under these circumstances, we think that defendant's threatened, and actual, breach of contract was coercive, and that plaintiff yielded because of economic duress. The threat was effective as a result of defendant's economic power derived from his status as sole supplier of stone, not because of any economic power derived from the contract itself. Dobbs, supra, § 10.2. This economic power continued through the entire ten-year term of the contract, so that the economic duress was likewise continuous. . . ." 282 N.C. at 665 and 666, 194 S.E. 2d at 536 and 537.

In our present case, plaintiffs found themselves in a similar predicament. Defendants had acquired title to the land and were

now refusing to fulfill their obligations under the contract This alone did not constitute duress. Defendants, also, had threatened to destroy the whole project. Johnson testified:

> "Mike's father lost his temper one day, jumped up and down and pounded the table. . . . Mr. Weaver told me one day, in no uncertain terms, that if this project was ever built, that it would only be built by Weaver Construction Company and, if I didn't believe it, to press him."

Johnson also testified that the delays were creating problems.

> "[T]he loss of it [the project authorization] was imminent. I was getting threatening telephone calls from everybody. . . .
>
> Mr. Worth Chesson, executive director of the Authority, called and said, 'If you can't do something, you've got to get off the pot.' Mrs. Farrior, the chairman of the Authority, various people of HUD, were saying that they just can't wait; they've got to move the project."

Johnson testified that defendants were conscious of the power they had over the project.

> "The times that I began to feel that I was being coerced was when I was sat down into a conference room with Mr. Weaver and his counsel, Ted Leonard, and was negotiated with in manners that I felt were somewhat unfairly, in that they held the power; they had the land; it was necessary for the land to be—the land was a necessary ingredient in order to complete the project, and always the fact that the Weaver interests held the land and would never permit its return to Housing, Inc. without the additional payment of some—anywhere from two hundred to two hundred and twenty-five thousand dollars as a bonus for the return; it was then that I felt I was being unfairly dealt with. . . ."

It is the confluence of these two factors with the breach that created the duress. If plaintiffs had controlled the land, they could have proceeded without defendants and sued them. If the government had not been threatening to cancel the project unless they started construction, plaintiffs could have litigated prior to construction. These alternatives, however, were foreclosed. Thus, plaintiffs, according to their evidence, faced two choices: (1) Enter

into the 1972 agreement or (2) Lose the entire project. In similar situations, leading commentators have found duress. *See* Dobbs, § 10.2 at 668; Williston, § 1617; *see also* Restatement of Contracts, § 493, Comment e, Illustrations 8 and 13 (1932); Restatement (Second) of Contracts § 317, Comment b, Illustrations 3, 4 and 5 and § 318(1)(d), Comment e, Illustration 10 (Tent. Draft No. 12, 1977). This situation is clearly within the purview of the rule set out in *Rose v. Materials Co., supra.* The Court there held that breach of contract would amount to duress if the breach threatened to destroy the victim's business where the wrongdoer's power did not come to him as a result of the contract. Here defendants' power to destroy the project was a result of the government's threats to cancel the project if plaintiffs did not begin construction.

We believe that this evidence is sufficient evidence of duress to withstand defendants' motion for summary judgment. We make no decision on the merits of this case. We only hold that insofar as the allegations of duress are concerned there is sufficient evidence to withstand the motion for summary judgment.

II.

The only remaining basis upon which a motion for summary judgment could possibly be granted in this case is on the theory of ratification. Defendants vigorously contend that plaintiffs ratified the 1972 agreement by keeping the land, by making payments, and by waiting approximately 20 months to file suit.

> "It is elementary that a transaction procured by . . . duress . . . may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside. *May v. Loomis*, 140 N.C. 350, 52 S.E. 728; 25 Am. Jur. 2d, Duress and Undue Influence, §§ 28 and 41. It is equally clear, however, that an act of the victims . . . will not constitute a ratification of the transaction thereby induced unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely. [Citations omitted.]" *Link v. Link*, 278 N.C. at 197, 179 S.E. 2d at 706 and 707 (1971).

[4] The remedy in an action on a contract procured by duress is restitution. Unlike the victim of fraud, the victim of duress cannot affirm the contract and sue in tort. The victim of duress must

either affirm the contract or seek restitution. *May v. Loomis*, 140 N.C. 350, 52 S.E. 728 (1905); Dobbs, § 10.2. Additionally, some cases have suggested that the mere passage of time can amount to ratification. *E.g., Reed v. Exum*, 84 N.C. 430 (1881). Thus, there appears to be some merit in defendants' contentions.

[5] The first question presented is whether plaintiffs can prevail in this action inasmuch as they retained the property. In the more typical situation, retention of the property transferred as a result of the contract allegedly induced by duress would present a genuine problem. Here, however, plaintiffs, in essence, contend that they paid for property which was rightfully theirs in the beginning. Stated otherwise, plaintiffs contend that defendants forced them to pay for property of which they were the equitable owners while defendant Weaver only held bare legal title. In this instance, then, the restitutionary remedy would award plaintiffs *both* the property *and* the return of their funds. Thus, there is no inconsistency in plaintiffs' having retained the property and having sued for recovery of their funds. We note that the facts in this regard are in direct conflict. Plaintiffs assert that Michael Weaver held bare legal title. Defendants contend that plaintiffs had no interest in the property. Thus, the fact that plaintiffs have retained the property is not a sufficient basis upon which to grant summary judgment in this case.

[6] Insofar as the other acts are concerned, as we noted earlier, "*an act of the victim . . . will not constitute ratification of the transaction . . . unless, at the time of such act, the victim . . . was then capable of acting freely.* [Citations omitted.]" (Emphasis added.) *Link v. Link*, 278 N.C. at 197, 179 S.E. 2d at 706 and 707. Thus, even if payments were made over an extended period of time, there would be no ratification so long as the duress continued. This rule is a sound one. So long as the conditions which gave rise to the duress continue, the wrongdoer can continue to control the actions of the victim. Indeed, it may be easier to control the victim after the initial hurdle is crossed. Where, as here, the whole contract has been induced by duress, it is undoubtedly easier to induce a single payment if the duress continues. If the duress continues, there is no ratification.

In this case, defendant Michael Weaver had record title to the property. Plaintiffs contend that they had the equitable in-

terest in this property and that they were forced to enter into the 1972 agreement by Michael Weaver's refusal to transfer title to them as he was obliged to do. They contend that Weaver had threatened to destroy the project through control of the land. The undisputed evidence reveals that although Weaver transferred title to the property, he in the same transaction demanded and received a deed of trust securing payment of the notes given by plaintiffs in the transaction. Thus, defendants' power over the project continued. Plaintiff Carl Johnson testified under oath as follows:

> "As to why did I wait till December 31, 1973, to institute suit against Weaver Construction Company, after negotiating with Weaver and Weaver Construction Company over a year in an effort to get this project to a point that it could be constructed, after having been subjected to some rather trying times, after being fearful that I might see more of those, after being coerced into accepting an agreement that I felt was completely unreasonable, unfair, but having no other alternative, having entered into the agreement on behalf of Housing, Incorporated, I was fearful of the results of any opposition to Weaver's contract until such time as the project was closed, completed, and beyond any attack from the Weaver interests; I was so fearful that they might take and cloud the title to prevent closing of the project. . . . [T]hey had the control of the land in Mid East at that time and I had no alternative but to acquiesce or to succumb to the pressures. . . ."

If plaintiff's testimony is accepted as true, and, on motion for summary judgment, the nonmoving party's evidence must be considered favorably, that testimony is sufficient evidence of continuing duress to rebut any allegations of ratification. We also note that the Supreme Court in *Rose v. Materials Co., supra,* held that the victim of duress in that case had not ratified the agreement by his payments and acquiescence because the duress continued throughout the ten-year period of acquiescence. Thus, if it should be found that the defendants' power over plaintiffs continued throughout the period, plaintiffs' payments, acquiescence, and delay would not amount to ratification.

On the motion for summary judgment, the defendants had the burden of proving that there is no genuine issue as to any

material fact and that on the undisputed facts they are entitled to judgment as a matter of law. The record before us clearly indicates that they have failed to meet that stringent test. The record is replete with conflicts in the evidence. In ruling on a motion for summary judgment, those conflicts must be resolved in favor of the nonmoving party, in this case, the plaintiffs. When the evidence in this case is so viewed, it is clearly sufficient to withstand the motion for summary judgment. The motion should have been denied both as to plaintiffs' claim and defendants' counterclaim.

The judgment of the trial court is reversed and the case remanded for trial.

Reversed and remanded.

Judge ARNOLD concurs.

Judge MARTIN dissents.

IN THE MATTER OF: APPLICATION FOR LICENSE AS A PRACTICING PSYCHOLOGIST OF BURKE F. PARTIN, JR.

No. 7710SC763

(Filed 1 August 1978)

1. Constitutional Law § 10.2— judicial review of statute—no inherent power in courts

A court of this State has no inherent power to review acts of the General Assembly and to declare invalid those which the court disapproves or, upon its own initiative, finds to be in conflict with the Constitution; rather, the authority of a court to declare a legislative act unconstitutional arises from, and is an incident of, its duty to determine the respective rights and liabilities or duties of litigants in a controversy brought before it by the proper procedure.

2. Constitutional Law § 10.2— conflict between statute and Constitution

If there is a conflict between a statute and the Constitution, the court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.

3. **Physicians, Surgeons and Allied Professions § 5.2— denial of license as practicing psychologist—judicial review—constitutionality of statutes not presented**

Where the only claim for relief asserted by petitioner was that he be granted a license under the Practicing Psychologist Licensing Act, no question as to the constitutionality of sections of that Act was presented to the court upon review of the decision of the Board of Examiners of Practicing Psychologists denying a license to petitioner, since one may not question the constitutionality of the statutes upon which he bases his claim.

4. **Physicians, Surgeons and Allied Professions § 5.2— licensing of practicing psychologist—doctoral degree—primarily psychological studies**

The requirement of G.S. 90-270.11(a)(1)c that an applicant for a license as a practicing psychologist must have received his doctoral degree "based on a program of studies the content of which was primarily psychological" was neither vague nor uncertain but called for the application of objective standards which bore a rational relationship to the purposes of the Practicing Psychologist Licensing Act and furnished sufficiently clear guidelines to control the Board of Examiners of Practicing Psychologists in exercising its licensing and rule-making functions.

5. **Physicians, Surgeons and Allied Professions § 5.2— licensing of practicing psychologist—rule of Board of Examiners—doctoral degree not in psychology**

The Board of Examiners of Practicing Psychologists did not exceed the rule-making power delegated to it by G.S. 90-270.9 in adopting a rule requiring that an applicant's doctoral degree, if other than one based on a Ph.D. program in psychology at an accredited educational institution, must have been based on a program of studies which was psychological in nature with a minimum of sixty hours of graduate study in standard psychology courses, and requiring an applicant who claimed that course work done by him in departments other than in psychology should be counted in meeting the sixty-hour requirement to provide evidence that such courses were psychological in nature.

6. **Physicians, Surgeons and Allied Professions § 5.2— denial of license as practicing psychologist—doctoral degree not in psychology—absence of necessary psychology courses**

The evidence supported findings by the Board of Examiners of Practicing Psychologists that certain graduate courses taken by an applicant who had a Ph.D. in Guidance and Counseling were not psychological in nature and that the applicant failed to carry his burden of showing that another course was psychological in nature, and the Board's findings supported its conclusion that the applicant did not have the necessary sixty hours of graduate study in standard psychology courses.

APPEAL by the respondent, North Carolina State Board of Examiners of Practicing Psychologists, from *Godwin, Judge.* Judgment entered 22 July 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1977.

This is an appeal by the North Carolina State Board of Examiners of Practicing Psychologists (hereinafter referred to as the "Board") from a judgment of the superior court which, among other matters, adjudged certain provisions of the Practicing Psychologist Licensing Act, being Article 18A of G.S., Chap. 90, to be unconstitutional.

This matter was initiated on 20 April 1975 when Dr. Burke F. Partin, Jr., who since 1971 had held a license from the Board as a psychological examiner, applied to the Board for a temporary license as a practicing psychologist. This application being denied, Dr. Partin applied for and was granted an administrative hearing before the Board pursuant to Article 3 of G.S., Chap. 150A. Following this hearing, which was held 6 August 1976, the Board entered its order making findings of fact on the basis of which it concluded:

> 1. Dr. Fred Burke [sic] Partin did not receive his doctoral degree from "a program of study the content of which was primarily psychological" as required by G.S. 90-270.11 and does not have the necessary sixty (60) hours of graduate study in standard psychology courses or courses which are psychological in nature as required for an applicant seeking a license on the basis of a degree related to psychology according to Rule .0303(a) of Chapter 54 of Title 21 of the North Carolina Administrative Code in the duly adopted Rules of the North Carolina State Board of Examiners of Practicing Psychologists on file with the Office of the North Carolina Attorney General.
>
> 2. Dr. Partin does not have appropriate supervised experience as a student and since obtaining his degree necessary for obtaining a license as a Practicing Psychologist as required by Rule .0305(a) of Chapter 54 of Title 21 of the North Carolina Administrative Code, as set out in the Rules of the North Carolina State Board of Examiners of Practicing Psychologists duly adopted and filed with the Office of the North Carolina Attorney General.

On these conclusions the Board denied Dr. Partin's application. Pursuant to G.S. 150A-43, et seq., Dr. Partin filed exceptions to certain of the Board's findings of fact and to its conclusions of law and petitioned for judicial review in the Superior Court of Wake

County, petitioning the court to "reverse the Board's decision denying licensure to this applicant and remand this matter to the Board for issuance of the license of practicing psychologist."

Dr. Partin's petition for judicial review was heard in the superior court upon the record of the proceedings before the Board and on oral argument and briefs presented by counsel for the petitioner and the Board. Following the hearing, Judge Godwin entered judgment dated 22 July 1977 in which he held: first, that certain provisions of Art. 18A of G.S., Chap. 90, particularly G.S. 90-270.2(e), G.S. 90-270.4, and G.S. 90-270.2(d), were unconstitutional, void, and of no effect; second, that in promulgating its rule which is codified as Section .0303(a) of Title 21, Chap. 54 of the North Carolina Administrative Code the Board exceeded the rule-making authority granted to it by G.S. 90-270.9; and third, that the Board's findings of fact 3, 4, 5, and 16 were not based upon substantial evidence in the record and were, therefore, arbitrary and capricious. Judge Godwin's order then concludes as follows:

> Therefore, the Board's conclusions 1 and 2, based upon the above erroneous findings of fact, are not based upon substantial evidence, are arbitrary and capricious, and are hereby reversed by this Court.
>
> Upon the foregoing, the decision of the Board of Examiners of Practicing Psychologists of November 19, 1976, denying a license to the petitioner is declared null, void and of no effect, and the Board's findings of fact 3, 4, 5 and 16 and conclusions 1 and 2 are reversed.
>
> This is the 22nd day of July, 1977, at Raleigh, Wake County, North Carolina.
>
> s/ A. PILSTON GODWIN, JR.
>
> Judge Presiding

From this judgment, the Board appealed.

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

Hollowell, Silverstein, Rich & Brady, P.A., by Ben A. Rich for Burke F. Partin, Jr., appellee.

PARKER, Judge.

In the judgment appealed from, the court held G.S. 90-270.2 (e), which defines "Professional psychological services" for purposes of the Practicing Psychologist Licensing Act, to be unconstitutional on the grounds that the definition contained therein "is so vague, uncertain, sweeping and broad as to confuse men of ordinary intelligence." This court held G.S. 90-270.4, which grants exemption from requirements of the Licensing Act to certain persons in the regular employ of federal, state, county, or municipal government, or other political subdivision, or agency thereof, or of a duly accredited educational institution, or private business, provided such employee is performing duties for which he is employed within the confines of such organization and provided neither the employee nor the organization are engaged in the practice of psychology as defined in the Act, to be unconstitutional on the grounds that it creates an invalid distinction and exempts so many persons that the licensing of the few remaining is not reasonably necessary to promote the public good to the extent required for a valid exercise of the State's police power. The court held G.S. 90-270.2(d), which defines the practice of psychology within the meaning of the Act as the rendering of professional psychological services for a fee, thereby in effect authorizing the rendering of such services by an unlicensed person so long as no fee is charged, to be unconstitutional on the grounds that the threat posed to the public health and welfare by the practice of psychology by an unqualified person is in no way lessened simply because no fee is charged and the Act, therefore, lacks the substantial relationship to the public health or welfare required for a legitimate exercise of the State's police power. In our opinion, none of the constitutional questions discussed in the judgment appealed from were properly before the court in the present proceeding and, by undertaking to deal with them in this case, the court exceeded its authority.

[1, 2] A court of this State has no inherent power to review acts of our General Assembly and to declare invalid those which the court disapproves or, upon its own initiative, finds to be in conflict with the Constitution. Rather, the authority of a court to declare an act of the Legislature unconstitutional arises from, and is an incident of, its duty to determine the respective rights and liabilities or duties of litigants in a controversy brought before it

by the proper procedure. In performing this duty, the court, in the event of a conflict between two rules of law, must determine which is the superior rule and, therefore, the rule governing the rights and liabilities or duties of the parties to the controversy before the court. If there is a conflict between a statute and the Constitution, the court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969).

[3] In the present case the only question properly presented by petitioner's application to the Board was whether he was entitled to receive the license for which he applied. The Board ruled that he was not, and upon judicial review of this administrative ruling of the Board under the procedure established by G.S. 150A-43 *et seq.*, the only question properly presented to the court was whether the Board had correctly ruled that petitioner was not entitled to a license. G.S. 150A-46 provides that the petition for judicial review shall "explicitly state . . . what relief the petitioner seeks," and the only relief stated in the petition to the superior court in the present case was that the court "reverse the Board's decision denying licensure to this applicant and remand this matter to the Board for issuance of the license of practicing psychologist." Neither the proceedings before the Board nor the judicial review of those proceedings in the superior court presented any question as to petitioner's right to engage in the practice of psychology *without* a license. Therefore, no question of any conflict between the Constitution and the sections of the Practicing Psychologist Licensing Act which the court held to be unconstitutional was properly presented, and it was not necessary for the court to consider such questions to decide the case before it.

The petition for judicial review filed with the superior court in this case did contain allegations setting forth, apparently for the first time in this proceeding, petitioner's contentions as to the unconstitutionality of certain sections of the Practicing Psychologist Licensing Act. However, no relief was sought, nor could any have properly been sought in this proceeding, on account of these constitutional contentions. The only claim for relief asserted by the petitioner throughout this proceeding was that he

be granted a license under the Act, and one may not question the constitutionality of the very Act upon which he bases his claim. *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E. 2d 659 (1964). "One may not, in the same proceeding, seek an advantage which is authorized by a specific statute only and, at the same time, deny the constitutionality of the statute." *Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 118, 171 S.E. 2d 406, 413 (1970).

For the reasons above stated, we hold that the constitutional questions discussed in the judgment appealed from were not properly before the court in this proceeding and that, in undertaking to adjudicate those constitutional questions in this proceeding, the court exceeded its authority. Decision of such questions will have to await a case in which they are properly presented before the court in a proceeding in which determination of the constitutionality of the various statutory sections involved is required in order to adjudicate the respective rights and liabilities or duties of the litigants in the controversy then before the court. In the meantime, "[t]he presumption is that any act passed by the legislature is constitutional." *Ramsey v. Veterans Commission, supra* at 647, 135 S.E. 2d at 661.

We now turn to the other questions presented by this appeal, whether the court was correct in its ruling that the Board exceeded its statutory rule-making authority and in its ruling that certain of the Board's findings of fact were not based upon substantial evidence in the record.

G.S. 90-270.11(a)(1), as that statute was in effect prior to 1 July 1977 and as it was in effect at the time Dr. Partin made application to the Board for license in the present case, provided that the Board should issue a license to practice psychology to any applicant who paid the prescribed fees, who passed a satisfactory examination in psychology, and who submitted evidence verified by oath and satisfactory to the Board that he was at least 21 years of age, of good moral character, and

> c. Has received his doctoral degree based on a program of studies the content of which was primarily psychological from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of

acceptable and appropriate professional experience as a psychologist.

The statute did not further define what constituted "a program of studies the content of which was primarily psychological." However, G.S. 90-270.9 includes the provision that "[t]he Board shall make such rules and regulations not inconsistent with law, as may be necessary to regulate its proceedings and otherwise to implement the provisions of this Article." Pursuant to this authority, the Board adopted Rules, including its Rule .0303(a), which is as follows:

> .0303 EDUCATION REQUIREMENTS
>
> (a) Practicing Psychologist. Licensure for practicing psychologist requires a doctoral degree based on a planned and directed program of studies which are psychological in nature. If the applicant possesses a doctoral degree other than a Ph.D. based on a Ph.D. program in psychology at an accredited educational institution, evidence must be provided that the degree is based on a program of planned and directed studies which are psychological in nature. Sixty semester hours of graduate study in standard psychology courses is the minimum requirement for such a doctoral program. If the applicant wishes to claim that course work done in departments other than psychology should be counted in meeting the 60 hour minimum requirement, evidence must be provided, in a form specified by the board, that such courses are psychological in nature. This evidence shall consist of a description of the courses, textbooks used, name of professor and statement of professor's membership in national, regional and state psychological associations and his license or certification status.

[4, 5] In the judgment appealed from, the superior court concluded that the words "a program of studies the content of which was primarily psychological," as contained in G.S. 90-270.11(a)(1)c, were so vague and uncertain that they failed to furnish standards sufficiently clear to prevent arbitrary and capricious action by the Board in exercising its delegated licensing and rule-making authority. The court further concluded that the Board's requirement, contained in its Rule .0303(a), that the applicant's doctoral degree, if other than one based on a Ph.D. program in psychology

at an accredited educational institution, must have been based on a minimum of sixty semester hours of graduate study in standard psychology courses, did not constitute a provision either necessary to regulate the Board's proceedings or otherwise to implement the provisions of the Practicing Psychologist Licensing Act, and that therefore it exceeded the Board's delegated rule-making authority as granted to it by G.S. 90-270.9. We do not agree with either of these conclusions of the superior court.

It is, of course, well established that "[i]n licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the Legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance," and "[w]here such a power is left to the unlimited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory but must be regarded as an attempted delegation of the legislative function offensive both to the State and the Federal Constitution." *State v. Harris*, 216 N.C. 746, 754, 6 S.E. 2d 854, 860 (1940). In the present case, however, the Legislature did not grant unlimited discretion to the Board in the matter of licensing practicing psychologists. On the contrary, the Legislature in G.S. 90-270.11 provided the Board with clear and objective standards to guide it in the exercise of its delegated licensing authority. The requirement of the statute that the applicant must have received "his doctoral degree based on a program of studies the content of which was primarily psychological from an accredited educational institution," is in our opinion neither vague nor uncertain. On the contrary, such a requirement calls for application of objective standards which both bear a rational relationship to the purposes of the Practicing Psychologist Licensing Act and furnish sufficiently clear guidelines to control the Board in the exercise of its licensing and rule-making functions. Moreover, in adopting its Rule .0303(a) the Board did not exceed the rule-making authority granted to it by G.S. 90-270.9. That Rule was not inconsistent with but was reasonably necessary to implement the provisions of the Practicing Psychologist Licensing Act. In adopting that Rule, the Board assumed that a doctoral degree, if based on a Ph.D. program in psychology at an accredited educational institution, would

necessarily be a degree based on "a program of studies the content of which was primarily psychological." That assumption appears to us to be entirely reasonable. In addition, the Board recognized that doctoral degrees may be granted based on programs other than in psychology but in fields so closely related as to be properly considered as being "based on a program of studies the content of which was primarily psychological" within the meaning of G.S. 90-270.11(a)(1)c. The Board provided for such a case in its Rule .0303(a) by specifying that sixty semester hours of graduate study in standard psychology courses should be considered the minimum requirement for such a doctoral program. The Rule further provided that if the applicant for licensure holding such a doctoral degree claimed that course work done by him in departments other than psychology should be counted in meeting the sixty-hour requirement, he must provide evidence to show that such courses were psychological in nature, and the Rule then specified the type of evidence which should be provided. These provisions of the Board's Rule not only are not inconsistent with the Practicing Psychologist Licensing Act, but they appear to us to be reasonably necessary to implement the provisions of that Act. Our conclusion that the Board's Rule .0303(a) is consistent with the legislative intent is further strengthened by the amendment effected by Sec. 7 of Chap. 670 of the 1977 Session Laws. That Act amended G.S. 90-270.11(a)(1)c effective 1 July 1977 to read as follows:

> c. Has received his doctoral degree based on a planned and directed program of studies, the content of which was psychological in nature, from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his area of practice as a psychologist.

Accordingly, we hold that in adopting its Rule .0303(a) the Board did not exceed the rule-making power delegated to it by G.S. 90-270.9.

[6] The application of the Board's Rule .0303(a) is well illustrated by the facts of the present case. Here, Dr. Partin, the applicant for licensure as a practicing psychologist, had previously passed the Board's examination in 1971, when he received his license as a

psychological examiner, with a score sufficiently high to qualify him to be licensed as a practicing psychologist. However, he did not hold a doctoral degree in psychology. He was originally a student in the School Psychology Program at UNC-Chapel Hill, but later changed and entered a Guidance and Counseling Program in the Department of Education at UNC-Chapel Hill, where he received his Ph.D. in Guidance and Counseling. Because Dr. Partin's doctoral degree was in a related field rather than in psychology, the Board required that he submit evidence that he had taken a minimum of sixty semester hours of graduate study in standard psychology courses. After reviewing the evidence submitted, the Board found that Dr. Partin had only fifty-one such semester hours. The Board's findings of fact 3, 4, and 5 were as follows:

> 3. E.D.S.T. 315, a course for which Dr. Partin contended he should have been given credit towards the sixty (60) hours necessary, is a course in vocational rehabilitation and is not psychological.
>
> 4. Education 371, a course for which Dr. Partin contended he should have been given credit towards meeting the sixty (60) hours required, is an independent study course which may be psychological in nature or may be educational in nature depending upon the needs of the student. No documentation established the fact that this course was primarily psychological in nature in Dr. Partin's case.
>
> 5. Education 206 is a guidance and counselling course and is not primarily psychological.

In the judgment appealed from, the superior court held that these three findings of fact were not based upon substantial evidence in the record and were arbitrary and capricious. We do not agree.

At the outset, we note that G.S. 90-270.11(a)(1) placed the burden on the applicant to submit evidence "verified by oath and satisfactory to the Board" to show that he was qualified for licensure. In regard to the Board's finding of fact number 3 (dealing with the course referred to therein as E.D.S.T. 315 but referred to in the testimony as "EDSP 315, Problems in Rehabilitation Counseling"), Dr. Partin testified that "[t]his is roughly a systems approach at establishing vocational rehabilita-

tion services evaluating the effectiveness of the services" and that the course "overviewed setting up services, canvassing the community, establishing needs oriented toward the delivery of vocational rehabilitation services." He further testified that "this course is in the area of vocational rehabilitation and is listed with the university as a vocational rehabilitation course as opposed to a counseling course." This testimony is consistent with and tends to support the Board's finding that EDSP 315 was "a course in vocational rehabilitation and is not psychological." It is true that Dr. Partin also testified that, "I consider vocational rehabilitation to be psychological," and he presented an affidavit of Dr. Thomas K. White, who taught EDSP 315 and who was a practicing psychologist, in which Dr. White stated that he "would consider this class as having been primarily psychological in nature." However, the Board was not bound by these expressions of the opinions of the applicant and of his teacher. The burden was on the applicant to present evidence that the content of the course was psychological in nature. Other than the conclusory opinions of the applicant and of his teacher, we find no such evidence in the record. In any event it was the function of the Board, and not that of the reviewing court, to resolve conflicts in the evidence and to make findings of fact. The Board's findings of fact, when supported by competent, material, and substantial evidence in view of the entire record, are conclusive on appeal. *In re Berman*, 245 N.C. 612, 97 S.E. 2d 232 (1957); *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954). The Board's finding of fact number 3, being so supported in this case, is conclusive on this appeal.

In regard to the Board's finding of fact number 4, relating to the course designated therein as "Education 371," Dr. Partin presented evidence to show that the catalog listed this course as "ED-371 Readings and Investigations in Educational Psychology." He testified that he had taken this course in the summer of 1969 and his recollection was "a bit hazy on this," but that his memory was that they "spent time in the schools administering standardized group tests with children during the summer" and that to the best of his recollection they "administered, scored, and prepared a paper on the basis of the research that was done." Dr. Brantley, who taught the course, testified that "[t]he nature of course work in Education 371 might be determined by the individual needs of the student whether it's more educational in

nature or more psychological in nature, needs in the sense of interest or professional determination," but that he could not recall in Dr. Partin's case whether his interest as it related to what he did in that course was primarily psychological or primarily educational in nature. This evidence fully supports the Board's finding of fact number 4, which found only that the course in question might, or might not, have been psychological in nature. Again, the burden was on the applicant, Dr. Partin, to come forward with evidence to show that the content of the course was psychological in nature, and all that his evidence shows is that in his case it may, or may not, have been. In effect, the Board found in its finding of fact number 4 that the applicant had failed to carry his burden of proof. On such inconclusive evidence the Board was not required to make a more determinative finding.

Regarding finding of fact number 5, relating to the course designated as "Education 206," Dr. Partin testified: "The title of this is theories, appraisals, and uses of resource materials and guidance. This covers theories of vocational choice and development, use of vocational materials, and the like." This testimony tends to support the Board's finding that this is a guidance and counseling course and not primarily psychological. The only evidence to the contrary is the statement in Dr. White's affidavit that: "In my judgment Ed. 206 is a primary support class in psychology and such a class or similar class is a usual requirements [sic] in advanced programs in the clinical, counseling, and educational areas." Again, the Board was not bound to accept Dr. White's judgment in this matter. Again, also, the burden was on the applicant, Dr. Partin, to produce evidence to show that the content of the course was psychological in nature. The evidence presented, if it only partially supports the Board's finding number 5 that the course was not primarily psychological, clearly was insufficient to compel a finding that it was.

We note that any one of the Board's findings of fact numbers 3, 4, or 5 would have been sufficient in itself to support the Board's conclusion number 1 that the applicant did not have the necessary sixty hours of graduate study in standard psychology courses, since it would have been necessary for all three of the courses to have qualified in order to make up the necessary sixty hours. We note further that the Board's conclusion number 1 was in itself sufficient to support the Board's order denying Dr.

Partin's application for a license. It is, therefore, unnecessary for us to consider the Board's conclusion number 2 and its finding of fact number 16, on which the Board's conclusion number 2 was based, since these simply supplied an alternative grounds for supporting the denial of license in this case.

The judgment of the superior court here appealed from is reversed and this cause is remanded to the Superior Court of Wake County for entry of a judgment affirming the decision and order of the Board.

Reversed and remanded.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD HUNT

No. 779SC1033

(Filed 1 August 1978)

1. Jury § 6.3— examination of prospective jurors—questions about performance—objections properly sustained

Where defense counsel asked one prospective juror if he would permit anything to influence him in his decision and another prospective juror if he would allow the fact that a considerable number of jurors were voting differently from him to influence him to change his verdict, the trial court properly sustained the State's objections, since the questions could not reasonably be expected to result in answers bearing upon the jurors' qualifications but instead would tend to commit the jurors to a decision on the performance of their duties prior to an instruction by the court with regard to their proper performance pursuant to law.

2. Jury § 7.10— policeman as prospective juror—knowledge of defendant's case—no challenge for cause

The trial court did not err in denying defendant's challenge for cause of a prospective juror who was a police officer and who had heard defendant's case discussed by other police officers since it is not required that any individual must be excused for cause solely by virtue of the nature of his employment; the prospective juror clearly indicated that he could base his determination solely upon the evidence and the law without being swayed by anything else; and the court offered defendant the opportunity to examine the witness further, but no additional questions were asked.

3. Searches and Seizures § 14— consent to search vehicle—failure to find no duress—specific finding not required

Evidence was sufficient to support the trial court's conclusion that a search of defendant's automobile was made with his consent which was given at a time when he understood his rights, was sober, was not frightened and understood the questions asked him, and the court did not err in failing specifically to find and conclude that the voluntary consent was given without duress, since the court's finding that defendant did not appear to be frightened when he gave consent and that he gave consent voluntarily was sufficient to support a conclusion that consent was given without duress.

4. Criminal Law § 158.2— argument omitted from record—presumption of propriety

When a portion of the argument of either counsel is omitted from the record on appeal, the arguments are presumed proper.

5. Criminal Law § 113.1— jury instructions—misstatement of evidence—no reversible error

In a homicide prosecution where the trial court charged that one of the State's witnesses had testified that soil samples taken from an area near the victim's body were "the same" as soil samples taken from defendant's shoes, but the witness had in fact testified only that it was highly likely that the samples came from the same source, such inadvertent and slight inaccuracy in recapitulating the evidence was not reversible error, since later in the charge the court specifically instructed the jury that they were to rely upon their own recollection of the evidence and to disregard the court's recollection if the two differed.

APPEAL by defendant from *Graham, Judge.* Judgment entered 12 July 1977 in Superior Court, WILSON County. Heard in the Court of Appeals 6 April 1978.

Defendant was indicted and tried for murder in the first degree. Upon his plea of not guilty, the jury returned a verdict of guilty of murder in the second degree. From judgment sentencing him to imprisonment for a period of sixty years, the defendant appeals.

The State's evidence tended to show that the deceased, Charlene Perry, and the defendant, James Edward Hunt, had dated for a time prior to 8 March 1977, but that she had stopped dating the defendant and was dating another man. Approximately two weeks prior to 8 March 1977, the defendant and the deceased had a conversation at a funeral home. At that time the defendant told the deceased that "if she didn't watch what she was doing, someone would be viewing her body."

The State also offered evidence tending to show that the defendant went to a party in the home of one Christine Hargrove on 8 March 1977. He had a conversation there with the deceased and asked her if he could speak to her for a few minutes. The two went outside the Hargrove home where the defendant bent the deceased backward over an automobile. The deceased appeared to try to get away from the defendant at this time. When told to, he released the deceased and returned to the inside of the home. At this time he displayed a knife and a pistol.

The State's evidence further tended to show that on 8 March 1977, after the defendant and deceased returned to the inside of the Hargrove home, the defendant again asked to speak to the deceased. They then left the home together. The body of the deceased was found later, on the evening of 8 March 1977, beside a public highway. Her death was the result of gunshot wounds.

The defendant was stopped by members of the Vance County Sheriff's Department while driving his automobile at 5:00 a.m. on 9 March 1977. At their request, the defendant followed the officers to the sheriff's office. The defendant then consented to a search of his automobile. During a search of the automobile, blood stains were found. Blood and soil samples were taken from the automobile and from the defendant's shoes and tested by the State Bureau of Investigation. The blood in the car and on the defendant's shoes matched the blood type of the deceased but not that of the defendant. The soil found on the defendant's shoes was tested and found to be of a similar type to that at the point where the deceased's body was found. Elmer T. Miller, a specialist in soil comparison for the State Bureau of Investigation, testified that it was highly likely that the two soil samples came from the same original source.

The defendant offered evidence tending to show that he had gotten along well with the deceased, Charlene Perry. The defendant also offered evidence tending to show that the deceased had been seen going to a party in the apartment of another person at 9:00 p.m. on the evening of her death.

Other relevant facts are hereinafter set forth.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Kermit W. Ellis, Jr., for the defendant appellant.

MITCHELL, Judge.

[1] The defendant first assigns as error the trial court's actions in sustaining the State's objections to two of his questions to prospective jurors during jury selection. The defendant asked one prospective juror: "[I]f you are firmly convinced the defendant was not guilty, would you permit anything to change your mind or influence you in your decision as to how to vote?" The trial court sustained the State's objection to this question. At a later point in jury selection, the defendant asked another prospective juror: "Would you allow the fact a considerable number of jurors were voting differently from you to influence you to change your verdict?" The trial court also sustained the State's objection to this question. The defendant contends that sustaining the objection to either question constituted a failure to permit defense counsel the latitude required in order to adequately assess each of these prospective juror's fitness and constituted reversible error. We do not agree.

We find the two questions were properly excluded as tending to "stake out" the two prospective jurors and cause them to pledge themselves to a future course of action. This is neither contemplated nor permitted by the law. The trial court should not permit counsel to question prospective jurors as to the kind of verdict they would render or how they would be inclined to vote, under a given state of facts. *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206, 96 S.Ct. 3204 (1976). The hypothetical question posed here could not reasonably be expected to result in an answer bearing upon a juror's qualifications. Rather it would tend to commit the juror to a decision on the performance of his duties prior to an instruction by the court with regard to their proper performance pursuant to law. The trial court properly sustained the objections to both questions. *State v. Poole*, 25 N.C. App. 715, 214 S.E. 2d 774 (1975).

The defendant also contends the trial court erred in halting his attempts to ask repetitive questions without the State having objected. Regulation of the manner and extent of the inquiry of a prospective juror concerning his fitness rests largely in the trial court's discretion and will not be found to constitute reversible error unless harmful prejudice and clear abuse of discretion are

shown. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *modified as to death penalty*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976). This contention is without merit.

[2] The defendant next assigns as error the trial court's denial of his challenge for cause of prospective juror, Clarence Varker. Mr. Varker had previously indicated that he was a member of the Henderson Police Department and had heard the defendant's case discussed by other police officers. On this basis the defendant challenged the prospective juror for cause. The court inquired as to whether Mr. Varker could listen to the evidence and the court's instructions on the law and be guided solely by those two things and nothing else. The prospective juror answered affirmatively and the court denied the motion to excuse for cause. The court then specifically offered counsel for the defendant the opportunity to pursue the issue further with the prospective juror, but no further questions were asked.

We note that the defendant exhausted his peremptory challenges and thereafter asserted his right to challenge peremptorily an additional juror. Error by the trial court in denying the defendant's challenge for cause would, therefore, be reversible. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *modified as to death penalty*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3207 (1976); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). We do not, however, under the particular circumstances of this case, find the ruling of the trial court erroneous.

The defendant refers us to *State v. Lee*, 292 N.C. 617, 234 S.E. 2d 574 (1977), and contends that the holding of that case required the trial court to grant this defendant's challenge of Mr. Varker for cause due to his status as a police officer and the fact that he had heard the case discussed. We do not find the holding in *Lee* so broad as to have required the trial court to excuse the juror for cause in this case. We decline to hold that any individual must be excused for cause *solely* by virtue of the nature of his employment. Such holding might well require exclusion of numerous classes of individuals solely by virtue of employment or membership in voluntary associations which were perceived as indicating some type of predisposition on the part of a prospective juror.

Neither do we find the fact that the prospective juror had heard the case to be tried discussed previously to be determinative of his competence to serve as a member of the jury. To exclude all individuals who had prior information concerning a given case from jury duty would, in cases involving extensive publicity, often tend to require the exclusion of most individuals who regularly read newspapers or otherwise kept themselves informed as to current affairs of public note. Arguably, this would require our courts to exclude from service those best qualified to hear and deal with evidence and to understand instructions upon the law.

Our Supreme Court specifically indicated in *Lee* that its holding was limited to the particular circumstances of that case. Those circumstances are easily distinguishable from the circumstances presented by the case *sub judice*. In *Lee* the prospective juror was a police officer's wife who knew a crucial State's witness well and had known him over a period of time. More importantly, however, the prospective juror indicated in that case that she felt it possible she might be unable to keep herself from giving more weight to the testimony of police officers she knew than she would give to other witnesses. Here, the prospective juror clearly indicated that he could base his determination solely upon the evidence and the law without being swayed by anything else.

The trial court offered the defendant the opportunity to pursue these matters further with the prospective juror by asking additional questions. No further questions were asked. The record does not indicate what the prospective juror had heard about this case when he heard it discussed by other officers. In order to find error by the trial court in denying the challenge by Mr. Varker for cause, we would, therefore, be required to hold that he could be excluded for cause solely by virtue of his employment as a police officer who had been exposed to some unspecified information about the case to be tried. We do not believe such a holding is required by law, and we decline so to hold. 8 Strong, N.C. Index 3d, Jury, § 7.10, pp. 186-7.

[3] The defendant next assigns as error the ruling of the trial court that the search of the defendant's automobile, which resulted in the introduction into evidence of blood samples and

other physical evidence, was conducted with the defendant's consent. Upon objection by the defendant to the introduction of this evidence, the trial court held a voir dire out of the presence of the jury and heard evidence concerning the events leading up to the search of the defendant's automobile. The law enforcement officers who testified for the State on voir dire indicated that, when the defendant was stopped in the early morning hours of 9 March 1977, he was asked to and did drive his automobile to the sheriff's office. Upon arrival there, the defendant was advised of his constitutional rights and asked by the officers if they could search his automobile. The defendant responded at that time by stating that the keys were in the switch, and they could search the automobile. The officers further testified that the defendant appeared at this time to understand his rights, to be sober, not frightened and to understand the questions asked him. The trial court made specific findings of fact incorporating the substance of this testimony and concluded that the search of the defendant's automobile was with consent which had been given freely and voluntarily.

When the State seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, voluntarily given, and not the result of duress or coercion, express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). Additionally, the presumption is against the waiver of such fundamental constitutional rights. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). Where, as here, the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by an unlawful search, it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant as to the lawfulness of the search and seizure. The trial court is further required to make findings of fact from the evidence, and such findings are binding on appeal if supported by competent evidence. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974), *cert. denied*, 421 U.S. 987, 44 L.Ed. 2d 477, 95 S.Ct. 1990 (1975).

Here, the trial court heard evidence and made findings of fact and concluded that the defendant voluntarily consented to the search of his automobile. The defendant contends, however, that the trial court erred in failing to specifically find and conclude that the voluntary consent was given without duress. The defendant additionally contends that such finding would have

been unsupported by the evidence before the trial court. We do not agree.

The trial court heard specific testimony that, at the time the defendant gave his consent to the search, he did not appear to be frightened. The court specifically adopted this as a finding of fact. We think that this evidence and finding, together with the other evidence and findings previously set forth, was sufficient to support a conclusion that consent was given without duress. We do not find the trial court committed error by failing to specifically state in its findings and conclusions that the consent was "without duress." *See State v. Glaze*, 24 N.C. App. 60, 210 S.E. 2d 124 (1974). The trial court found the defendant consented to the search and that his consent was voluntary. As consent is not in fact voluntary if the product of duress or coercion, the trial court's finding and conclusion that the defendant voluntarily consented was also an implicit finding that the consent was without duress. *See State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971). Thus, the trial court did not err in admitting the fruits of the consensual search of the defendant's automobile.

[4] The defendant next assigns as error the trial court's action in overruling his objections to certain portions of the district attorney's closing arguments to the jury. The defendant contends that these portions of the closing argument on behalf of the State emphasize the defendant's failure to produce an essential defense witness and tended to require the defendant to prove his innocence. The trial court in its discretion controls the arguments of counsel, and the court's rulings will not be disturbed absent a gross abuse of discretion. *State v. Maynor*, 272 N.C. 524, 158 S.E. 2d 612 (1968). Further, appellate courts do not ordinarily interfere with the trial court's control of jury arguments, unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. We are unable to make any such determination here, as the argument of counsel for the defendant in its entirety and the majority of the argument of the district attorney are omitted from the record. When a portion of the argument of either counsel is omitted from the record on appeal, the arguments are presumed proper. *See State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954); 1 Strong, N.C. Index 3d, Ap-

peal and Error, § 42.2, pp. 293-4. This assignment of error is overruled.

[5] The defendant also assigns as error a portion of the trial court's charge in which the court stated that one of the State's witnesses had testified that soil samples taken from an area near the body of the deceased were "the same" as soil samples taken from the defendant's shoes. The witness had in fact testified that the soil samples matched as to color, texture type and mineral composition. He also testified that it was highly likely they came from the same source. Later in the charge the trial court specifically instructed the jury that they were to rely upon their own recollection of the evidence and to disregard the court's recollection if the two differed. We find, therefore, that this inadvertent and slight inaccuracy in recapitulating the evidence was not reversible error.

We also note that the defendant did not object to this slight misstatement in recapitulating the evidence. Such inadvertent misstatements must be called to the trial court's attention in time for correction if they are to be relied upon on appeal. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). We will not hold such slight inaccuracies to be reversible error when not called to the trial court's attention in apt time to afford an opportunity for correction. *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969).

The defendant also assigned as error certain matters in the record concerning the trial court's charge on circumstantial evidence. These appear to have arisen from transcribing or typographical errors and were waived and abandoned by the defendant during oral arguments. Although we have reviewed them and find no reversible error, we will not deal here with those assignments in detail.

The defendant has brought forward and argued numerous other exceptions and assignments of error. We have reviewed each of them and find that they do not present reversible error.

The defendant received a fair trial free from prejudicial error, and we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

VANITA B. STANBACK v. FRED J. STANBACK, JR.

No. 7719SC610

(Filed 1 August 1978)

1. **Contracts § 29.3— breach of contract—special or consequential damages**

To recover special or consequential damages in a breach of contract action, plaintiff must prove that such damages were in fact caused by the breach, that the amount of such damages can be proved with a reasonable degree of certainty, and that the damages were within the contemplation of the parties at the time they contracted.

2. **Contracts § 29.3— breach of separation agreement provision for payment of taxes—no special damages**

Defendant husband's breach of a provision of a separation agreement that he would pay any difference in the plaintiff wife's income taxes resulting from her inability to deduct counsel fees paid to her attorneys, which led to a lien on her home and its advertisement for sale, was not the breach of a "personal" contract provision for which the wife could recover special damages for mental anguish; nor could the wife recover special damages for loss of reputation in the community allegedly resulting from such breach.

3. **Contracts § 29.3; Damages § 12.1— breach of contract—punitive damages**

Plaintiff's allegation that defendant wrongfully and willfully breached a provision of a separation agreement requiring him to pay any increase in plaintiff's income taxes resulting from her inability to deduct counsel fees paid to her attorneys was insufficient as a basis for punitive damages.

4. **Process § 19— abuse of process—insufficient allegations**

Plaintiff's complaint was insufficient to allege abuse of process where it sufficiently alleged ulterior purpose but failed to allege any bent or inappropriate act in an otherwise proper proceeding.

5. **Malicious Prosecution § 8— termination in plaintiff's favor—insufficient allegation**

Plaintiff's complaint was insufficient to state a claim for relief for malicious prosecution where it failed to allege termination of the prior action in plaintiff's favor but alleged only that "the action of the defendant against the plaintiff was dismissed by the court."

APPEAL by plaintiff from *Rousseau, Judge*. Order entered 15 April 1977, in Superior Court, ROWAN County. Heard in the Court of Appeals 26 April 1978.

Plaintiff-wife initiated this contract action to recover actual, consequential and punitive damages from defendant. The complaint alleges that defendant-husband breached part of their

separation agreement, a supplementary letter-agreement given in consideration of the formal separation agreement's provision allocating the burden of payment to wife's counsel to the wife and increasing husband's periodic payments of 25% of the wife's attorneys' fees. The supplementary agreement was an agreement between husband's and wife's attorneys, and reads as follows:

> "We agree that if Vanita Stanback is unable to deduct the fees she is required to pay . . . during 1968 that Fred Stanback will pay to her . . . the difference in the federal and state income tax that she is required to pay by virtue of being unable to make this deduction for attorneys' fees.
>
> It is understood that a valid effort will be made by Mrs. Stanback to claim such deductions and that the tax returns for 1968, both federal and state, will be prepared under the supervision of [the attorneys]."

Plaintiff paid her attorneys the $31,000.00 fee set by the court and claimed both federal and state income tax deductions. The I.R.S. audited her 1968 tax return and disallowed $28,500.00 of the $31,000.00 deduction, as did the North Carolina Department of Revenue. Defendant refused to pay her tax deficiency. As a result of this alleged breach of their agreement, plaintiff was unable to pay her deficiency, and the United States filed a lien against her property. In 1974 she borrowed $18,099.51, secured by deed of trust, to pay off her deficiency, plus interest, and avoid foreclosure. As she has been unable to pay off the loan, the lender is in the process of foreclosing on her home. The State of North Carolina, as a means of collecting her state income deficiency, issued a garnishment against defendant and, as a result of the garnishment, defendant paid $2,989.00, plus interest "using funds which he had agreed under the deed of separation between the parties to pay to the . . . [plaintiff] for support and maintenance." Plaintiff requested $250,000.00 consequential (special) damages to compensate for mental anguish and loss of reputation in the community, $100,000.00 punitive damages and some $18,000.00 actual general damages for defendant's breach.

Plaintiff joined in her complaint a second cause of action, alleging that defendant had initiated a federal suit against the I.R.S. and had joined her as codefendant for no legitimate reason but rather "to harass, embarrass and annoy the plaintiff . . . and

to cause her to incur expenses for the defense of said action and to cause her to forego her legal rights and remedies." This second count labeled the action "abuse of process" but summed up the action as follows:

> "4. The action of the defendant was malicious, wrongful and unjustified and without probable cause since his claim, if any, against the United States was unrelated to this separate obligation to the plaintiff herein and the defendant instituted the said action for an ulterior and wrongful purpose of restraining the plaintiff from exercising her rights."

The complaint further alleged that this action had been dismissed. The defendant moved for a G.S. 1A-1, Rule 12(b)(6) dismissal of both counts, and a Rule 37 dismissal for wilful failure to answer Rule 33 interrogatories. Plaintiff was permitted to amend the first count of her complaint to allege:

> "15(a). The special and consequential damages alleged in the preceding paragraphs of this complaint were within the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

The trial court denied defendant's Rule 37 motion but granted his Rule 12(b)(6) motion to dismiss all of plaintiff's second count and to dismiss the first count's claims for consequential and punitive damages. From this order plaintiff appeals.

Brinkley, Walser, McGirt & Miller by Walter F. Brinkley for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and George L. Little, Jr.; and Kluttz & Hamlin by Clarence Kluttz for defendant appellee.

CLARK, Judge.

The trial court did not dismiss plaintiff's claim for actual compensatory damages for breach of contract. The measure of such damages is the amount which will compensate the injured party for the loss which fulfillment of the promise could have prevented or which breach of it entailed. 3 Strong's N.C. Index, Contracts, § 29.2, p. 442. The traditional goal is to award a sum that will put the non-breaching party in as good a position as he would have

been had the contract been performed. Restatement, Contracts, § 329 (1932); Dobbs, Remedies, § 12.1, p. 786. A plaintiff is, of course, entitled to nominal damages automatically, upon proof of breach but may recover general compensatory damages as above measured upon proof by the greater weight of the evidence that such damages were incurred and were naturally and proximately caused by the breach of contract. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); 3 Strong's N.C. Index, Contracts, § 29, p. 440. Plaintiff Stanback may proceed to trial on her claim for actual compensatory damages incurred in the alleged breach of contract.

The issue raised by this appeal is whether the trial court erred in dismissing plaintiff's claims for special or consequential damages and for punitive damages. Such damages will sometimes be awarded, but such additional award has always been subject to rather stringent limitations. Proper pleading is crucial to such award. *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634 (1953); 3 Strong's N.C. Index, Contracts, § 29.3, p. 444.

[1] Plaintiff's claim for consequential or special damages amounting to $250,000.00 rests on the allegation that defendant's alleged breach of their separation agreement, which led to the lien on her home, and its advertisement for sale, with the concommitant publicity, caused her mental anguish, and damaged her reputation in the community. Plaintiff was permitted to amend her complaint to allege that such special mental anguish damages were within the contemplation of the parties at the time they contracted. It is well established that, to recover special or consequential damages in a contract action, plaintiff must prove that these damages were in fact caused by the breach, that the amount of such damages can be proved with a reasonable degree of certainty, and that the damages were within the "contemplation of the parties" at the time they contracted. Dobbs, Remedies, § 12.3, p. 798. The "contemplation of the parties" rule was established in the English case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854) and is a rule which is generally applied to preclude an award of special damages unless there is some evidence that the parties had not only "contemplated" them but had actually *allocated* the risk of breach to include them either implicitly or explicitly, or unless the breach is also a tort. Dobbs, Remedies, § 12.3, pp. 805-807; *Iron Works Co. v. Cotton Oil Co.*, 192 N.C.

442, 135 S.E. 343 (1926); *Builders v. Gadd*, 183 N.C. 447, 111 S.E. 771 (1922). Mere allegation that the parties contemplated the damages, as in the case *sub judice*, is clearly insufficient, absent allegation of facts to support the conclusional allegations. Plaintiff alleged no such facts but argues in her brief that the very nature of a separation agreement contemplates the mental anguish of the innocent party should breach occur. Plaintiff correctly argues the general law that the nature of the contract is an important key to determining when non-commercial special damages may be awarded. Determination of the nature of the contract, of course, is a generalization of the "contemplation of the parties" rule and includes an analysis of allocation of risk. *Carroll v. Rountree*, 34 N.C. App. 167, 174, 237 S.E. 2d 566, 571 (1977), states:

> ". . . 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. . . ."

But, *Lamm v. Shingleton*, 231 N.C. 10, 14, 55 S.E. 2d 810, 813 (1949), a case essentially involving an action for mental anguish special damages for breach of contract to furnish a casket and watertight vault, and to conduct the funeral and inter the body, listed the exceptions to the rule disallowing special damages for non-commercial injury in contract cases:

> ". . . [A]s a general rule, damages for mental anguish suffered by reason of the breach thereof are not recoverable. Some type of mental anguish, anxiety, or distress is apt to result from the breach of any contract which causes pecuniary loss. Yet damages therefor are deemed to be too remote to have been in the contemplation of the parties at the time the contract was entered into to be considered as an element of compensatory damages. . . .
>
> The rule is not absolute. Indeed, the trend of modern decisions tends to leave it in a state of flux. Some courts qualify the rule by holding that such damages are recoverable when the breach amounts in substance to a willful or independent tort or is accompanied by physical injury. . . . Still others treat the breach as an act of negligence

and decide the question as though the action were cast in tort, and thus confuse the issue. Thus, to some extent the courts have modified the common law rule.

In this process of modification a definite exception to the doctrine has developed. *Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.* . . . In such case the party sought to be charged is presumed to have contracted with reference to the payment of damages of that character in the event such damages should accrue on account of his breach of the contract. . . ." [Emphasis added.]

The *Lamm* decision noted that such damages had been held recoverable in an action for breach of contract of marriage and for breach of contract to transmit a death message. It held mental anguish damages recoverable in its own case because "[t]he contract was *predominantly personal* in nature and no substantial pecuniary loss would follow its breach." The *Lamm* decision continued:

". . . Her [the widow-plaintiff's] mental concern, her sensibilities, and her solicitude were the prime considerations for the contract, and the contract itself was such as to put the defendants on notice that a failure on their part to inter the body properly would probably produce mental suffering on her part. It cannot be said, therefore, that such damages were not within the contemplation of the parties at the time the contract was made. . . ." 231 N.C. at 15, 55 S.E. 2d at 813-814.

The *Carroll* decision applied the *Lamm* test of the "personalness" of the contract in refusing to grant mental anguish damages in a case alleging that defendant's actions breached an implied contract he had with his client by releasing certain monies to plaintiff's former wife without receiving specified signed documents in return. The court stated:

> ". . . 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." 34 N.C. App. at 174, 237 S.E. 2d at 572.

[2] In the case *sub judice*, the alleged promise to pay for increased tax was not a personal contract provision, but a regular, "commercial" one, a promise to pay monies to compensate for extra taxes paid. "The measure of damages for breach of a promise to pay a debt or a tax owed by the promisee personally, or charged upon his property, is the amount of such debt or tax, with interest. . . ." 22 Am. Jur. 2d, Damages, § 67, p. 101. The compensatory damages are limited to the actual "expectation" measure. We echo the *Carroll* court in making clear that we are not holding that a separation agreement provision may never be "personal" in nature, clearly impliedly contemplating special mental anguish damage in the event of breach. We hold that in the case *sub judice* the breach of a tax arrangement is not "personal." It is also clear that plaintiff could not recover special damage for non-commercial, non-tortious loss of reputation in the community. Such recovery is not allowed, absent special contract relationship such as that binding employers and employees. 22 Am. Jur. 2d, Damages, § 156, p. 225.

[3] Plaintiff's claim for punitive damages rests on her allegation that

> "The acts and conduct of the defendant in failing to pay the amount of taxes assessed against the plaintiff has been wilful, malicious, calculated, deliberate, and purposeful, and with full knowledge of the consequences which would result, and was recklessly and irresponsibly done; and as a result of the acts and conduct of the defendant, the plaintiff is entitled to recover punitive damages . . . [of] $100,000.00."

Carroll, supra, reaffirms the general rule that punitive damages are never awarded as compensation but as punishment inflicted for intentional wrongdoing. *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). Such intentional wrongdoing clearly must be something other than intentional breach of contract, for breaching must be permitted as a legitimate business risk, the breacher compensating for the breach by putting the other party in as good a position as he would have been had the breach not occurred. Although courts will force a breacher to compensate, the breaching itself is not "wrongful." "Wrongful" breach, such as permits a jury consideration of punitive dmages, is limited to breach of promise to marry, such a "personal" contract as would permit mental anguish damages, and breach of duty to serve the public imposed by law upon a public utility. *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). If the breach is the result of tortious conduct, punitive damages may be awarded to punish the tortious conduct, but even then the conduct must be aggravated beyond that necessary to be merely tortious. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). Such aggravated tortious conduct was early defined to include fraud, malice, gross negligence, oppression, insult, rudeness, caprice or wilfulness. *Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). In the case *sub judice* plaintiff alleges no separate identifiable tortious conduct but merely alleges that the *contract* breach was wilful wrongful conduct, which allegation is insufficient as a base for punitive damages.

[4] Plaintiff's third argument attacks the trial court's dismissal of her second cause of action. It is clear that plaintiff's classification of this cause as "abuse of process" is erroneous. To allege satisfactorily abuse of process, plaintiff must allege facts tending to show (1) an ulterior purpose and (2) *a wilful act in the use of the process not proper in the regular conduct of the proceeding.*

Prosser, Torts (1971 ed.), § 121, p. 857; *Edwards v. Jenkins*, 247 N.C. 565, 101 S.E. 2d 410 (1958). Plaintiff's complaint alleges sufficient ulterior purpose, but nowhere alleges any bent or inappropriate act in an otherwise proper proceeding. But plaintiff's complaint does allege elements of malicious prosecution. Under our liberal pleading rules, a misclassification would not be fatal, provided the complaint put the defendant on notice as to the nature of the action against him. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Both malicious prosecution and abuse of process have the common element of an improper purpose in the use of the legal process, and there are many cases in which they overlap. Prosser, § 121, p. 857. In the leading English "abuse of process" case, the court denied the action of malicious prosecution, as the underlying case had not been terminated in the plaintiff's favor, but refused to permit its process to be misused to a bad end and found the defendant liable. *Grainger v. Hill*, 4 Bing. N.C. 212, 132 Eng. Rep. 769 (1838). Mere misclassifying is not herein fatal.

[5] However, a malicious prosecution complaint must allege sufficient facts to show that the proceeding was initiated without probable cause, that the proceeding was terminated in the plaintiff's favor on the merits, that defendant brought the former action out of "malice," generally defined as improper purpose. Prosser, § 120, pp. 853-855. The complaint alleges malice, lack of probable cause, and ulterior purpose, although we note that the "facts" alleged to support these allegations are arguably insufficient. It does not allege termination in the plaintiff's favor, but only that "the action of the defendant against the plaintiff was dismissed by the court." Plaintiff includes in the record defendant's complaint in the federal case but enters nothing as to the nature of the dismissal. It is clear that the dismissal could have been granted for reasons other than a judgment for plaintiff on the merits and plaintiff's complaint is therefore deficient. Even though the complaint could have established a good cause of action for malicious prosecution regardless of its misclassification as "abuse of process," it did not do so, and the trial court correctly dismissed this second count. As the court is deemed to have examined the federal court complaint, a matter outside the pleading, the dismissal turns from a Rule 12(b)(6) to a Rule 56 dismissal, and is with prejudice.

The trial court order is

Affirmed.

Judges BRITT and ERWIN concur.

SARAH P. VANDOOREN v. PETER VANDOOREN

PETER VANDOOREN v. SARAH P. VANDOOREN

No. 773DC525

(Filed 1 August 1978)

1. **Divorce and Alimony § 16.5— alimony without divorce—earnings of husband**

In an action for alimony without divorce, the trial court erred in excluding evidence of defendant's earnings and earning capacity since such evidence was relevant to support plaintiff's allegation that defendant, as supporting spouse, willfully failed to provide plaintiff with necessary subsistence according to his means and condition within the meaning of G.S. 50-16.2(10).

2. **Evidence § 25; Divorce and Alimony § 14.3— alimony action—photographs showing adultery—admission for *illustrative* purposes *only***

Photographs showing the defendant engaged in acts of adultery were not admissible as substantive evidence in an alimony action but would have been admissible only for the purpose of illustrating the testimony of a witness.

3. **Divorce and Alimony § 14.2— alimony action—spouse's testimony as to adultery**

An action by the wife for alimony without divorce was a divorce action encompassed by the provisions of G.S. 8-56 and 50-10, and the defendant husband could not be compelled to give testimony in support of the wife's allegation that he committed adultery so as to render admissible photographs showing the husband engaged in acts of adultery.

4. **Pleadings § 32; Rules of Civil Procedure § 15.1— motion to file supplemental pleadings**

Generally, a motion to file supplemental pleadings should be allowed unless its allowance would impose a substantial injustice upon the opposing party, and in order to facilitate litigation of related issues in a single action, the court may impose terms or conditions upon the allowance of the motion whenever the terms appear to be required by considerations of fairness. G.S. 1A-1, Rule 15(d).

5. **Pleadings § 11.1; Rules of Civil Procedure § 13— counterclaim—prior action based on same allegations**

The trial court in a husband's action for absolute divorce erred in striking the wife's counterclaim for alimony without divorce because the wife had previously instituted an action for alimony without divorce based upon essentially the same allegations as those contained in her counterclaim since the existence of pending litigation did not affect the wife's statutory right to plead the counterclaim in a divorce action. G.S. 1A-1, Rule 13(a) and (b).

APPEAL by Sarah P. vanDooren, plaintiff in Case No. 73CVD299 and defendant in Case No. 74CVD1260, from *Nowell, Judge*. Judgment in Case No. 73CVD299 entered 16 December 1976, and order in Case No. 74CVD1260 entered 13 December 1976, both is District Court, CARTERET County. Heard in the Court of Appeals 29 March 1978.

In May 1973, plaintiff-wife instituted the action in Case No. 73CVD299 against her husband seeking alimony without divorce, child custody, and child support. An earlier appeal in this case was taken from the court's order changing its original order regarding alimony pendente lite. This court's opinion in that appeal is reported at 27 N.C. App. 279, 218 S.E. 2d 715 (1975).

Peter vanDooren instituted Case No. 74CVD1260 on 19 December 1974 when he filed a complaint seeking an absolute divorce from his wife on the grounds of one year's separation. Mrs. vanDooren answered the complaint, alleging that her husband was not entitled to an absolute divorce because he had committed acts of adultery and had abandoned her. Mrs. vanDooren also filed a counterclaim alleging, just as she did in Case No. 73CVD299, that she was entitled to obtain alimony without divorce, child custody, and child support. By consent of the parties, the two cases were consolidated for the purpose of trial.

In response to a motion by the husband, the court entered an order on 13 December 1976 dismissing Mrs. vanDooren's counterclaim in Case No. 74CVD1260 because "there is a former action pending [Case No. 73CVD299] wherein the same issues are alleged." Mrs. vanDooren appealed, and no further action was taken by the trial court in that case.

Case No. 73CVD299 was tried before a jury at the 13 December 1976 session of District Court, and the jury returned its verdict, answering all issues in favor of the defendant-husband. Plaintiff-wife appealed.

Wheatly, Mason, Wheatly and Davis by L. Patten Mason for appellant.

Bennett, McConkey and Thompson by Thomas S. Bennett for appellee.

PARKER, Judge.

[1] We first consider the issues raised by the plaintiff-wife's appeal in Case No. 73CVD299. As one of the grounds for relief, Mrs. vanDooren alleged in her complaint that she is the dependent spouse and that the defendant "willfully failed to provide the plaintiff with the necessary subsistence according to his means and conditions so as to render the conditions of the plaintiff intolerable and the life of the plaintiff burdensome." Anticipating that plaintiff would attempt to introduce evidence of his earnings and earning capacity to support these allegations, defendant made a pretrial motion to exclude any such evidence, and the court granted the motion. Plaintiff assigns error to this pretrial ruling, contending that evidence regarding her husband's earnings was relevant to the issues raised in her complaint. We agree.

By the above-quoted allegations from plaintiff's complaint she sought relief in the form of alimony under the provisions of G.S. 50-16.2(10). For plaintiff to successfully establish this claim for alimony, the terms of the statute require proof that defendant, as the supporting spouse, has willfully failed to provide plaintiff "with necessary subsistence *according to his . . . means and condition.*" (Emphasis added.) Proof of defendant's earnings and his earning capacity was clearly relevant to a determination of "necessary subsistence according to his . . . means and condition," and the trial court erred in ordering all such evidence to be excluded.

Although the record does not reveal what evidence plaintiff would have introduced regarding defendant's earnings and earning capacity, it is clear that she was prejudiced by the court's blanket exclusion of such evidence. Despite the pretrial ruling that evidence of defendant's earnings should not be considered by the jury, the court, in charging the jury, instructed them that "the income of the husband" could properly be considered in determining whether plaintiff was entitled to relief under G.S. 50-16.2(10). The court then noted that "[i]n this instance, there is

no evidence as to income." In view of this instruction, the court's previous ruling excluding all evidence of defendant's earnings and earning capacity was clearly prejudicial error which entitles the plaintiff-wife to a new trial.

[2] Plaintiff alleged, as one of the grounds for alimony, that defendant had committed adultery, and she contends that the court erred in refusing to allow into evidence four photographs showing the defendant engaged in various acts of adultery. The North Carolina rule is that photographs may be received into evidence only for the purpose of illustrating the testimony of a witness, and not as substantive evidence. 1 Stansbury's N.C. Evidence (Brandis Rev.) § 34. Plaintiff argues that the photographs should have been admitted as substantive evidence on the authority of *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). In that case, our Supreme Court permitted photographs of fingerprints, properly authenticated, to be admitted as substantive evidence. While acknowledging the substantial criticism which has been directed toward North Carolina's limitation upon the use of photographs in evidence, the court in *Foster* nevertheless specifically declined to repudiate that limitation upon photographic evidence in general. Therefore, with the exception of photographs of fingerprints, the rule that photographs are admissible solely for the purpose of illustrating the testimony of a witness remains in effect in this State.

The only testimony regarding the conduct portrayed in the photographs came from an expert photographer and from the defendant himself. Though excluded from the jury's consideration, this testimony was included in the record at plaintiff's request. As to the expert photographer, the parties stipulated that he would have testified that he examined the photographs, that they accurately show what they purport to show, and that defendant is one of the individuals portrayed in the photographs. However, the photographer did not take the pictures and did not witness the scenes depicted therein. Thus, he could have offered no testimony which the photographs could illustrate, leaving defendant as the only witness whose testimony the photographs could illustrate.

[3] Defendant's testimony, if admitted into evidence, might have been sufficient to support the admissibility of the photographs. However, this action by the wife for alimony without divorce is a

divorce action encompassed by the provisions of G.S. 8-56 and 50-10, *Hicks v. Hicks*, 275 N.C. 370, 167 S.E. 2d 761 (1969), and defendant cannot be compelled to give testimony in support of his wife's allegation that he committed adultery. *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972); 1 Stansbury's N.C. Evidence (Brandis Rev.) § 58. Without defendant's testimony, there was no testimony for the photographs to illustrate, and the four photographs were therefore properly excluded by the trial court.

We next consider plaintiff's assignment of error directed to the trial court's denial of her motion to file supplemental pleadings. By her motion, plaintiff sought to supplement her complaint with allegations that defendant had assaulted and threatened her and had engaged in a course of adulterous conduct. Since these alleged occurrences happened after the date the original pleadings were filed, plaintiff's motion was made pursuant to G.S. 1A-1, Rule 15(d). *Williams v. Freight Lines*, 10 N.C. App. 384, 179 S.E. 2d 319 (1971). Although plaintiff's original complaint alleged adultery as well as cruel and barbarous treatment by defendant, the supplemental pleadings were necessary to enable plaintiff to introduce evidence of adultery and cruel and barbarous treatment occurring after the original complaint was filed, at least absent consent by defendant to introduction of such evidence. Even under the modern notice theory of pleading, a complaint cannot give notice of occurrences that do not take place until after the complaint is filed. *Gordon v. Gordon*, 7 N.C. App. 206, 171 S.E. 2d 805 (1970).

[4] Although the ruling on a motion to allow supplemental pleadings is within the trial judge's discretion, that discretion is not unlimited. Generally, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party, "for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E. 2d 697, 702 (1972). The rule that a motion to allow supplemental pleadings should ordinarily be granted is based upon the policy that a party should be protected from the harm which may occur if he is prevented from litigating certain issues merely by virtue of the court's denial of such a motion. In ruling on such a motion, the trial court should focus on any resulting unfairness which might occur to the party opposing the motion. In the absence of

any apparent or declared reason for its denial, the motion should be granted. In order to facilitate litigation of related issues in a single action, the court may impose terms or conditions upon the allowance of the motion whenever the terms appear to be required by considerations of fairness. *New Amsterdam Casualty Co. v. Waller*, 323 F. 2d 20 (4th Cir. 1963).

In the present case, the original complaint was filed in May 1973, while plaintiff's motion to allow supplemental pleadings was not made until approximately two weeks before the trial in 1976. The motion came over eighteen months after defendant allegedly assaulted and threatened plaintiff. While mere delay, standing alone, is not a sufficient reason to deny the motion, *compare Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F. 2d 380 (2d Cir. 1968) *with LaSalle Street Press, Inc. v. McCormick and Henderson, Inc.*, 445 F. 2d 84 (7th Cir. 1971), we do not find it necessary in this case to decide whether the court erred in denying plaintiff's motion. Since a new trial is necessary in this case, conditions have changed since the original motion was made, and plaintiff may renew her motion after remand. *See Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972). Delay in making the original motion may have previously presented difficulties to defendant but should present no unreasonable difficulties on remand if plaintiff renews her motion in apt time.

In the earlier order of 16 May 1973 awarding alimony pendente lite, child custody, and child support, the court awarded counsel fees for plaintiff in the amount of $2,500. On 21 December 1976, after the jury had returned its verdict, plaintiff filed a motion for additional counsel fees to cover the services of her attorney up through the trial and to cover services to be rendered on this appeal. The court denied the motion "on the grounds that the Court has no authority to award counsel fees to a dependent spouse where the jury answers the issues against her." The denial was thus made as a matter of law, without any exercise of discretion by the trial judge. We find it unnecessary to pass on plaintiff's assignment of error directed to this ruling, since in any event there must be a new trial and upon remand of this case for that purpose plaintiff may renew her motion for allowance of additional counsel fees, in which event the court shall consider the matter anew and without prejudice from its previous ruling denying additional counsel fees as a matter of law.

We do not find it necessary to consider plaintiff's remaining assignments of error in Case No. 73CVD299. A new trial is necessary in that case, and we do not think those problems are likely to arise at the next trial.

We turn now to the single issue raised by the wife's appeal in the husband's action for absolute divorce, Case No. 74CVD1260. In this case, the parties are reversed, the wife being defendant and the husband being plaintiff.

[5] While the wife's action for alimony without divorce, child custody, and child support was pending, the husband instituted a separate action for an absolute divorce on the grounds of separation for a period exceeding one year. The wife answered, alleging that the separation actually amounted to abandonment by the plaintiff-husband. She also filed a counterclaim seeking alimony without divorce, child custody, and child support, based upon essentially the same allegations as were contained in her complaint in Case No. 73CVD299. The trial judge granted plaintiff's motion to strike the counterclaim because "there is a former action pending wherein the same issues are alleged." Defendant-wife's sole contention in this case is that the court erred in striking her counterclaim.

The counterclaim provisions of G.S. 1A-1, Rule 13(a) and (b) are quite liberal, permitting a pleading to "state as a counterclaim any claim against an opposing party." Generally, if the claim arises "out of the transaction or occurrence that is the subject matter of the opposing party's claim," the counterclaim is compulsory; otherwise, it is permissive. In either event, however, the counterclaim must be permitted.

The existence of pending litigation does not affect defendant's statutory right to plead this counterclaim in the divorce action. It is possible that the issues raised in defendant's counterclaim will be finally resolved in Case No. 73CVD299, the wife's suit for alimony without divorce, and may become *res judicata* as to this case, the husband's action for absolute divorce. *See Garner v. Garner*, 268 N.C. 664, 151 S.E. 2d 553 (1966). Furthermore, pending resolution of Case No. 73CVD299, it may be necessary to stay the proceedings in this case, No. 74CVD1260. *See Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978). However, neither of these possibilities prevents the defendant

from pleading the issues raised in her counterclaim, and the trial court erred in ordering the counterclaim stricken.

The result is:

In Case No. 73CVD299,

New trial.

In Case No. 74CVD1260,

Reversed and remanded.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. REGINALD GILMORE DRAKEFORD AND REGINALD SCOTT WATSON

No. 7826SC272

(Filed 1 August 1978)

1. **Criminal Law § 66.6— lineup—different color pants worn by defendant**

   Even if the record supported defendant's contention that he wore brown pants in a lineup while other participants wore blue pants, such fact alone would not render the lineup procedure impermissibly suggestive.

2. **Criminal Law § 66.5— lineup—right to counsel—counsel on other side of one-way mirror**

   Defendant was not denied the presence of counsel at a lineup by the fact that his attorney was on the other side of a one-way glass with other persons who viewed the lineup.

3. **Criminal Law § 66.12— in-court identification—viewing defendant at preliminary hearing after lineup**

   A robbery victim's in-court identification of defendant was not tainted by the victim's viewing of defendant at his preliminary hearing where the preliminary hearing was held after a proper lineup in which the victim had identified defendant.

4. **Searches and Seizures § 43— seized evidence—waiver of constitutional objection—failure of record to show motion to suppress**

   Defendants waived any right to challenge on constitutional grounds the admission of evidence seized during a search of one defendant's motel room where the record failed to show whether defendants moved to suppress the

seized evidence pursuant to Art. 53 of G.S. Ch. 15A, and defendants' general objection to the admission of the seized evidence raised only the question of whether the evidence was relevant.

5. **Robbery § 4.6— participation in robbery—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of armed robbery where it tended to show that defendant was riding in the back seat of a codefendant's car while in flight from the robbery scene; the codefendant was identified as a participant in the robbery; defendant's fingerprint was on a cigarette pack found in the getaway car; defendant fled on foot with other occupants of the car when it was stopped by the police; and a .22 caliber rifle was prepared for use in the robbery in a motel room registered in defendant's name.

6. **Criminal Law § 134.4— youthful offender—sentencing as adult—finding required**

The trial court erred in sentencing defendants who were under the age of 21 at the time of conviction as adult offenders without first finding that they would not benefit from supervision and treatment as "committed youthful offenders." G.S. 148-49.4.

APPEAL by defendants from *Friday, Judge.* Judgment entered for each defendant on 20 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 30 June 1978.

Each defendant was charged in a bill of indictment with armed robbery, and each defendant pled not guilty. At trial the State presented evidence tending to show the following:

Around 1:45 a.m. on 29 November 1976, a doorbell sounded in the office of the Bel-Air Motel on North Tryon Street in Charlotte, North Carolina. Jewel H. Robbins, owner and manager of the motel, admitted two black men, later identified as defendant Watson and Dennis Mathis. Mathis revealed a gun and ordered Robbins to give them her money, while defendant Watson went behind the desk and cut the wires of the silent burglar alarm. After Robbins gave Mathis and Watson money from the cash register as well as her billfold, she was tied face down on her bed with her hands behind her back. As the two men disappeared through the front door, Robbins freed herself, went outside, and began shooting at a Volkswagen leaving the premises.

Officer B. R. Pence of the Mecklenburg County Police Department, responding to the silent alarm which had been activated before the wires were severed, approached the motel and ob-

served a dark-colored Volkswagen with its lights off turn from the motel driveway and cross the median into the south-bound lane of Tryon Street. Officer Pence followed the vehicle and informed the dispatcher on his radio that he intended to stop a Volkswagen carrying three black males. He then directed his spotlight through the back window of the vehicle and turned on his blue light. When the vehicle failed to stop Officer Pence turned on his siren, called in for help, and pursued it at high speeds. At all times during the chase the police car stayed within two to three feet of the Volkswagen, and the spotlight shone on a black man, whom Pence later identified as defendant Drakeford, peering out of the rear window of the vehicle. The Volkwagen finally turned onto a field and stopped, and its passengers fled into the surrounding forest. Officer Pence was unable to apprehend any of the men after a short chase on foot. When he returned to the cars, other police officers had arrived on the scene. Several of the officers searched the Volkswagen and found a sawed-off .22 caliber rifle, a wallet and some papers belonging to defendant Watson, and an empty cigarette pack. Later a motel registration slip bearing defendant Drakeford's name was found in the back seat of the car. The Volkswagen was registered in defendant Watson's name.

At 9 a.m. on the same morning, Officer Pence and other police officers, acting on an informant's tip, went to the home of Watson's uncle. When an elderly man appeared at the door, Officer Pence asked if Watson was inside. The man replied that he had not seen Watson, but consented to a search of the premises. Watson was found hiding in a closet and was taken into custody.

Officer J. C. Trail of the Charlotte City Police Department received a radio dispatch at approximately 5:30 a.m. concerning a prowler and drove to a street situated one hundred to two hundred yards from the field where the Volkswagen had come to rest. When Officer Trail arrived at the house of the caller he noticed a black man standing on the porch. Trail approached the man and asked for identification. The man handed him a driver's license identifying him as Reginald Drakeford. Drakeford's clothes and shoes were wet and muddy. Later Drakeford's fingerprints were lifted from the cigarette pack found in the Volkswagen.

Officer J. F. Styron, investigating the robbery, went to the Days Inn Motel for the purpose of searching the room which was

registered under the name of defendant Drakeford. The room was registered from 10 a.m. on 28 November to 12 noon on 29 November 1976. A search of the room disclosed pieces of a barrel and stock sawed off of a .22 caliber rifle, a hacksaw, and a brown cap. The rifle pieces found in the room were later determined to match the sawed-off rifle found in the Volkswagen.

At a lineup conducted at 11 a.m. on 29 November defendant Watson was identified by Jewel Robbins as a participant in the robbery. Robbins was unable to identify defendant Drakeford.

Defendant Watson offered the testimony of Debra Denise Rudisill who stated that defendant Watson had picked her up at 10:30 p.m. on 28 November and escorted her to a bar; that when they arrived at the bar Dennis Mathis left in defendant Watson's Volkswagen assuring them that he would return at closing time to pick them up; that she and defendant Watson remained in the bar until it closed at 2:30 a.m.; that defendant Watson asked a friend to drive them home because Mathis had not returned with his car; and that she arrived at her house at 2:45 a.m. and did not see defendant Watson thereafter.

Defendant Drakeford offered no evidence.

The jury found each defendant guilty of armed robbery. From judgments imposing 50-70 years imprisonment for defendant Watson, and 40-60 years imprisonment for defendant Drakeford, the defendants appealed.

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

Gene H. Kendall for the defendant appellants.

HEDRICK, Judge.

[1] We first consider defendant Watson's separate assignment of error which challenges the admission of evidence identifying him as a participant in the robbery. On the morning of the robbery a lineup was conducted at which Jewel Robbins, the victim of the robbery, identified Watson as one of her assailants. Under this assignment Watson first contends that the lineup was impermissibly suggestive in that the defendant was required to wear brown pants while the other men in the lineup wore blue pants.

The record does not support the defendant's contention but discloses that all participants in the lineup were black males and were of approximately the same height and weight as Watson, and that all wore varying shades of blue pants. This procedure clearly comports with constitutional principles. 1 Stansbury's N.C. Evidence, § 57 (Brandis Rev. 1973). However, even if it were shown that the defendant's pants were of a different color, this fact alone would not render the lineup procedure impermissibly suggestive. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

[2] Watson also contends that he was denied presence of counsel at the lineup. The record reveals that while the defendant was fully advised of his rights prior to the lineup, he made no request to have counsel present at that time. Nevertheless, an attorney from the Public Defender's Office was contacted by the police, and was allowed to advise the defendant and view the lineup. The defendant bases his contention on the fact that the attorney "was on the side of the one-way glass with the individuals to view the lineup, while defendant Watson was on the back side of that glass and could see neither [his] attorney . . . nor Mrs. Robbins and/or such other individuals as may have viewed the lineup." The defendant's contention is patently absurd and merits no discussion.

[3] Finally, under the same assignment the defendant contends that the in-court identification by Jewel Robbins was inadmissible because it was tainted from her seeing the defendant at his preliminary hearing at which Robbins appeared as a witness. The preliminary hearing was held after the lineup in which she had previously identified Watson. These contentions of the defendant Watson are totally without merit, and his assignment is overruled.

[4] The remaining assignments of error are argued jointly in the defendants' brief. The defendants assign as error the admission of testimony regarding the search of Room 114 at the Days Inn Motel and the admission of the fruits of that search. The exceptions upon which these assignments are based refer to general objections by each defendant to admission of the evidence. The State contends that the defendants' failure to comply with the statutory procedure for challenging evidence obtained in an allegedly invalid search constitutes a waiver of objection to the evidence on that ground.

Article 53 of Chapter 15A of the North Carolina General Statutes, entitled "Motion to Suppress Evidence," prescribes "the exclusive method of challenging the admissibility of evidence" on constitutional or statutory grounds. G.S. 15A-979(d). General Statute 15A-975(a) requires a defendant to make his motion to suppress evidence prior to trial "unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c)." The subsections referred to authorize a motion to suppress during trial "when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner than 20 working days before trial, of its intention to use the evidence," and the evidence is of a specified nature; or when "additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before" the denial of his pretrial motion. The specific timing of the pretrial motion is provided in G.S. 15A-976, and the procedure for filing and hearing such motion is set forth in G.S. 15A-977.

Our Supreme Court recently held in *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978), that the failure to raise the question of the admissibility of evidence obtained in an allegedly unlawful search in a proper motion pursuant to the foregoing statutes constitutes a waiver by the defendant of his objection to the admission of the evidence. In *Hill* the trial court found as a fact that "the defendant had reasonable opportunity to move to suppress the evidence which is the subject of this motion" within the statutory time limit, 294 N.C. at 333-4, 240 S.E. 2d at 803; and, therefore, his failure to make a timely motion, was fatal to his objection to the evidence.

In the present case there is no such finding by the trial court. Furthermore, there is no indication in the record as to whether a motion to suppress was made at any time by the defendant. Thus, we are unable to determine whether the defendant presented his objection in a timely fashion and in suitable form. In our opinion, Article 53 of chapter 15A not only requires the defendant to raise his motion according to its mandate, but also places the burden on the defendant to demonstrate that he has done so. Since the record reflects only general objections to the admission of the evidence, the defendants have waived any right to challenge the evidence on constitutional grounds.

Thus, as the State contends, the only question raised by the defendants' general objections is whether the evidence is relevant. The search of Room 114 of the Days Inn Motel which was registered under defendant Drakeford's name yielded a hacksaw, a brown cap, and portions of a rifle barrel and stock which had been sawed off of a .22 caliber rifle and which, according to one witness, matched the sawed-off .22 caliber rifle found in defendant Watson's automobile. This evidence is unquestionably relevant in connecting the defendants to the crime committed. The defendants' assignment of error challenging the admission of this evidence is overruled.

[5] The defendants also assign as error the denial of their respective motions to dismiss at the close of the evidence. Defendant Drakeford argues that there is no evidence to support the verdict that he was a participant in the robbery. It is established that " 'when two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.' " *State v. Rankin*, 284 N.C. 219, 222, 200 S.E. 2d 182, 184 (1973). In order to support the defendant Drakeford's conviction the State's evidence must be sufficient to raise an inference

> that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

State v. Sanders, 288 N.C. 285, 290-1, 218 S.E. 2d 352, 357 (1975). It is also settled that flight from the scene of the crime is competent evidence of the defendant's guilt. *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977); *State v. Rankin, supra.*

The evidence pertaining to defendant Drakeford, when viewed in the light favorable to the State, tends to show that Drakeford was riding in the back seat of Watson's Volkswagen while in flight from the motel; that his fingerprint was on a cigarette pack found in the getaway car; that he fled on foot with the other occupants of the car after they had stopped; and that a

.22 caliber rifle was prepared for use in the robbery in a motel room registered in his name. We think this evidence was sufficient to withstand Drakeford's motion for judgment as of nonsuit.

Defendant Watson's contention with respect to his motion for judgment as of nonsuit was predicated on his contention that his identification was inadmissible in evidence. In view of our rejection of this latter contention it is clear that the evidence favorable to the State is sufficient to submit the case to the jury and to support the verdict. The assignments based on the denial of the defendants' motions for judgment as of nonsuit are overruled.

[6] Finally, both defendants assign as error the sentencing of the defendants as adults without a preliminary finding that they would not benefit from sentencing as youthful offenders. The State concedes that each defendant was under 21 years of age at the time of his conviction, and that the trial judge nevertheless sentenced them as adult offenders. The State argues, however, that the statutes in effect at the time of the defendants' convictions did not require the trial court to make a finding that a youthful offender would not benefit from treatment as such in order to sentence him as an adult offender. In doing so the State requests that we reconsider our decision in *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975), and the cases which followed. *See In re Tuttle*, 36 N.C. App. 222, 243 S.E. 2d 434 (1978); *State v. Matre*, 32 N.C. App. 309, 231 S.E. 2d 688 (1977); *State v. Worthington*, 27 N.C. App. 167, 218 S.E. 2d 233 (1975); *State v. Jones*, 26 N.C. App. 63, 214 S.E. 2d 779 (1975).

In *State v. Mitchell, supra*, Judge Clark, writing for this Court, discussed the applicable statutes, G.S. 148-49.1 through 148-49.9 (1974), providing special treatment for youthful offenders and quoted as follows from G.S. 148-49.4:

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

The court then held that the quoted portion of the statute

> expresses a clear legislative intent that a youthful offender receive the benefit of a sentence as a 'committed youthful of-

> fender,' unless the trial judge shall find that he will not derive benefit from such sentence.

24 N.C. App. at 488, 211 S.E. 2d at 648.

We uphold our decisions in the cited cases. Furthermore, in our opinion the rewritten statutes regarding youthful offenders, G.S. 148-49.10 through 148-49.16 (1978) which explicitly require that the trial judge make a " 'no benefit' finding on the record" if he determines that the defendant "should not obtain the benefit of release under G.S. 148-49.15," merely clarify the legislative intent which this Court found manifest in *Mitchell. Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). *See also State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977), in which the Supreme Court recognizes the requirement of the amended statutes but expresses no view of our decision in *State v. Mitchell, supra*. Thus, we hold that the trial court erred in sentencing the defendants as adult offenders without first finding that they would not benefit from the treatment provided youthful offenders in Chapter 148 of the General Statutes.

We find no error in the trials of defendants in which they were convicted of armed robbery. We remand the cases to the Superior Court for re-sentencing in accordance with this opinion.

No error in trial.

Remanded for re-sentencing.

Judges MORRIS and WEBB concur.

FIREMAN'S FUND INSURANCE COMPANY, A CORPORATION v. DR. DENNIS L. JACKSON, DENNIS L. JACKSON, JR., (A MINOR), NATHANIEL MOORE, ARCHIE GORE, WILLIAM F. JACKSON (ADMINISTRATOR OF THE ESTATE OF FLOYD JACKSON, AND NATIONWIDE MUTUAL INSURANCE COMPANY (A CORPORATION)

No. 7710SC773

(Filed 1 August 1978)

1. **Insurance § 94— automobile liability policy—cancellation by lost policy cancellation release form**

An automobile liability insurance policy was cancelled by surrender of the policy on 8 April 1975, not by notice of cancellation, where the insured instructed his receptionist on 8 April 1975 to cancel the policy, the receptionist notified an insurance agent by telephone that insured wished to cancel the policy, the receptionist and the insured were advised by the agent that cancellation should be effected by surrender of the policy, the insured authorized the insurance agent to sign his name on a lost policy cancellation release form at that time, and the form was signed for the insured on 8 April 1975 pursuant to his instruction and was mailed to the insurer on that date.

2. **Insurance § 94— automobile liability policy—lost policy cancellation release form**

Although an automobile liability insurance policy made no specific provision for the use of a lost policy cancellation release form in lieu of surrender of the actual policy for cancellation, a policy was effectively cancelled by use of the form where the parties mutually consented to cancellation by use of the form in lieu of actual surrender of the policy.

3. **Insurance § 94— automobile policy—lost policy cancellation release form—notation not part of agreement**

The phrase "Cancel flat effective 3-30-75" which was typed at the bottom of a lost policy cancellation release form beneath the signature of insured and the insurer's agent did not render the form ambiguous as to whether cancellation was intended to become effective on the date the form was signed, 8 April 1975, or on the original date the policy was effective, 30 March 1975, where the typed notation was merely an interoffice notation from one agent of the insurer to another and was not a part of the agreement of the parties.

APPEAL by plaintiff from *Clark, Judge*. Judgment entered 9 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 20 June 1978.

The plaintiff appellant, Fireman's Fund Insurance Company, instituted this action for a declaratory judgment by which it sought a judicial determination of the rights and liabilities of the parties herein arising out of a policy of automobile liability in-

surance issued by the plaintiff to the defendant, Dr. Dennis L. Jackson. The action was tried by the trial court without a jury. Based upon competent evidence adduced at trial, the trial court found the following facts:

During the first half of 1974, the defendant, Dr. Dennis L. Jackson, had placed much of his personal and business insurance with the S. W. Tomlinson Insurance Agency [hereinafter referred to as the "Agency"], in Fayetteville, North Carolina. The Agency had authority to bind the plaintiff, Fireman's Fund Insurance Company [hereinafter referred to as the "Company"] to policies of automobile liability insurance.

Prior to 30 March 1975, the Company issued a policy of automobile liability insurance to the defendant renewing his existing automobile liability insurance with the Company. The renewal policy provided for coverage of named vehicles for the period from 30 March 1975 through 30 March 1976 inclusive. It was sold through and issued by the Agency as authorized agent of the plaintiff Company. The policy and an attached premium statement were delivered by mail to the defendant and received by him sometime in January of 1975.

The defendant, at all material times, also carried other insurance policies with the Company issued by the Agency. The Agency had previously engaged in a course of dealing with the defendant which included the extension of credit for payment of the premiums on the policies he carried with the Company through the Agency. After billing the premiums for policies to the defendant, the Agency had in such instances carried them on their books as credit items.

During the months of March and April of 1975, Lois Proctor was employed as a receptionist by the Central Animal Hospital, a corporation in which the defendant owned approximately 90 percent of the stock and of which he was president. The defendant's principal contacts with the Agency had been by having Mrs. Proctor contact the Agency on his behalf.

The defendant instructed Mrs. Proctor on 7 March 1975 to call the Agency and request cancellation of an insurance policy on a motorcycle. She called the Agency at that time and spoke with Patricia McDonald, an employee of the Agency, and requested

that the policy covering the motorcycle be canceled or not renewed. Acting pursuant to the instructions of the defendant as communicated by Mrs. Proctor, Mrs. McDonald did not issue a renewal policy on the motorcycle, and no further billings were sent to the defendant relative to this policy.

During the same conversation on 7 March 1975, Mrs. Proctor advised Mrs. McDonald that the defendant wished to cancel or not renew a fire insurance policy. Mrs. McDonald prepared and sent to the defendant by that day's mail a Lost Policy Cancellation Release form for the fire insurance policy.

The defendant received a statement by mail from the Agency on 8 April 1975 which he took to Mrs. Proctor on the same date. He inquired as to whether she had previously canceled the insurance policy covering the motorcycle, and she advised him that she had. The defendant then instructed her to call again and cancel the motorcycle insurance.

Mrs. Proctor called the Agency on 8 April 1975 and again spoke with Mrs. McDonald. During this conversation, Mrs. Proctor again spoke with the defendant who instrtucted her to direct the Agency to cancel all of his personal insurance, including the policy covering the motorcycle and the policies covering his Dodge automobile and other automobiles. Mrs. Proctor immediately instructed the Agency to cancel all of the defendant's insurance, including the policy in question, as it came due. Mrs. McDonald then advised Mrs. Proctor that it would be necessary for the defendant to return the automobile liability insurance policy to the Agency in order to effect cancellation. Mrs. Proctor advised the defendant of this and was informed by him that he did not have the policy with him. He then authorized Mrs. Proctor to authorize the Agency to sign his name to a Lost Policy Cancellation Release form for the purpose of effecting cancellation of the policies. Before ending the conversation with Mrs. McDonald, Mrs. Proctor communicated this authorization to Mrs. McDonald of the Agency. The statement from the Agency, which the defendant handed to Mrs. Proctor before her call to the Agency on 8 April 1975, contained the policy number of the automobile insurance policy, which number was communicated by Mrs. Proctor to Mrs. McDonald during their conversation. After her conversation with Mrs. McDonald on 8 April 1975, Mrs. Proctor told the

defendant that she had canceled the insurance on his personal automobiles and the defendant acknowledged this information.

A Lost Policy Cancellation Release form was executed in the defendant's name by an employee of the Agency on 8 April 1975, pursuant to the defendant's authorization as conveyed by Mrs. Proctor. On that date, the form was mailed to the home office of the plaintiff Company in Greensboro, North Carolina.

On the morning of 10 April 1975, an underwriter employed by the plaintiff in its home office found the form together with pertinent attached papers on his desk and stamped it with his name and the date of 10 April 1975. In the normal course of the plaintiff Company's business, clerical employees take such forms from the mail at the home office and match them up with appropriate documents from the plaintiff's file. They then carry them to the desk of an underwriter who receives them on his desk the day following the receipt of the forms by mail.

The accident giving rise to this litigation occurred on 10 April 1975 in Brunswick County, North Carolina. It involved a 1974 Dodge automobile driven by the defendant's son and listed as an insured vehicle in the Company's automobile liability insurance policy in question.

The defendant never paid any sum by way of policy premium for the renewal policy of automobile liability insurance in question. He wrote a check for the policy premium on 12 April 1975, however, and mailed it to the Agency on 13 April 1975. This check was later received by the Agency but not cashed.

After making the above findings of facts and others, as well as conclusions of law which are discussed hereinafter, the trial court entered a declaratory judgment finding and declaring that the plaintiff was an insurer of the defendant and his son against liability arising out of the operation of the automobile in question on 10 April 1975 at the time of the accident. From this judgment the plaintiff appealed.

Other pertinent facts are set forth hereinafter.

Teague, Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Dan M. Hartzog, for plaintiff appellant.

Blackwell, Thompson, Johnson & Thompson, by E. Lynn Johnson, for defendant appellees Dr. Dennis L. Jackson and Dennis L. Jackson, Jr.

McRae, McRae & Perry, by James E. McRae, for defendant appellee Dr. Dennis L. Jackson.

Butler, High & Baer, by Keith Jarvis, for defendant appellee William F. Jackson, Administrator of the Estate of Floyd Jackson.

Smith, Anderson, Blount & Mitchell, by Samuel G. Thompson, for defendant appellees Nationwide Mutual Insurance Company, Nathaniel Moore and Archie Gore.

MITCHELL, Judge.

This action was tried by the trial court without a jury, and its findings of fact previously set forth herein were fully supported by competent evidence. Therefore, they are conclusive and will not be disturbed upon appeal. 12 Strong, N.C. Index 3d, Trial, § 58.3, p. 493.

[1] The plaintiff assigns as error the conclusion of the trial court that the policy of automobile liability insurance in question was not canceled prior to 10 April 1975 by the means specified therein. In support of this assignment the plaintiff contends that the trial court erred in treating the method of cancellation employed by the defendant as notice of cancellation rather than cancellation by surrender of the policy. We find the plaintiff's assignment and contention meritorious.

The policy by its terms specifically provides for cancellation "by surrender thereof to the company or any of its authorized agents or by mailing written notice to the company stating when thereafter the cancellation shall be effective." Assuming arguendo that the policy in question became binding when the plaintiff mailed it together with a premium statement to the defendant, we think the facts found by the trial court compel the conclusion that cancellation was effected by surrender of the policy to the plaintiff on 8 April 1975.

During the conversation between Mrs. Proctor and Mrs. McDonald on that date, the defendant instructed Mrs. Proctor to effect cancellation of the policy. In her initial attempt to do so, Mrs. Proctor attempted to add, apparently of her own volition, the condition that the policy be canceled "as it came due." She was then, however, advised by Mrs. McDonald that cancellation should be effected by surrender of the policy. Mrs. Proctor so advised the defendant. He then advised her that he did not have the policy with him and authorized Mrs. Proctor to have his name signed by the Agency to a Lost Policy Cancellation Release form at that time. Mrs. Proctor conveyed this instruction, and the form was signed for the defendant pursuant to his instruction. On the same day it was mailed by the Agency to the home office of the plaintiff. Therefore, the findings of fact by the trial court reveal that, whatever the intent of Mrs. Proctor in her initial attempt to cancel the defendant's policy "as it came due," the only mutual agreement of the parties, as communicated through the agents, was that the Lost Policy Cancellation Release be signed for the defendant on 8 April 1975.

As a general rule, when a liability insurance policy contains a provision allowing a cancellation at the request of the insured, the surrender of the policy with a request that it be terminated operates ipso facto as a cancellation. *Hayes v. Indemnity Co.*, 274 N.C. 73, 161 S.E. 2d 552 (1968); 43 Am. Jur. 2d, Insurance, § 423, p. 469. Additionally, the Lost Policy Cancellation Release signed for the defendant by mutual agreement of the parties specifically provided that: "[S]aid policy having been lost or mislaid, it is hereby agreed that said policy is hereby canceled and terminated as of 12 o'clock noon on the date hereof at the place where the property described in the said policy is located, and it is hereby agreed that no claim whatever will be made for any loss under said policy, and if found to return said policy to this Company forthwith and without further compensation." The defendant's signature was affixed to the form containing this agreement at his request and was, therefore, effective and had the same validity as though written by him. *Barrett v. Fayetteville*, 248 N.C. 436, 103 S.E. 2d 500 (1958).

It is apparent from the findings of fact of the trial court and from the contents of the form itself, that the Lost Policy Cancellation Release was intended by the parties to constitute an act in

lieu of the surrender of the actual policy. Thus, it was their mutual intent and agreement that the policy be canceled by its surrender and that the signing of the form constitute and be treated as such a surrender. As the signed form was mailed directly to the plaintiff Company on 8 April 1975, the surrender and cancellation were effective on that date. *Hayes v. Indemnity Co.*, 274 N.C. 73, 161 S.E. 2d 552 (1968).

[2] The defendant contends that, as the policy makes no specific provision for the use of a form, such as that employed in the present case, in lieu of surrender of the actual policy, the use of the form by the parties did not constitute surrender and must be treated as a written notice of cancellation rather than as cancellation by surrender. We do not find this argument persuasive, as the findings of fact by the trial court clearly indicate the parties mutually consented to cancellation by use of the form in lieu of actual surrender of the policy and not as a written notice of cancellation. The parties were free to mutually consent to this method of cancellation. *See Waters v. Annuity Co.*, 144 N.C. 663, 57 S.E. 437 (1907).

[3] The defendant also calls our attention to the fact that at the bottom of the release form and beneath the signatures of the defendant and the agent of the plaintiff, the phrase "Cancel flat effective 3-30-75" is typewritten. The defendant contends that this fact together with testimony by Mrs. McDonald indicates ambiguity as to whether the release form was intended to effect cancellation of the policy on 8 April 1975 or on its original effective date of 30 March 1975. The defendant further contends that this ambiguity prevented effective cancellation of the policy. We do not agree.

The typed notation referred to is on the bottom half of the form, which was introduced into evidence, and comes after its terms and the signatures of the defendant and the agent of the plaintiff. The notation is further separated from the signatures of the defendant and the agent of the plaintiff and from the terms of their agreement by a heavy line dividing the page from left to right. It appears, therefore, that the typed notation was merely an interoffice notation from one agent of the plaintiff Company to another and was not a part of the mutual agreement of the parties.

In any event, we do not think the defendant can be heard to complain if the plaintiff has now elected not to collect a premium for the period of insurance coverage from 30 March 1975 until 8 April 1975. Our holding that the policy was not canceled until 8 April 1975 renders the plaintiff's refusal to accept premiums for prior periods favorable to the defendant who received insurance coverage during those periods.

The plaintiff has brought forward and argued numerous other assignments of error. Our holding, however, makes it unnecessary for us to consider them.

For the reasons previously set forth herein, we find the trial court erred in its conclusions that the methods of cancellation provided by the terms of the policy were exclusive and were not complied with and that the time of cancellation was so equivocal as to be ineffective. The judgment of the trial court must be reversed and the cause remanded to the Superior Court of Wake County to the end that a judgment in favor of the plaintiff and consistent with this opinion may be entered.

The judgment of the trial court is therefore

Reversed and the cause remanded.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIAM COX

No. 782SC231

(Filed 1 August 1978)

1. Criminal Law § 26.5— not guilty of armed robbery—trial as accessory—no double jeopardy

The trial of defendant on a charge of accessory after the fact of armed robbery after a directed verdict of not guilty was entered in a trial of defendant for armed robbery did not violate the principle of double jeopardy since accessory after the fact of armed robbery is not a lesser included offense of armed robbery, and the directed verdict of not guilty of armed robbery did not decide the issue of whether defendant joined the criminal scheme after the robbery was completed.

2. Criminal Law § 92.3— failure to consolidate charges—no violation of statute

The trial of defendant on a charge of accessory after the fact of armed robbery after a directed verdict of not guilty was entered in a trial of defendant for armed robbery did not violate the joinder of offenses statute, G.S. 15A-926, so as to require dismissal of the accessory charge since (1) there could have been no joinder of offenses because defendant had not been charged as an accessory at the time of the armed robbery trial, and (2) armed robbery and accessory after the fact to armed robbery are mutually exclusive offenses and not joinable for trial.

3. Arrest and Bail § 3.6; Searches and Seizures § 11— warrantless search and arrest—probable cause

Officers had probable cause to stop and search defendant's automobile and to arrest defendant without a warrant after the search where an officer saw defendant operating an automobile near a convenience store; the officer saw three black males standing across from the store, heard someone yell at defendant, and saw defendant make a U-turn and pull his automobile up to the area where the black males were standing; the officer observed that one of the black males wore a big black coat; the officer thereafter learned that the convenience store had been robbed by three black males, one of whom was wearing a black coat; an hour after the robbery, officers stopped an automobile which fit the description of the automobile the officer had observed defendant driving in the vicinity of the crime and which was occupied by four black males; officers observed a sawed-off shotgun in the front seat; and an officer who entered the car to retrieve the shotgun observed a bank bag protruding from under the seat similar to bank bags taken in the robbery.

4. Constitutional Law § 68— trial as accessory—refusal of perpetrators to testify—no showing of prejudice

In a prosecution for accessory after the fact of armed robbery, defendant has shown no prejudice from the fact that the three men who committed the robbery indicated that, on the advice of their counsel, they would refuse to testify in defendant's trial where the record did not show any attempt to call the three as witnesses or what their testimony would have been had they been called as witnesses.

5. Criminal Law § 11; Robbery § 4.6— accessory after fact of armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for accessory after the fact of armed robbery where it tended to show that three black males robbed a convenience store at gun point; defendant was observed at the approximate time of the robbery driving his car down the street on which the store was located; three black males were observed standing across from the convenience store; someone yelled at defendant and he made a U-turn and drove to the spot where the three men were standing; an hour later defendant was found driving a car occupied by three males who later pled guilty to robbing the convenience store; and a shotgun and bank bag fitting the description of bags taken in the robbery were found in defendant's car.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 27 October 1977 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 28 June 1978.

On 16 February 1977, three black males entered the Zip Mart, located at East Third and Brown Streets in Washington, held a shotgun on the manager, Christine Boone, and took $106.00 from the cash register and safe. At the approximate time of the robbery, Officer J. D. Lockley of the Washington Police Department, was driving to work on Third Street. In front of him was a white Plymouth Valiant with dealer license tags, which he observed was being operated by defendant. As Officer Lockley drove past the Zip Mart, he saw three black males standing on the side of the street opposite the Zip Mart and heard someone yell at defendant. The defendant drove a bit further down the street, made a U-turn and pulled his car up near the black males. When Officer Lockley arrived at Police Headquarters, he was informed by the dispatcher of a possible robbery at the Zip Mart on Third Street. He went to the Zip Mart and questioned Mrs. Boone about the incident. She told the officer that three black males had just entered the store and robbed her. Officer Lockley asked her if one of the men was wearing a big black coat and could she give a description of the man. Mrs. Boone answered yes and described the man. Officer Lockley had observed that one of the black males standing across from the Zip Mart earlier that night was wearing a big black coat. Deputy sheriffs located a white Valiant with dealer license tags occupied by four black males later that night. They stopped the vehicle, noticed a sawed-off shotgun inside the car, and arrested the occupants. A search of the interior of the car was then performed and the deputies found two blue First Citizens Bank and Trust Company bank bags similar to the ones allegedly taken from the Zip Mart. Defendant was the operator of the white Valiant.

Defendant and the three fellow occupants of the car were charged with armed robbery. Of the four, defendant alone pled not guilty. He was tried on the charge of armed robbery, but the trial judge directed a verdict of not guilty at the close of the State's evidence. The defendant was then served with a warrant charging him with the offense of accessory after the fact to armed robbery. Prior to trial on the accessory charge, defendant moved to dismiss the case on the grounds that a trial on accessory

charges would violate his double jeopardy protections, but the motion was denied. At trial, defendant moved to dismiss on the basis that the joinder of offenses statute, G.S. 15A-926, had been violated. That motion was also denied. From a jury verdict of guilty of accessory after the fact to armed robbery, defendant was sentenced to a ten year term in prison. He appeals to this Court.

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

Wilkinson and Vosburgh, by James R. Vosburgh, for defendant appellant.

WEBB, Judge.

[1] Defendant contends the second trial on accessory after the fact to armed robbery charges violates the principles of double jeopardy and the joinder of offenses statute, G.S. 15A-926, and thus it was error for the trial court to deny his motions to dismiss. We do not agree with defendant. In support of his argument that a second trial would offend double jeopardy protections, defendant relies on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970) in which the Court held that the principles of collateral estoppel are embodied in the Fifth Amendment's guarantee against double jeopardy. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson, supra*, at 443. In the *Swenson* case, three or four masked gunmen interrupted a six-man poker game and robbed each of the players. The defendant was tried for the robbery of one of the players and was acquitted. Six weeks later, the defendant was brought to trial for the robbery of another of the players and was convicted. In reversing the conviction of the second trial, the Court stated that when a defendant seeks to prohibit the trial of an issue because of a prior general verdict of acquittal, the Court must examine the record of the prior proceeding and determine " 'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Ashe v. Swenson, supra*, at 444. The Court in *Swenson* concluded that the only

conceivable issue before the jury in the first trial was whether the defendant was one of the robbers. The jury having found that he was not one of the robbers by its verdict, subsequent prosecution for the robbery of another poker player was prohibited. In the instant case, the directed verdict of not guilty of armed robbery foreclosed the State from subsequent prosecutions for armed robbery of this Zip Mart or for any lesser included offenses of armed robbery. But, accessory after the fact of armed robbery is not a lesser included offense of armed robbery. *State v. McIntosh*, 260 N.C. 749, 133 S.E. 2d 652 (1963). Therefore, general double jeopardy notions would not bar the trial of defendant on charges of accessory after the fact to armed robbery. We are without the benefit of the record in defendant's trial for armed robbery, but accepting as true defense counsel's statement that the evidence introduced at both trials was virtually the same, we find that the directed verdict of not guilty of armed robbery only removes the issues of whether defendant participated as a principal robber or whether he aided and abetted in the commission of the robbery. The possibility remains that after the robbery was committed, the defendant assisted the felons by transporting them in his car from the scene of the crime. Since "[t]he crime of accessory after the fact has its beginning after the principal offense has been committed," the directed verdict of not guilty of armed robbery did not decide the issue of whether the defendant joined the criminal scheme after the robbery was complete. *See State v. McIntosh, supra*, at 753.

[2] As an alternative, defendant contends the joinder of offenses statute, G.S. 15A-926 requires the dismissal of the accessory charges. G.S. 15A-926 provides in part:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.
>
> * * *
>
> (c) Failure to Join Related Offenses.—
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> * * *

(2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial, and must be granted unless

a. A motion for joinder of these offenses was previously denied, or

b. The court finds that the right of joinder has been waived, or

c. The court finds that because the solicitor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

Defendant argues that armed robbery and accessory after the fact to armed robbery were joinable offenses since both charges arose from the same transaction and the evidence for proof of both charges was available at the first trial. He further contends that he questioned the district attorney as to whether accessory after the fact charges would be brought and he was advised that they would not. We are sympathetic with defendant's dilemma, but we do not believe G.S. 15A-926(c)(2) mandates the dismissal of accessory charges. At the outset, we note that defendant had not been charged with the offense of accessory after the fact to armed robbery. There could be no joinder of offenses in the absence of a second offense to join with the first. Additionally, Judge Tillery found armed robbery and accessory after the fact of armed robbery to be mutually exclusive offenses and not joinable for trial. We agree with this holding.

[3] Defendant next contends that his arrest without a warrant and the search and seizure of evidence from his automobile were unlawful. The legality of the search and subsequent arrest must stand or fall on whether there was probable cause to stop and search defendant's automobile. In defendant's view, his presence near the scene of the crime at the approximate time of the crime is not enough to create a reasonable belief that defendant had committed or was committing a crime. We might agree with defendant if those were the only circumstances before us, but they are not. We must consider all of the circumstances, including

the facts that Officer Lockley knew defendant and recognized him as the operator of the white Plymouth Valiant that night; that he saw three black males standing across from the Zip Mart; that after someone yelled at defendant, he made a U-turn and pulled up his car to the vicinity where the black males were standing; that Officer Lockley observed one of the black males wearing a black coat and Mrs. Boone later confirmed of three black males who had robbed the Zip Mart, one was wearing a black coat; that approximately an hour after the robbery, officers stopped a white Plymouth Valiant fitting the description of the car observed by Officer Lockley and occupied by four black males; that when the occupants stepped from the car the interior dome light came on, and a detective observed a sawed-off shotgun in the front seat; and that when the detective entered the car to retrieve the shotgun, he observed a blue bank bag protruding from under the seat. We hold that these facts are sufficient to create a reasonable belief that the automobile was carrying contraband or the fruits of crime. Given their authority to stop and search, the seizure of evidence they found in plain view, plus the connection of the seized evidence with the earlier robbery, the officers had probable cause to arrest the defendant. *See State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419, *rehearing denied*, 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed. 2d 94 (1970); *Pennsylvania v. Mimms*, --- U.S. ---, --- S.Ct. ---, 54 L.Ed. 2d 331 (1977).

Error has been assigned to certain evidentiary rulings and to the trial court's instructions to the jury. We note, however, that defendant has not presented any argument or authority in support of these exceptions. They are deemed abandoned. Rule 28(b), Rules of Appellate Procedure.

[4] At the close of the State's evidence, the defendant moved for a mistrial on the grounds that he was denied his right of compulsory process for obtaining witnesses in his favor because the three men who robbed the store indicated that, on the advice of counsel, they would refuse to testify. An examination of the record does not reveal any attempt to call any of these men to the witness stand. We believe it is inappropriate for this Court to surmise what testimony would or would not have been given if these men had been called as witnesses and questioned by defend-

ant's counsel. Therefore, we find that the defendant has not shown any prejudice to him under the facts as presented.

Other assignments of error raised questions of the prejudicial effect of an out-of-court identification procedure and the sufficiency of evidence to withstand defendant's motion to dismiss. With respect to the identification procedure, the defendant objects to the court's conclusion that Mrs. Boone based her identification of the three men who robbed her on her observations of the men in the store and that the identification was not based on an unnecessarily suggestive out-of-court line-up. We find that there was ample evidence to support the trial court's conclusion that Mrs. Boone's identification of the three men in court was based on her independent observation of the men on the night of the robbery. *See State v. Stephens*, 35 N.C. App. 335, 241 S.E. 2d 382 (1978).

[5] Defendant also contends the State has failed to prove each of the necessary elements of the offense of accessory after the fact to armed robbery and thus, it was error to deny his motion to dismiss and motion for a directed verdict of not guilty. "On a charge of accessory after the fact the State must show (1) robbery, (2) the accused knew of it and (3) possessing that knowledge he assisted the robber in escaping detection, arrest and punishment." *State v. McIntosh, supra,* at 753. There was plenary evidence to show that three black males entered the Zip Mart at approximately 10:00 p.m. on 16 February 1977 and robbed the business at gun point. At the approximate time of the robbery, the defendant was observed driving his automobile down the same street on which the victimized business was located. Three black men were observed standing across from the Zip Mart, one of whom was wearing a black coat. Someone from the area where the black males stood yelled at defendant and he made a U-turn in the road and drove to the spot where the three men were standing. Shortly thereafter, the police officer who observed this activity responded to a dispatch and was told by Mrs. Boone at the Zip Mart that she had just been robbed by three black males, one of whom was wearing a black coat. About an hour later, defendant was found driving three males, who later pled guilty to robbing the Zip Mart, in his car. A shotgun and bank bags, fitting the description of those taken from the Zip Mart, were found in the car. When we consider this evidence in the light most favorable to the State, giving it every reasonable intendment and

every reasonable inference, we hold that it is sufficient evidence of every element of the crime charged to survive defendant's motions and convict defendant. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976).

For the above stated reasons, we find

No error.

Judges MORRIS and HEDRICK concur.

IN THE MATTER OF JEFFERY D. KOWALZEK

No. 7711DC1027

(Filed 1 August 1978)

1. Parent and Child § 6— child custody—right of natural parent

The natural parent is presumed to be the appropriate custodian of his or her child as opposed to third persons and should not be deprived of custody merely because the child could be better cared for in a material sense by others.

2. *Parent and Child § 6.3— child custody—natural parent—award to third party*

The trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person, since a natural parent may be a fit and proper person to care for the child while all other circumstances dictate that the best interests of the child would be served by placing custody in a third party.

3. Parent and Child § 6.3; Infants § 6.3— award of custody to natural parent—insufficient findings

The trial court's findings failed to support its conclusion that the natural mother was a fit and proper person to have custody of her child and that it would be in the best interest of the child that his permanent custody be placed eventually with his natural mother where the court failed to make findings as to the circumstances surrounding the mother's separation from the child's father and her leaving of the child with the father in North Carolina when she returned to Minnesota prior to the father's death, her failure to make any effort to learn the whereabouts of the child for over five months after the father's death although she had been notified of the death, and the mother's living quarters, employment, earnings and other circumstances in Minnesota.

APPEAL by Elizabeth Y. Kowalzek, petitioner, and Salvador C. Liendo and Frankie B. Liendo, respondents, from *Lyon, Judge.* Order entered 26 July 1977 in District Court, LEE County. Heard in the Court of Appeals 30 June 1978.

This is a proceeding for custody of Jeffery David Kowalzek originally instituted by the petitioner. The following facts are uncontroverted:

Prior to December, 1974, the petitioner lived with her husband, James Kowalzek, and their infant son, Jeffery, in Sanford, North Carolina. On 1 December 1974 the petitioner left her husband and returned to her former home in Little Falls, Minnesota. Jeffery remained with his father. On 28 February 1975 James Kowalzek was killed in an automobile accident. The petitioner was notified of the death of her husband but made no inquiry concerning the whereabouts of her child. Pursuant to an order of 6 March 1975 legal custody of Jeffery was placed in the Lee County Department of Social Services (hereinafter "Department") and physical custody was awarded to Frances Carter and her sister, Frankie Liendo, both of whom had cared for the child while the father was alive.

In April of 1975 the Department received a letter written by an aunt of the petitioner inquiring as to the whereabouts of the child. In September of the same year the petitioner corresponded with the Department seeking custody of her child. A hearing was conducted on 9 October 1975, at the conclusion of which the petitioner was denied custody.

On 27 July 1976 the Department filed a motion that the order of 9 October 1975 be modified to grant custody of the child to the mother. The mother was heard *ex parte* before the District Court of Lee County, and custody was granted to the mother. Upon the respondents' appeal this Court found that the respondents, as custodians of the child, were entitled to notice and the right to present evidence at the hearing. This Court further found the order fatally defective for inadequate findings of fact and conclusions of law. The order was vacated and the cause remanded to the District Court. *See In the Matter of Kowalzek,* 32 N.C. App. 718, 233 S.E. 2d 655 (1977).

In June of 1977 a hearing was conducted at which the respondents as well as the petitioner presented evidence. By

order entered on 26 July 1977 the trial court made findings of fact and conclusions of law, including the following:

> 1. That Sgt. and Mrs. Liendo and Mrs. Elizabeth Kowalzek are each fit and proper persons to have the care, custody, tuition and control of Jeffery Kowalzek.
>
> 2. That legal custody of Jeffery Kowalzek shall remain in the Lee County Department of Social services, but that temporary actual residence of said child be and remain with Sgt. and Mrs. Liendo; . . . .
>
> 3. That it would be for the best interst of Jeffery Kowalzek that his care, custody and control eventually be placed permanently with his natural mother, Mrs. Elizabeth Kowalzek; but not immediately, as the shock of a complete transfer of custody at this time will be too injurious to the health, emotions and welfare of Jeffery David Kowalzek.
>
> 4. That to effect transfer of custody of said child, it will be necessary for the Lee County Social Services Department to take Jeffery from time to time from the home of Sgt. and Mrs. Liendo and place him in a foster home for short durations in order that he may gradually become accustomed to being away from the home and influence of Sgt. and Mrs. Liendo; that it is further necessary that Mrs. Kowalzek return to North Carolina from time to time in order to re-establish a mother-child relationship with Jeffery Kowalzek; that when the Lee County Department of Social Services determines that a proper mother-child relationship has been re-established between Mrs. Elizabeth Kowalzek and her child; and further determines that it would not be a traumatic experience on Jeffery to permanently take him from the home of Sgt. and Mrs. Liendo, it will petition this court for further orders in regard to such custody; or any party hereto may do so, if she or they so determine.

The petitioner and the respondents appealed.

Harry E. Wilson for Lee County Department of Social Services.

J. Douglas Moretz for petitioner appellant Elizabeth Kowalzek.

Hoyle and Hoyle, by J. W. Hoyle, for the respondent appellants Liendos.

HEDRICK, Judge.

Petitioner assigns as error the trial court's failure to award her immediate permanent custody of the child. In her brief petitioner contends that the trial court is powerless to award custody of an infant to a third party without finding as a fact that the natural parent is unfit to accept the responsibilities of custody, care and tuition of the child. We disagree.

[1] General Statute § 50-13.2(a) requires the trial court to "award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, *best promote the interest and welfare of the child*" (emphasis provided). Accordingly, it has been frequently stated that the trial court should be primarily concerned with the welfare of the child in deciding which party before it should be charged with the enormous responsibilities of custodianship of the child. *See e.g., Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). A principle equally well-entrenched in our case law and deeply rooted in the social fabric of our culture is that the natural parent is presumed to be the appropriate custodian of his or her child as opposed to third persons and should not be deprived of custody merely because the child could be better cared for in a material sense. *See e.g., Spitzer v. Lewark*, 259 N.C. 50, 129 S.E. 2d 620 (1963); *In re Wehunt*, 23 N.C. App. 113, 208 S.E. 2d 280 (1974). In *Spence v. Durham*, 283 N.C. 671, 687, 198 S.E. 2d 537, 547 (1973), Justice (now Chief Justice) Sharp quoted approvingly from 2 Nelson, *Divorce and Annulment* § 15.09 at 226-9 (2d ed. 1961):

> It is universally recognized that the mother is the natural custodian of her young. . . . If she is a fit and proper person to have the custody of the children, other things being equal, the mother should be given their custody, in order that the

children may not only receive her attention, care, supervision, and kindly advice, but also may have the advantage and benefit of a mother's love and devotion for which there is no substitute.

See also Tucker v. Tucker, 288 N.C. 81, 216 S.E. 2d 1 (1975). Harmony of these principles is suggested in the words of Justice Parker in *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E. 2d 759, 761 (1955):

> Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it. [citations omitted].

[2] We conclude that while the fitness of a natural parent is of paramount significance in determining the best interests of the child in custody contests, it is not always determinative in itself. It is entirely possible that a natural parent may be a fit and proper person to care for the child but that all other circumstances dictate that the best interests of the child would be served by placing custody in a third party. Thus, we hold that the trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. *See In re Morrison*, 6 N.C. App. 47, 169 S.E. 2d 228 (1969). The petitioner's assignment is overruled.

[3] The respondents contend that the facts found do not support the conclusions that the petitioner is a fit and proper person to have custody of the child and "that it would be for the best interest of Jeffery Kowalzek that his care, custody and control eventually be placed permanently with his natural mother."

In *Hunt v. Hunt*, 29 N.C. App. 380, 383, 224 S.E. 2d 270, 271-2 (1976), we find the following:

> ". . . when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact."

This Court held that the trial judge's conclusions that the defendant was a fit and proper person and that it was in the best interest of the child to place him in the custody of the defendant were not supported by adequate findings. Similarly, in *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E. 2d 26, 29 (1977), our Court pointed out the duties of the trial judge in a custody proceeding and declared that a custody order must include "findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will 'best promote the interest and welfare of the child.' " The Court then found the order inadequate to meet the standards prescribed.

In the case before us the trial judge made extensive findings bearing on the respondents' fitness to maintain custody of Jeffery. Indeed, it is undisputed that since the death of Jeffery's father the respondents have provided Jeffery with all the ingredients of a healthy home environment. On the other hand, we find relatively little in the trial judge's findings with respect to whether the petitioner is in fact the proper person to have custody of her child. In this regard, the trial judge found only that the petitioner is presently employed by the Lutheran Home and

> [t]hat although Mrs. Kowalzek has irregular working hours, she can make arrangement for day or night care for Jeffery as well as suitable living quarters; and all of which arrangements have met with the approval of Morrison County, Minnesota, Social Services Department, and which department has joined in the request for the return of Jeffery to his natural mother, Mrs. Elizabeth Kowalzek.

However, the trial judge further found that when the petitioner was notified of her husband's death she "made no effort to contact anyone about her child," and "[t]hat from the time Mrs. Elizabeth Kowalzek left the State of North Carolina on December 1, 1974, it was five months and 21 days before and until she made any other or further contact or inquiry about the child."

It is clear from the record that a considerable question has been raised as to the circumstances surrounding the petitioner's separation from her husband and her leaving the child in North Carolina when she returned to Minnesota. After the child's father was killed in the automobile accident and the petitioner notified

of his death, a considerable period elapsed before the petitioner made any effort to learn the whereabouts of the child. With the exception of a single conclusory finding that the petitioner "has not abandoned, Jeffery, in a legal sense," the trial judge failed to resolve the questions raised by the evidence. Moreover, the court made no definitive findings as to the petitioner's circumstances in the State of Minnesota, particularly with respect to her living quarters, employment, and earnings. Surely, these matters are of essential concern in determining whether the best interests of the child will be promoted by awarding custody of Jeffery to the petitioner. In short, the findings bearing on the party's fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto. In this regard, we find the order fatally defective.

We feel compelled to point out that even if the facts found by the trial judge were sufficient to resolve all of the critical issues raised by the evidence and to support the conclusions of law, the order entered is so equivocal as to be practically unenforceable. The order purports to award legal custody of the child to the Department, temporary physical custody to the respondents, and eventual permanent custody to the petitioner. No provision is made for determining when and if a "mother-child relationship" has been established. The order is likewise indefinite as to who is to bear the present responsibility of providing for the needs of the child. It must be assumed, however, that the court intended for the respondents to continue to provide for all of Jeffery's needs until such time as they are required to relinquish custody to the petitioner. Furthermore, by requiring an unspecified number of reunions with the child the court is rendering it practically impossible for the petitioner, who lives in Minnesota and is apparently of very limited means, to establish a "mother-child relationship." In short, the order creates more problems than it solves, and, at best, will prolong the agony of all concerned by necessitating additional hearings to determine with finality the future status of the parties.

We recognize that the task of the trial judge in custody matters is monumental. However, the issues of fact raised by the evidence and pointed out in this opinion must be confronted and resolved with as little delay as possible in order to minimize the

inevitable hurt to all parties and particularly to the subject of this controversy.

The order is vacated, and the proceeding is remanded to District Court for a new hearing, new findings, and the entry of a new order based thereon.

Vacated and remanded.

Judges MORRIS and WEBB concur.

LINDA M. LEE (NOW WILBER), PLAINTIFF PETITIONER v. WILLIAM F. LEE, DEFENDANT RESPONDENT

No. 7726DC642

(Filed 1 August 1978)

1. **Contempt of Court § 6.2— violation of child visitation order—willfulness**

The evidence supported the trial court's judgment holding plaintiff in contempt for defying a child visitation order "willfully and without legal excuse or justification," and her violation of the order was not justified by the fact that when plaintiff took her daughter to defendant's apartment on one occasion she found that the apartment was in a state of disarray and that defendant looked disheveled and had bloodshot eyes and alcohol on his breath.

2. **Contempt of Court § 6.2— violation of child visitation order—present ability to comply**

The trial court was not required to find that plaintiff had the present ability to perform in accordance with a child support order in order to hold plaintiff in contempt for failure to comply with such order; however, there was plenary evidence in this contempt proceeding to justify a finding of a present ability to comply.

3. **Contempt of Court § 6; Divorce and Alimony § 25.7— show cause hearing—modification of child visitation order**

The trial court was without authority to transfer a show cause hearing as to why plaintiff should not be held in contempt for violation of a child visitation order, on its own motion and without notice to the plaintiff, into a hearing on the issue of modification of defendant's visitation rights as set forth in prior orders.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered 7 and 12 April 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1978.

The plaintiff and defendant herein were awarded an absolute divorce in 1973. The plaintiff wife was awarded custody of their two minor daughters with the defendant husband to have monthly weekend visitation rights. The terms of these visitation rights were set forth initially in a consent order entered 21 May 1974. By a subsequent consent order entered 3 September 1975, the terms of the prior order, including the visitation rights of the defendant, were modified.

The defendant's visitation rights under the 3 September 1975 order included the right to have the two minor daughters visit with him on the fourth weekend of each calendar month, at least half of all holidays and an additional period of at least four days during the summer months. The visitation rights were somewhat different as to each minor daughter. The monthly visitation of the younger daughter was to be from 6:00 p.m. on Friday until 5:00 p.m. on Sunday. The monthly visitation of the elder daughter was to be from 12:00 noon until 5:00 p.m. on the Sundays when the younger child was visiting. The defendant was to furnish their transportation both ways.

The defendant husband filed a motion in the cause on 11 January 1977 seeking to have the plaintiff wife held in contempt for willful failure to allow him to exercise his visitation rights in accordance with the 3 September 1975 order. A hearing was held on 4 April 1977 to resolve the issues raised by the defendant's allegations. At the hearing the defendant's evidence tended to show that, since August of 1976 he has seen his elder daughter only about five hours per month and his younger daughter seven or eight hours per month, notwithstanding his regular requests for visitation and attempts to visit. The children have indicated that they wish to visit with him and, although the elder daughter is in college and cannot visit frequently, he would like to visit with his younger daughter more frequently.

The defendant's evidence further tended to show that he is presently on medical disability for anxiety and is being treated by a psychotherapist through group therapy. He also is treated periodically for high blood pressure. The defendant's condition does not interfere with his "parenting ability." Although he takes medication and has been drunk on occasion over the past years, he has never been drunk while his children were visiting.

The defendant's evidence additionally tended to show that, he moved to a new apartment in December, 1976, where he does his own housekeeping and laundry. He cleans the apartment three times a week. He was not evicted from his former apartment for poor housekeeping habits although, during August and September of 1976, the apartment was in need of cleaning. His daughters have never indicated to him that they were afraid to stay with him and have treated him with affection.

The plaintiff offered evidence tending to show that she took the younger daughter to the defendant's apartment during September of 1976. On that occasion the apartment was in a state of disarray, and the defendant looked disheveled, had bloodshot eyes, slurred speech and alcohol on his breath. As a result, she felt the defendant was in no condition to take care of the child and refused to allow her to stay. Since that time the plaintiff has only allowed the younger daughter to visit for a few hours at a time and not overnight. During these short visits with the defendant, the plaintiff has waited in her car for the child. The child does not like to visit overnight now that the elder daughter is in college and does not visit at the same time.

The plaintiff's evidence further tended to show that in August or September, 1976, the resident manager inspected the defendant's apartment following complaints from other tenants. She testified that the apartment was dirty and unkempt. Upon request, the defendant had the apartment cleaned and exterminated. Thereafter he had it cleaned weekly by a professional cleaning service. Although the defendant subsequently kept his apartment clean, he was asked, for other reasons, to leave the apartment in December, 1976.

On 7 April 1977 the trial court made findings which are summarized as follows:

The plaintiff complied with the visitation schedule of the 3 September 1975 order through August, 1976. In September, 1976, however, the plaintiff took the younger daughter to the defendant's apartment and found the apartment to be in a deplorable condition with the defendant depressed, upset and crying. As of 7 April 1977, the defendant was capable of having a meaningful parent-child relationship with his younger daughter although he

did not wish to require the elder daughter, who was attending college, to visit with him.

Based upon these findings, the trial court concluded that the visitation privileges set forth in the 3 September 1975 consent order should be amended and modified to terminate as they related to the elder daughter and so as to preclude overnight visits by the younger daughter. Based upon these conclusions, the trial court entered an order on 7 April 1977 terminating visitation rights as to the elder daughter and terminating overnight visits by the younger daughter. The order specifically provided for regular monthly daytime visits by the younger daughter.

Five days later, on 12 April 1977, the trial court entered an order finding that the plaintiff had not allowed the children to visit the defendant pursuant to the terms of the order of 3 September 1975. It further found that she had "willfully and without sufficient legal excuse or justification defied the Orders of [the] Court, and as a result of such action and conduct should be punished as for contempt." The trial court entered judgment declaring the plaintiff in contempt and sentenced the plaintiff to three days incarceration, which sentence was deferred upon condition that she comply for one year with the amended provisions as to visitation contained in its "contemporaneous order" of 7 April 1977. From these judgments, the plaintiff appealed.

James L. Roberts for plaintiff appellant.

R. Kent Brown for defendant appellee.

MITCHELL, Judge.

[1] The plaintiff assigns as error the trial court's failure to allow her motion to dismiss as to willful contempt at the close of the defendant's evidence and again at the close of all of the evidence. She contends that the court did not find and the evidence did not support a finding of "willfulness" on her part in violating the 3 September 1975 order. She further contends that, even if her violation of the order was willful, it was negated by the condition of the defendant and his apartment as set forth in the trial court's findings. We do not agree. As the defendant's evidence was sufficient to withstand the plaintiff's motion to dismiss both at the close of the defendant's evidence and at the close of all of the evidence, denial of those motions was proper.

The trial court found in its order of 12 April 1977 that the plaintiff had not allowed visitation pursuant to the order of 3 September 1975. The trial court further found that the plaintiff "willfully and without sufficient legal excuse or justification" defied that order. The trial court's findings in this regard were supported by competent evidence, and in contempt proceedings such findings are conclusive on appeal when so supported. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978).

A review of the record on appeal indicates that the plaintiff's own testimony was that, since September of 1976, she had not complied with the order of 3 September 1975. She made no attempt to petition the court for a modification of the 1975 order so as to require the defendant to keep his premises clean and refrain from the use of alcohol or drugs when exercising visitation rights. Instead, she chose to continue to ignore the 1975 order with regard to the defendant's visitation rights. This violation of the 1975 order was not justified. *See Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978).

[2] The plaintiff further contends that, prior to a finding of willful contempt, the trial court must find that the contemnor had the "present ability to perform" pursuant to the order violated. The plaintiff argues that there was no evidence in the record showing she was in a position to comply with the visitation order, and that the omission of this finding was fatal. We do not agree.

In *Moore v. Moore*, 35 N.C. App. 748, 242 S.E. 2d 642 (1978), we upheld a finding that the defendant was in willful contempt for failing to transfer an automobile title pursuant to a prior order for child support. No specific finding as to the defendant's present ability to transfer the title had been made. We found that none was required, although the evidence before the trial court was sufficient to enable it to reasonably conclude that the defendant had been possessed of the present ability to comply. We find *Moore* analogous to the present case, in that there was plenary evidence introduced here to justify a finding of a present ability to comply. *Cf. Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978) (Finding of willful refusal to obey a visitation order supported by plenary evidence and contemnor's contention that she had no knowledge of the existence or terms of the prior order was without merit.)

[3] The plaintiff's final contention is that the trial court was without authority to issue its order of 7 April 1977 which modified the defendant's visitation rights established in prior orders, as this was done without notice to the plaintiff. This contention has merit. On 11 January 1977 the court ordered the plaintiff to appear and show cause why she should not be adjudged in willful contempt for failure to abide by the terms of the 3 September 1975 order. No notice that custody or visitation would be considered was given. Based upon the evidence adduced at its hearing conducted pursuant to the order of 11 January 1977 directing the plaintiff to show cause why she should not be held in contempt, the trial court entered its order of 7 April 1977 modifying prior orders concerning the defendant's visitation rights. The trial court was without authority to transform the show cause hearing, on its own motion and without notice to the plaintiff, into a hearing on the issue of modification of the defendant's visitation rights as set forth in prior orders. *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313 (1967). *See also Conrad v. Conrad*, 35 N.C. App. 114, 116, 239 S.E. 2d 862, 863 (1978). The trial court's order of April 1977 must be and is, therefore, vacated.

For reasons previously set forth herein, we find that portion of the trial court's judgment of 12 April 1977 adjudging the plaintiff to be in contempt was supported by competent evidence, and it is affirmed. As the record reveals and both counsel agree that the plaintiff has complied with that portion of the contempt judgment of 12 April 1977 permitting her to purge herself of contempt, issues relating to the validity of the conditions imposed therein have become moot and need not be considered or discussed.

Affirmed in part and vacated in part.

Judges PARKER and HEDRICK concur.

MARTHA E. SCHELL v. J. L. RICE AND WALTER WARD

No. 776DC277

(Filed 1 August 1978)

1. **Trespass § 4; Trespass to Try Title § 1— right of life tenant to bring trespass action**

A life tenant of land had the right to maintain an action for trespass based on defendants' construction of a building on the land, and the nonjoinder of the remaindermen did not entitle defendants to a directed verdict but at most entitled them to have the remaindermen joined as parties upon their motion to do so.

2. **Trespass to Try Title § 4— title by adverse possession—sufficiency of evidence**

Plaintiff's evidence in an action for trespass was sufficient to show open, notorious, continuous, adverse and unequivocal possession of the land in controversy, under color of title in herself and those under whom she claims, for more than 21 years before the action was brought, where plaintiff introduced a 1926 deed to her father and connected herself with that title by introducing the wills of her father and mother, and plaintiff testified that her father had farmed the property during his lifetime, and that after her father's death in 1943, her mother and the plaintiff had continuously sharecropped the property up until the time of the trial.

3. **Trespass to Try Title § 4.1— fitting descriptions to land claimed**

Plaintiff's evidence in a trespass action was sufficient to establish the location on the ground of the boundary lines of the property described in the complaint where an expert surveyor testified to the several surveys which he had made of the property, to the location on the ground of the lines which he had established by those surveys, to the old marked corners which he had found, to the exact location of the western boundary line across which defendants had commenced construction of a building, and to the identity of that western boundary line with the western line of the tract described in a 1926 deed to plaintiff's father.

4. **Rules of Civil Procedure § 50.2— directed verdict—party having burden of proof**

The trial court erred in directing a verdict in favor of plaintiff in a trespass action since the plaintiff's right to recover depended upon the credibility of her witnesses.

APPEAL by defendants from *Blythe, Judge.* Judgment entered 19 November 1976 in District Court, Northampton County. Heard in the Court of Appeals 1 February 1978.

Plaintiff instituted this action against the original defendant, Rice. In her complaint plaintiff alleged that she is the owner of a

tract of land, which is particularly described by metes and bounds in the complaint, containing 102.56 acres more or less located in Northampton County, that defendant constructed a building which encroaches on a part of plaintiff's land to the extent that practically one-half of the building is built on plaintiff's land, and that in connection therewith defendant cut certain trees which were located entirely on plaintiff's land. Plaintiff sought to recover damages caused by defendant's construction of the building, to recover treble damages for the value of the trees cut, and prayed for an injunction enjoining defendant from maintaining his building on plaintiff's land. A temporary restraining order was entered enjoining defendant from trespassing upon the lands of plaintiff described in the complaint, which restraining order was subsequently continued in effect pending determination of the case on the merits.

Defendant Rice filed answer denying all allegations in the complaint and alleging as a counterclaim that "plaintiff is trying to take defendant's building with a malicious undertone" [sic], for which defendant prayed that he recover actual and punitive damages. Thereafter defendant Ward was added as a party defendant by order of court after it was made to appear that the original defendant had transferred his interest to the real estate in question to Ward. Defendant Ward filed answer and counterclaim identical with that filed by defendant Rice.

At trial before a jury, plaintiff introduced in evidence a recorded deed dated 17 November 1926 by which R. E. Brown and wife conveyed to plaintiff's father, W. C. Ellis, a particularly described tract of land containing 104.2 acres, more or less. J. C. Shearin, a registered surveyor and civil engineer, testified for plaintiff that he had first become familiar with the property in 1933 when he had made a map of the property for W. C. Ellis for a Federal Land Bank loan, that he next ran some of the western boundary lines of the property in 1947 or 1948, and that he had again surveyed the property in 1974, at which time he had prepared a map for plaintiff showing the 102.56 acre tract described in the complaint. This map was introduced in evidence as plaintiff's Exhibit D. This witness also testified that he had again surveyed the western boundary line of the property in 1976 and found that the line ran through a building then under construction, one part of the building encroaching approximately twenty

feet over on plaintiff's side of the line. He had prepared a map showing this portion of the western boundary line with the building encroaching over the line, which map was introduced in evidence as plaintiff's Exhibit E. The map which the witness had prepared in 1933 for the Federal Land Bank loan was introduced in evidence as plaintiff's Exhibit F. The witness testified that the western boundary line shown on plaintiff's Exhibits D, E, and F was the same line.

Plaintiff also introduced in evidence the will of her father, Wiley Coker Ellis, who died in 1943, by which he devised all of his property to his wife, Annie Musgrove Ellis, who was plaintiff's mother, and the will of Annie Musgrove Ellis, who died in 1970, by which she gave all of her property to plaintiff "for her lifetime," with the direction that at plaintiff's death "the property both real and personal shall be equally divided between her heirs, William (Billy) Schell, Jr., and Wiley A. Schell," who are plaintiff's sons.

Plaintiff testified that her father had farmed the property during his lifetime, that after he died in 1943 her mother had sharecropped the property with a Mr. Joyner until her mother's death in 1970, and that since her mother's death she has continued to sharecrop the property with Mr. Joyner. She also testified that when she found out that construction was taking place on her property, she had gone to the site to take pictures, at which time defendant had come to her and had asked if she would sell him the piece that was being built upon, that she had refused to sell, and that defendant did not stop construction until the court had issued a restraining order.

At the close of plaintiff's evidence, defendants' motion for directed verdict dismissing plaintiff's action was denied except as to plaintiff's claim for damages for cutting timber. Defendants did not present evidence. Plaintiff then moved for a directed verdict in her favor, which motion was allowed except as to plaintiff's claim for damages. Defendants' subsequent motions for judgment in accord with their previous motion for a directed verdict notwithstanding the court's decision and for a new trial were denied.

Judgment was entered enjoining defendants from maintaining their building upon the premises of the plaintiff as described in the complaint, ordering defendants to remove the building from

said premises and to restore the land to its original condition, and enjoining defendants from cutting trees on plaintiff's premises. From this judgment, defendants appealed.

Allsbrook, Benton, Knott, Allsbrook & Cranford by William O. White, Jr. for plaintiff appellee.

Satisky & Silverstein by Howard P. Satisky for defendants appellants.

PARKER, Judge.

[1] Defendants first assign error to the denial of their motion for a directed verdict. They contend that their motion should have been allowed, first, because plaintiff's evidence showed that she held only a life estate in the property, the remainder interest being in her two sons who are not parties to this action. There is no merit to this contention. As life tenant plaintiff was entitled to the immediate possession of the property, and she was entitled to recover at least nominal damages for any trespass which interfered with her possessory interest. *Lee v. Lee*, 180 N.C. 86, 104 S.E. 76 (1920). It has long been recognized that one in possession of real property holding rights far less substantial than those of a life tenant may maintain an action against a third party trespasser to recover for injury to his possession. *See, e.g., Smith v. Fortiscue*, 48 N.C. 65 (1855); Annot., 12 A.L.R. 2d 1192 (1950); Dobbs, *Trespass to Land in North Carolina—Part I. The Substantive Law*, 47 N.C. L.Rev. 31, 40-42 (1968). In such a case, of course, the owner of the title is a proper and may be a necessary party to an action of trespass, when the wrongful invasion of the property involves an injury both to the possession and to the inheritance. *Tripp v. Little*, 186 N.C. 215, 119 S.E. 225 (1923). However, the failure to join even a necessary party is not grounds for dismissal of the action, the remedy being to add the necessary party, which may be done "by order of the court on motion of any party or on its own initiative at any stage of the action." G.S. 1A-1, Rule 21. In the present case, the plaintiff, as holder of the life estate, had a right to maintain this action to protect her interest in the property. Nonjoinder of the remaindermen did not entitle defendants to a directed verdict, but at most entitled them to have the remaindermen joined as parties upon their motion to do so. Defendants made no such motion.

[2] Defendants next contend that their motion for directed verdict should have been allowed because plaintiff failed to prove her title in any of the ways enumerated in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). We do not agree. The 1926 deed to plaintiff's father constituted color of title, and plaintiff connected herself with that title by introducing the wills of her father and mother. She also testified that her father had farmed the property during his lifetime, and that after her father's death in 1943, her mother and the plaintiff had continuously sharecropped the property up to the time of the trial in 1976. Thus, plaintiff's evidence, when viewed in the light most favorable to her as it must be in passing on defendants' motion for directed verdict, was sufficient to show open, notorious, continuous, adverse, and unequivocal possession of the land in controversy, under color of title in herself and those under whom she claims, for more than twenty-one years before the action was brought. This was one of the methods listed in *Mobley v. Griffin, supra*, by which a *prima facie* showing of title may be made.

[3] Finally, defendants contend their motions for a directed verdict should have been allowed because plaintiff's evidence was insufficient to establish the location on the ground of the boundary lines of the property described in the complaint. Again, we do not agree. The plaintiff's witness, J. C. Shearin, a registered land surveyor and civil engineer who was accepted by the court as an expert surveyor, testified to the several surveys which he had made of the property, to the location on the ground of the lines which he had established by those surveys, to the old marked corners which he had found, and in particular to the exact location of the western boundary line across which defendants had commenced construction of their building. He also testified to the identity of that western boundary line with the western line of the tract described in the 1926 deed to plaintiff's father. This evidence sufficiently located the boundary lines of plaintiff's property to withstand defendants' motion for a directed verdict. We find no error in the denial of defendants' motion.

[4] Defendants' second assignment of error is that the court erred in allowing plaintiff's motion for a directed verdict. This assignment of error has merit. Plaintiff had the burden of proving that she had title to the property and that defendants had trespassed thereon. Essential for that purpose was the testimony

of the plaintiff and of her witness, J. C. Shearin. A directed verdict may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). In the present case plaintiff's right to recover depended upon the credibility of her witnesses, and it was error to direct a verdict in her favor. For this error there must be a

New trial.

Judges MARTIN and ARNOLD concur.

JESSE THIGPEN v. DR. JAMES W. PIVER

No. 774SC842

(Filed 1 August 1978)

1. Rules of Civil Procedure § 41— cost of deposition—counsel's knowledge of items of costs

The evidence was sufficient to support the trial court's finding that plaintiff's counsel knew that the cost of taking plaintiff's deposition in a prior action would be an item of costs in that action where it showed that plaintiff's counsel attended and participated in the taking of plaintiff's deposition; plaintiff, through counsel, thereafter took a voluntary dismissal of the action; at the request of defendant's counsel, the $103 disbursement for the deposition was entered as an item of costs in the record; and before instituting a new action, plaintiff's counsel discussed the item with the assistant clerk of court who entered the cost of the deposition as an item of the costs of the action.

2. Costs § 3; Clerks of Court § 11— voluntary dismissal—authority of assistant clerk to tax costs

An assistant clerk of superior court had authority to assess the cost of taking plaintiff's deposition as an item of costs taxed against plaintiff in an action in which plaintiff took a voluntary dismissal before the case reached the trial calendar. G.S. 1-7; G.S. 6-7; G.S. 6-21(6); and G.S. 1A-1, Rule 41(d).

3. Rules of Civil Procedure § 41.2— voluntary dismissal—failure to pay costs—dismissal of new action

The trial court properly dismissed plaintiff's action because of plaintiff's failure to pay the costs of a prior action against defendant based on the same claim, not brought in *forma pauperis*, and voluntarily dismissed by plaintiff, since at the time of the entry of the court's order dismissing the action, G.S. 1A-1, Rule 41(d) was unequivocal in its requirement that the court, upon the motion of the defendant, "shall" dismiss the action under such circumstances.

APPEAL by plaintiff and defendant from *Small, Judge*. Orders entered 2 September 1977 in Superior Court, ONSLOW County. Heard in the Court of Appeals 29 June 1978.

Plaintiff instituted this action on 13 April 1977 seeking $500,000 damages for alleged malpractice on the part of defendant physician. On 12 May 1977 defendant filed an answer and motions asking, among other things, that the action be dismissed on the following grounds:

(1) Pursuant to Rules 41(b) and 8(a)(2) of the Rules of Civil Procedure for the reason that the complaint contains a monetary demand for relief expressly prohibited by Rule 8(a)(2); and

(2) Pursuant to Rule 41(d) because of plaintiff's failure to pay the costs of a previous action filed by him against defendant which action was not brought in *forma pauperis* and in which plaintiff submitted to a voluntary dismissal.

Thereafter plaintiff moved (1) to be allowed to amend his complaint with respect to the monetary demand and (2) that plaintiff's motion under Rule 41(d) be denied because plaintiff's attorney was unaware of the outstanding costs from the previous action at the time the present action was instituted.

Following a hearing on the motions, the court entered an order allowing plaintiff to amend his complaint (1) by striking all of Paragraph 9 (which alleged plaintiff's damage to be $500,000) and inserting in lieu thereof a paragraph alleging "damages incurred in excess of Ten Thousand Dollars ($10,000.00)"; and (2) by changing the prayer for relief to ask for such damages as plaintiff might show himself to be entitled to recover. Defendant appealed from this order.

The court entered a second order in which it found facts summarized in pertinent part as follows:

On 1 February 1973 plaintiff instituted an action against defendant and others which action was based upon and includes the same claim against defendant as is included in this action. The previous action was not brought in *forma pauperis* and at the time of filing same plaintiff advanced $25 costs. In said action plaintiff was represented by Fred W. Harrison and defendant was represented by Daniel Lee Brawley and John D. Warlick.

In connection with the previous action, on 3 June 1975, by consent of the parties, Nancy C. Poole, a notary public, took the deposition of plaintiff. Fred W. Harrison represented plaintiff at the taking of said deposition, and knew that the cost of taking the deposition would be an item of expense included in the costs of said action. Mr. Harrison is representing plaintiff in the present action.

Nancy C. Poole submitted a statement for $103 for taking said deposition and the statement was paid by defendant's attorneys.

On 13 December 1976, pursuant to Rule 41(a) of the Rules of Civil Procedure, plaintiff took a voluntary dismissal of his action then pending. Shortly thereafter, at the request of John D. Warlick, counsel for defendant, a Deputy Clerk of the Superior Court of Onslow County entered the $103 cost for the taking of said deposition on the civil costs bill in the action in which plaintiff had taken a voluntary dismissal.

Prior to 24 March 1977 Fred Harrison, as counsel for plaintiff, requested Betty Gurganus, Assistant Clerk of the Superior Court of Onslow County, to prepare a cost bill in the previous action. At the time of said request the cost bill in said action improperly showed an item of $41.60 for the taking of a deposition but it also showed an item of $103 for the taking of plaintiff's deposition. Mr. Harrison advised Betty Gurganus that the $41.60 item was improper and should be placed in another file. In preparing the final cost bill in the previous action, which included the $103 item aforesaid, Betty Gurganus had one or more conversations with Mr. Harrison relative to the costs in said action.

On 24 March 1977 Mr. Harrison paid $9.00 to the Clerk of Superior Court of Onslow County as costs in the previous action but did not pay the $103 cost incurred in the taking of the deposition of plaintiff before Nancy C. Poole. On 13 April 1977 plaintiff, represented by Mr. Harrison, instituted the present action and paid $35 advanced costs.

The cost of taking the deposition of plaintiff in the previous action was properly assessed or taxed by the Clerk of Superior Court of Onslow County and remains unpaid by plaintiff.

Upon said findings of fact, the court concluded that the present action instituted by plaintiff is based upon the same claim as the previous action against defendant; that plaintiff took a voluntary dismissal in the previous action pursuant to Rule 41(a); that plaintiff had not paid the costs of court properly taxed and assessed against him in the previous action at the time he instituted this action, and that he may not maintain this action without the payment of the cost in the original action.

Pursuant to said findings of fact and conclusions of law the court ordered the present action dismissed with prejudice. Plaintiff appealed from this order.

Turner and Harrison, by Fred W. Harrison, for plaintiff appellant-appellee.

Marshall, Williams, Gorham & Brawley, by Daniel Lee Brawley and Ronald H. Woodruff, for defendant appellant-appellee.

BRITT, Judge.

PLAINTIFF'S APPEAL

[1] By his first assignment of error, plaintiff contends the trial court erred in finding as a fact that plaintiff's counsel knew that the cost of taking plaintiff's deposition in the previous action would be an item of costs in that action. Plaintiff argues that this finding is not supported by competent evidence. We find no merit in this assignment.

It is clear that findings of fact may be based on competent evidence presented and on *reasonable inferences* arising therefrom. The evidence that plaintiff's counsel, (a licensed attorney with many years' experience in the practice of law), attended and participated in the taking of plaintiff's deposition; that soon after plaintiff, through said counsel, took a voluntary dismissal, at the request of defendant's counsel, the $103 disbursement for the deposition was entered as an item of costs in the record; and that thereafter, before instituting the new action, plaintiff's counsel discussed the item with the assistant clerk of the superior court was more than sufficient to raise a reasonable inference that counsel knew that the item would be in-

cluded as a part of the costs and to support a finding of fact to that effect.

By his second and third assignments of error, plaintiff contends the trial court erred in finding that the $103 item for the deposition was properly assessed or taxed by the clerk of the superior court and included in the bill of costs for the previous action. We find no merit in these assignments.

[2] Plaintiff argues that under G.S. 6-21(6) costs for taking depositions may be taxed against either party, or apportioned among the parties, in the discretion of the court; and that the assistant clerk of the superior court had no authority to tax the $103 item against plaintiff.

We think G.S. 6-21(6) must be considered in *pari materia* with at least two other statutes, G.S. 1-7 and G.S. 1A-1, Rule 41(d).

G.S. 1-7 provides:

> When court means clerk.—In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which cases the judge of the court alone is meant.

G.S. 1A-1, Rule 41(d), on the date of the order in question, provided:

> (d) Costs.—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall dismiss the action.

G.S. 6-7 vests the clerk of the superior court with the authority and responsibility to "enter in the case file, after judgment, the costs allowed by law". Certainly in this case, which evidently never reached the trial calendar and in which the judge

was not involved in its disposition, the clerk, through his deputy or assistant, was the proper official to tax or assess costs. Of course, plaintiff could have appealed to the judge from any item that he considered improper.

To adopt plaintiff's argument would mean that costs in all matters enumerated in G.S. 6-21 would have to be taxed by the judge. These include all costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the partition statutes. We cannot perceive that to be the law.

Furthermore, Rule 41(d), provides that a plaintiff who voluntarily dismisses his claim or action *shall* be taxed with the costs of the action unless it was brought in *forma pauperis*.

[3] By his fifth and final assignment of error plaintiff contends the trial court erred in entering the order dismissing his action. We find no merit in this assignment.

As of the date of the entry of the order from which defendant appeals, G.S. 1A-1, Rule 41(d), was unequivocal in its requirement that the court, upon motion of the defendant, "shall" dismiss the action of a plaintiff who took a voluntary dismissal in a prior action not brought in *forma pauperis* and thereafter instituted a new action against the same defendant on the same claim without paying the costs of the first action.

We are aware of the changes in Rule 41(d) made by Chapter 290 of the 1977 Session Laws which provides as follows:

> Section 1. G.S. 1A-1, Rule 41(d), as it appears in the 1969 Replacement of Volume 1A, is amended by rewriting the second sentence and by adding another sentence to read as follows:
>
> "If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with

the order. If the plaintiff does not comply with the order, the court shall dismiss the action."

However, § 2 of said Chapter 290 provides that the act "shall become effective on January 1, 1978."

Since the order in question was entered on 2 September 1977, we must construe Rule 41 (d) as it read as of that date. We hold that the trial court properly dismissed plaintiff's action. *Cheshire v. Aircraft Corp.*, 17 N.C. App. 74, 193 S.E. 2d 362 (1972).

DEFENDANT'S APPEAL

Inasmuch as we are affirming the order dismissing plaintiff's action and from which plaintiff appeals, we find it unnecessary to pass upon the question raised by defendant in his appeal from the order allowing plaintiff to amend his complaint.

* * *

For the reasons stated, the order dismissing plaintiff's action is

Affirmed.

Judges MORRIS and ARNOLD concur.

EARL N. PHILLIPS, JR., AND WIFE, SARAH BOYLE PHILLIPS v. STANLEY DAVIS PHILLIPS, AND WIFE, KATHERINE ANTHONY PHILLIPS

No. 7718SC710

(Filed 1 August 1978)

1. **Partition § 7.2— value of property—findings by commissioners—appellate review**

The appellate court will not review findings of commissioners, approved by the superior court, as to the value of property in partitioning proceedings.

2. **Partition § 7— division of property without injury to cotenants—sufficiency of evidence**

The trial court's finding in a partitioning proceeding that the property could be divided without injury to the cotenants, with owelty of $70,450 charged to one parcel, was supported by competent evidence, although the evidence was conflicting.

3. Partition § 7— slight diminution in value by partition

A $2,100 diminution in value when property worth $280,000 was partitioned, or $1,050 per cotenant, was not a substantial or material impairment of the rights of the cotenants in the property so that an actual partition would be unconscionable.

APPEAL by respondents from *Walker (Ralph A.), Judge.* Judgment entered 1 April 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 May 1978.

Petitioners instituted this special proceeding seeking partition by actual division of a tract of land consisting of approximately 14 acres located in High Point. The property in question is owned by petitioner Earl N. Phillips, Jr. and respondent Stanley Davis Phillips, brothers, as tenants in common (subject to the marital interests of their wives), by virtue of the will of their late father, Earl N. Phillips, Sr. Respondents contend that the land in question is more valuable as a whole and should be sold rather than divided in kind.

On 17 March 1976, a hearing was held before the Assistant Clerk of Superior Court, who found that the tract of land could be divided in kind without material injury to the cotenants, and appointed commissioners to divide the land. Respondents filed exceptions and notice of appeal. The order of the Assistant Clerk was affirmed after a hearing in superior court before Judge William Z. Wood, by judgment entered 23 July 1976. Respondents filed exceptions.

On 9 September 1976, an order was entered by the Clerk of Superior Court, with the consent of the parties, removing the original commissioners who had stated that they would be willing to partition the property but would not determine which portion each of the parties would receive, and appointing replacement commissioners.

On 18 November 1976, the commissioners' report was filed, allocating an 8.361 acre tract, including house, pool, and pool house, to respondents, and allocating a 5.71 acre tract to petitioners. A cash dividend (owelty) of $70,450.00 was charged against the share allocated to respondents. As determined by the commissioners, the market value of the entire property, undivided, was $280,000.00. The total value of the property as divided

was found to be $277,900.00. Thus the value of the shares allocated to the opposing parties, including the cash dividend, was $138,950.00 each. Respondents filed exceptions to the report of the commissioners.

A confirmation hearing was held before the Clerk of Superior Court on 17 December 1976. By order entered 5 January 1977, the Clerk found that partition in kind would cause substantial and material injury to the cotenants and that the only equitable method of partitioning would be by sale of the property as a whole. Whereupon, the Clerk vacated the commissioners' report and ordered the sale of the property. Petitioners filed exceptions to the order of the Clerk and gave notice of appeal to superior court.

The matter came on for hearing in superior court, and both parties presented evidence. On 1 April 1977, an order was entered finding facts adverse to respondents and confirming the report of the commissioners.

Respondents appealed.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and Steven E. Philo, for petitioners.

Jordan, Wright, Nichols, Caffrey & Hill, by Luke Wright and William W. Jordan, for respondents.

BROCK, Chief Judge.

The crux of this appeal is respondents' objection to the partition in kind of the land in question. Certain principles which guide the courts in deciding whether to order a sale of property owned by cotenants in lieu of an actual partition of the property are set out in *Brown v. Boger*, 263 N.C. 248, 255-257, 139 S.E. 2d 577, 582-583 (1965). Among those principles are the following: A tenant in common is entitled, as a matter of right, to a partition in kind if it can be accomplished equitably. That is to say, partition in kind is favored over sale of the land for division, and the burden is upon those opposing a partition in kind to establish the necessity of a sale. G.S. 46-22 allows the court to order a sale where it is proven that actual partition cannot be had without injury to some or all of the cotenants. Injury to a cotenant means "substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual par-

tition." The test of such injury is whether the value of each cotenant's share upon actual partition would be *materially less* than the monetary share of each that could probably be obtained from a sale of the whole. Whether there should be a partition in kind or a partition by sale is to be determined on the facts of each case. The findings of the trial judge are conclusive and binding if supported by competent evidence; the judge has discretion in making the determination, and his decision will not be disturbed absent some error of law.

We now proceed to examine respondents' assignments of error. Respondents bring forward twelve assignments of error in five arguments.

[1] For their first argument, assignments of error numbers 1 and 8, respondents contend that the trial court erred in adopting the report of the commissioners as to the value of the subject property. This argument is without merit.

Respondents contend that the valuations assigned by the commissioners are not supported by evidence which was presented at trial, and especially point to an offer by respondent Stanley Davis Phillips to purchase the property as a whole for $320,000.00 as evidence of the market value of the property. However, the appellate courts of this jurisdiction are not disposed to review findings of commissioners, approved by the superior court, as to the value of property in partition proceedings. *See Fisher v. Toxaway Co.*, 171 N.C. 547, 88 S.E. 887 (1916). The trial court in the instant proceeding made the following finding of fact:

> "(18) The values assigned by the Commissioners to the property as a whole, including improvements, and the values assigned to the tracts and improvements allocated to the respective tenants in common are fair and reasonable and represent present market values."

Respondents' own expert witness, W. Calvin Reynolds, testified as to the good character and reputation of the three commissioners and their substantial experience in the real estate business.

We decline to review the valuations assigned to the subject property by the commissioners, as confirmed by the trial court.

Respondents' assignments of error numbers 1 and 8 are overruled.

[2] For their second argument, covering assignments of error numbers 6, 7, 9, 10, 11, 13 and 14, respondents contend that the trial court erred in finding and concluding that the subject property could be divided without injury to the cotenants. We disagree.

As noted *supra*, the trial court's findings are conclusive if supported by competent evidence. The evidence in the instant case was conflicting as to whether the property would be more valuable as a whole, or as divided. The trial court made the following pertinent findings of fact and conclusions of law:

> "(16) The southern tract of the property allocated to the petitioner Earl N. Phillips, Jr. and consisting of approximately 5.7 acres, is suitable for either a single family dwelling or for future subdivision, and neither use of that tract nor any other use permitted by current High Point zoning ordinances, which uses include institutional uses such as for schools or churches, doctors' offices, or residential subdivisions, would cause any material damage to the northern tract consisting of approximately 8.3 acres allocated to respondent Stanley Davis Phillips.
>
> (17) The property is worth as a whole no more than it is divided in the manner allocated by the Commissioners' the value of the share of each cotenant in the manner allocated is worth at least as much as the money equivalent to be realized by each cotenant should the property be sold by partition sale; and the division of the 14 acre tract made by the Commissioners will not adversely affect either the northern or southern tract.
>
> (18) The values assigned by the Commissioners to the property as a whole, including improvements, and the values assigned to the tracts and improvements allocated to the respective tenants in common are fair and reasonable and represent present market values.
>
> (19) The line drawn by the Commissioners to divide the property between the two tenants in common has been placed in such a manner as to effect the most equitable divi-

sion in kind of the property, whereby each assigned tract retains suitable accesses to adjoining streets, each tract has the capability of remaining and/or developing its highest and best use and the major existing improvements still used are allocated to the northern tract to be used in conjunction with the home.

(20) The owelty of $70,450 charged the more valuable tract in favor of the inferior tract is fair and reasonable and necessary to equalize the several interests and effect the most equitable partition and the payment of that owelty will work no economic hardship on the respondent Stanley Davis Phillips.

(21) The division in kind made by the Commissioners will not cause any injuries to any of the parties to this Special Proceeding.

(22) The respondents have had the division line determined by the Commissioners, located in the ground and stakes placed on this line.

The Court now makes the following Conclusions of Law:

(1) The property is suitable for a division in kind.

(2) The division in kind, with owelty, effected by the Commissioners, causes no substantial or material injury to any of the parties to this Special Proceeding.

(3) The Report of the Commissioners should be accepted and confirmed."

We will not detail all the evidence; suffice it to say that these findings are supported, even though the evidence is in conflict.

[3] Respondents contend that the trial judge was inconsistent in his adoption of the commissioners' valuations and his further finding that the property was worth no more as a whole than divided. Admittedly, the commissioners valued the property as a whole at $280,000, and as divided at $277,900. The question before the court was whether actual division would result in injury to the cotenants. Referring to the meaning of "injury" to the cotenants, as set out *supra*, we hold that a $2,100 diminution in value, or $1,050 per cotenant, is not a substantial or material impairment of

the rights of the cotenants in the property worth $280,000, so that an actual partition would be unconscionable. Certainly the trial judge so concluded. As pointed out in petitioners' brief, the court costs and commissioners' fees incurred in conducting a sale would likely amount to more than the difference in values as found by the commissioners.

The assignments of error presented by respondents' second argument are overruled.

Respondents assign error to the introduction of tax valuations into evidence. Assuming this evidence to be incompetent, there is substantial evidence in the record to support the judgment of the trial court. We presume the court disregarded incompetent evidence. *Stanback v. Stanback*, 31 N.C. App. 174, 229 S.E. 2d 693 (1976), *cert. denied*, 291 N.C. 712 (1977). This assignment of error is overruled.

Assignment of error to the exclusion of testimony of value by one of respondents' experts is overruled. Competent or not, the evidence was cumulative of testimony given by other of respondents' experts. It's exclusion could not have been prejudicial error.

Respondents' assignment of error to the denial of their motion for a new trial is overruled.

The judgment of the trial court is

Affirmed.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. OSCAR WHITE, ALIAS "MONK" WHITE, DEFENDANT AND STANLEY WHITE, DEFENDANT

No. 781SC264

(Filed 1 August 1978)

1. Criminal Law § 99.6— court's questioning of witness—clarification of testimony

The trial court did not express an opinion in violation of G.S. 1-180 when he questioned a witness at trial since the questioning did not place undue em-

phasis on the witness's testimony but instead served to clarify the witness's testimony.

2. **Criminal Law § 57— shotgun shells—bullet slug—sufficiency of identification**

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court properly allowed into evidence four expended shotgun shells and a bullet slug which an officer testified that he recognized as those he found at the scene of the crime, and such testimony was sufficient identification for admitting the exhibits into evidence, the shells and slug having distinctive characteristics.

3. **Assault and Battery § 14.4— assault with firearm—sufficiency of circumstantial evidence**

In a prosecution for assault with a deadly weapon inflicting serious injury, evidence was sufficient to be submitted to the jury where it tended to show that the victim saw defendant shoot a gun in his direction; the shot missed; the victim started running; another shot was fired at the victim from the same direction as the first shot; the victim was hit by the shot; and after he was shot, the victim observed defendant and another person struggling over the gun as if he were trying to take the gun away from defendant.

4. **Criminal Law § 134.4— sentencing of youthful offender—"no benefit" finding—requirements**

The trial court was not required to supply supporting reasons for his finding that defendant "would not derive benefit from treatment and supervision as a committed youthful offender," and no specific language was required by G.S. 148-49.14 to make the "no benefit" finding effective.

APPEAL by defendants from *Cahoon, Judge*. Judgment entered 27 October 1977 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 30 June 1978.

Defendant Stanley White was indicted on two counts of assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death and one count of discharging a firearm into an occupied building. Defendant Oscar White was indicted on two counts of aiding and abetting Stanley White in the above assaults and one count of discharging a firearm into an occupied building. At the close of the State's evidence, the trial court allowed the defendants' motion to dismiss charges of assault with intent to kill and submitted the case to the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury. The jury returned verdicts of guilty against both defendants as to all charges. Defendant Stanley White was sentenced to ten years imprisonment for discharging a firearm into an occupied building and to not less than six nor more than

seven years for assault with a deadly weapon inflicting serious injury, the sentences to run consecutively. The defendant Oscar White received the same imprisonment terms for his participation as an aider and abetter and for discharging a firearm into an occupied building. Defendants appeal to this Court.

Other facts necessary to the decision in this case will be more fully set out in the opinion.

Attorney General Edmisten, by Lucien Capone III, for the State.

O. C. Abbott, for defendant appellant, Oscar White.

John V. Matthews, Jr., for defendant appellant, Stanley White.

WEBB, Judge.

[1] Defendants contend that, in violation of G.S. 1-180, the trial judge impermissibly expressed an opinion on the evidence through his questioning of a witness at trial. During the direct examination of State's witness Vivian Johnson, the trial judge interrupted and asked this question: "Did you say how much time elapsed from the time you saw 'Monk' in the vicinity of the door, with the gun, and when you saw Stanley shoot?" Defendant Stanley White objects to the question on the grounds that it assumes a fact that was for the jury's determination, that is, whether the defendant Stanley White actually fired the gun. We do not believe the defendant's objection has any merit. Shortly before the question posed by the trial judge, the following exchange occurred between the district attorney and the witness Vivian Johnson:

> District Attorney: "How much time passed from the time that you saw 'Monk' White waving the gun around in front of the building until you saw Stanley White fire the shot, if you have an opinion as to the period of time?"
>
> Witness: "I don't know, not very long."

Also, earlier in her testimony, Vivian Johnson stated: "The person who shot through the door was Stanley White."

When we examine the trial judge's question in light of the witness's prior testimony, we conclude the trial judge was simply attempting to clarify part of the evidence in his mind. We note that he was careful to phrase the question in the second person, "you say" and "you saw," in order to avoid the assumption that the earlier testimony was fact. It is proper for a trial judge to ask questions for the purpose of clarifying a witness's testimony. *State v. Bunton*, 27 N.C. App. 704, 270 S.E. 2d 354 (1975).

The defendant Oscar White has objected to the same question asked by the trial judge, but he argues that the question was designed to repeat the witness's testimony to give it emphasis. He contends the evidence was clear and needed no clarification. Our examination of the evidence led us to conclude otherwise, and we find no merit in this contention of defendant Oscar White. In addition, defendant Oscar White contends the trial judge gave unnecessary emphasis to the State's testimony by asking the witness, Vivian Johnson, several questions about seeing "Monk" White shooting a gun at the direction of the building. Before asking the questions, the trial judge stated: "Let me ask her one question, and then you can clear it up." We believe his statement indicates that the trial judge wished to interject a question at this point in order to clarify the witness's testimony. We do not find any impermissible expression of opinion from questions calculated to clarify evidence. *See State v. Bunton, supra.*

[2] Over defendants' objections, four expended shotgun shells and a bullet slug were admitted into evidence. Defendant Oscar White assigns as error the introduction of this evidence on the grounds that a "chain of custody" was not properly established, thus leaving to speculation whether the shells and slug picked up by police officers at the scene of the crime were the same shells and slug introduced into evidence. In the case at bar, Shelton C. Zachary of the Perquimans County Sheriff's Department testified that he recognized a blue shotgun shell, three yellow shotgun shells, and a slug as those he found at the scene of the crime. We believe that this was sufficient identification for admitting the exhibits into evidence, the shells and slug having distinctive characteristics. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

[3] The defendants further assign as error the denial of their motions to dismiss at the close of the State's evidence. Defendant

Oscar White conceded there was no merit in his assignment and abandoned it. Defendant Stanley White contends that his motion to dismiss should have been granted because the State did not tender any direct evidence that Stanley White fired the shot which caused the injury to the victim, Edward Battle. His argument appears to rest on the wrongful assumption that the State was not allowed to prove the crime by circumstantial evidence. Edward Battle gave the following testimony which tended to show that he was shot by Stanley White: ". . . I saw Stanley had the gun pointed in my direction, . . . Stanley was holding the gun when I saw it being fired. . . . That shot didn't strike me. . . . When the first shot was fired I started running and then someone got in my way and I heard another shot and that is when I got hit. The second shot came from the same direction as the first shot." Earlier in his testimony, Edward Battle stated that after he was shot he tried to crawl under a pool table. He then testified: "As I was trying to crawl under the pool table, I saw Stanley and some other dude fighting over the gun like he was trying to take the gun from him." When the sufficiency of circumstantial evidence is challenged by a motion to dismiss, "the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). In addition, upon a motion to dismiss, the evidence is considered in the light most favorable to the State, giving it every reasonable inference and every reasonable intendment to be drawn therefrom. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Applying these principles, we believe there is sufficient evidence for a jury reasonably to infer the second shot was fired by Stanley White and that shot struck and injured Edward Battle.

[4] In sentencing the defendant Stanley White, the trial judge made a finding that Stanley White "would not derive benefit from treatment and supervision as a committed youthful offender." Defendant Stanley White first contends that this finding is improper because there was no competent evidence in the record to support this finding. *See State v. Bishop*, 272 N.C. 383, 158 S.E. 2d 511 (1967). We disagree. The trial judge is not limited to the evidence of guilt presented at trial in determining what punishment to impose upon a defendant; *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966), and this Court will not review what inquiry a trial judge has made before passing sentence if the

sentence imposed is within the limits provided by law. *State v. Frazier*, 14 N.C. App. 104, 187 S.E. 2d 357, *appeal dismissed*, 281 N.C. 315, 188 S.E. 2d 899 (1972). The sentences imposed in this case are within the limits of the law and the finding that the defendant would derive no benefit was properly made on the record. The trial judge was not required to supply supporting reasons for this finding in the record. *See State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975). As his second argument for reversing the sentence imposed, defendant Stanley White contends that the trial judge used language indicating that he was applying the old committed youthful offender statute, G.S. 148-49.4, instead of the new statute, G.S. 148-49.14, applicable at the time of defendant's sentencing. G.S. 148-49.14 requires a "no benefit" finding to be made on the record, if the court finds the defendant should not obtain the benefit of release under G.S. 148-49.15, parole of committed youthful offender's statute. We do not interpret G.S. 148-49.14 as requiring any specific language in order for the "no benefit" finding to be effective. We hold the finding made by the trial judge passes muster under G.S. 148-49.14 and we will not engage in any inquiry into what statute the trial judge was considering at the time of his finding. *See State v. Frazier, supra.*

For the above stated reasons, we find no error in the trial of Oscar White and Stanley White.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES BRYAN WATSON

No. 7712SC948

(Filed 1 August 1978)

1. Criminal Law § 181.3— post-conviction proceedings—petition for review by State

The State may petition for certiorari to review a final judgment in proceedings under the provisions of Art. 22 of G.S. Ch. 15 entitled "Review of Criminal Trials."

2. **Homicide §§ 24.2, 24.3— absence of malice—self-defense—burden of proof—instructions—failure to assign as error on appeal**

A defendant tried for murder waived objection to the trial court's instructions placing on defendant the burden to disprove malice and reduce the crime to manslaughter and to prove self-defense when he failed to except to such instructions or assign them as error in his appeal from a conviction of second degree murder.

3. **Constitutional Law § 48— effective assistance of counsel—failure to assign erroneous instructions as error on appeal**

A defendant convicted of second degree murder was not denied the effective assistance of counsel because of counsel's failure to assign as error on appeal from that conviction the trial court's instructions placing on defendant the burden of disproving malice and proving self-defense where the instructions were not improper at the time of the appeal under rules of law then in effect.

ON writ of certiorari to review order entered by *Smith (Donald L.), Judge*. Order entered 13 August 1977 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 28 March 1978.

Defendant was charged in a proper bill of indictment with the first degree murder of one Billy Gene Horner on or about 19 July 1969 in Cumberland County, was tried at the 19 April 1971 Criminal Session of Superior Court, was found guilty of murder in the second degree by a jury, and was sentenced to a term of not less than 25 years nor more than 30 years in the custody of the Commissioner of Correction.

No error was found in his trial by the Court of Appeals by opinion filed 15 December 1971. *State v. Watson*, 13 N.C. App. 54, 185 S.E. 2d 252 (1971). Our Supreme Court allowed certiorari and affirmed defendant's conviction by opinion filed 10 May 1972. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972), *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493, 93 S.Ct. 537 (1972).

On 14 November 1975, defendant filed this application for Post Conviction Hearing which was answered by the State on 12 December 1975. Defendant escaped from the Department of Correction on or about 19 December 1975 and was returned to the Department in October 1976. The hearing on the application was held on 1 August 1977, and Judge Smith entered his order dated 13 August 1977 finding and concluding:

"(1) The trial judge's charge to the jury, when construed as a whole, the relevant portions of which are set forth in detail above in the findings of fact, denied to the petitioner Watson due process of law under the Fourteenth Amendment to the Constitution of the United States in that the language of this charge placed the burden of proof upon the petitioner Watson to rebut the presumption of malice by proving to the satisfaction of the jury that the killing was in the heat of a sudden passion in order to reduce the offense from second degree murder to voluntary manslaughter. *MULLANEY v. WILBUR*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975); *STATE v. HANKERSON*, 288 N.C. 632, 220 S.E. 2d 575 (1975).

(2) The trial judge's charge to the jury at petitioner's trial in 1971, when construed as a whole, also denied the petitioner Watson due process of law under the Fourteenth Amendment to the Constitution of the United States in that the charge required the petitioner Watson to bear the burden of proof in rebutting the presumption that the killing was unlawfully done by proving to the satisfaction of the jury that he had killed in self-defense. SEE *STATE v. HANKERSON*, supra.

(3) The rule stated in *MULLANEY v. WILBUR*, supra, to the effect that it is a denial of due process under the Fourteenth Amendment to the Constitution of the United States for the State to require a criminal defendant to bear the burden of proof to negate an essential element or fact necessary to constitute the crime was made fully retroactive in the Opinion of *HANKERSON v. NORTH CAROLINA*, --- U.S. ---, 45 USLW 4717 (decided June 17, 1977). That decision of the United States Supreme Court overruled *STATE v. HANKERSON*, supra, to the extent that *STATE v. HANKERSON* held that the MULLANEY decision was not retroactive."

Judge Smith's order vacated and set aside the defendant's conviction and sentence entered at his trial in April 1971. The State was allowed a reasonable time to conduct a new trial of the defendant.

The State petitioned this Court for writ of certiorari, which was allowed on 21 September 1977, for review of Judge Smith's order.

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

Loflin, Loflin, Galloway, Leary & Acker, by Thomas F. Loflin III and James R. Acker, for defendant appellee.

ERWIN, Judge.

[1] The State may petition for certiorari to review a final judgment in proceedings under the provisions of Chapter 15, Article 22 of the General Statutes entitled "Review of Criminal Trials." *State v. White*, 274 N.C. 220, 162 S.E. 2d 473 (1968); *State v. Merritt*, 264 N.C. 716, 142 S.E. 2d 687 (1965).

[2] The first question presented by the State is whether the trial court erred in allowing the defendant Watson a new trial on the basis that the retroactivity of the *Mullaney* rule, *see Hankerson v. North Carolina*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), was applicable in this case in which the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. We answer the question yes in favor of the State.

The question here arose by reason of decisions of the United States Supreme Court since the defendant was tried and convicted in the Superior Court, Cumberland County, in April 1971. The first case, *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), held that a Maine instruction to the jury requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion or sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970), to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime.

In the April 1971 trial of defendant, the court charged the jury as courts have done for many years in North Carolina, that the defendant must prove to the satisfaction of the jury the

absence of malice to reduce the crime of murder to voluntary manslaughter and that he (defendant) acted in self-defense in order to be excused of the offense totally.

Judge Smith's order concluded that the United States Supreme Court's decision in *Hankerson v. North Carolina, supra,* overruled our Supreme Court which held that the *Mullaney, supra,* decision was not retroactive, and further concluded that footnote eight in Hankerson, *supra,* did not apply to North Carolina cases, in that our rules do not require a defendant to object to a charge given by the trial court at the time of trial. The footnote in question reads as follows:

> "8. Moreover, we are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as respondent asserts. If the validity of such burden-shifting presumptions was as well settled in the States that have them as respondent asserts, then it is unlikely that prior to Mullaney many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, e.g., Fed Rule Crim Proc 30." 432 U.S. at 244, 53 L.Ed. 2d at 316, 97 S.Ct. at 2345-6.

This Court held as follows in *State v. Abernathy*, 36 N.C. App. 527, 530-31, 244 S.E. 2d 696, 698 (1978):

> "Defendant argues on this issue that Judge Ervin's finding that footnote eight in *Hankerson, supra,* is inapplicable because of N.C. appellate procedure and cites *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), and Rule 10(b)(2) of the Rules of Appellate Procedure as authority for his contention. These two authorities actually provide support for our holding in the instant case rather than the defendant's position. Rule 10(b)(2) provides:
>
> (b) Exceptions.

* * *

> (2) Jury Instructions; Findings and Conclusions of Judge. An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury or to make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted instruction, finding, or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. 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.

In *State v. Hunt, supra,* defendant failed to request a charge concerning the legal principles of alibi evidence at trial, but on appeal excepted to the charge given and argued that the alibi instructions which were omitted due to his failure to request them should have been given automatically without the necessity of a request. Even though Rule 10(b)(2) and *State v. Hunt, supra,* do not require an objection to be made at the time of the trial in order to preserve the exception, they do require that an exception be duly noted in the record and argued on appeal in order to preserve the claim of error. Since the defendant in the present case failed to preserve his claim of error in the required manner, he is not entitled to raise the question for the first time on a motion for a new trial in a post conviction hearing."

Our Supreme Court has held in *State v. Brower and Johnson,* 293 N.C. 259 (1977); *State v. Crowder,* 293 N.C. 259 (1977); *State v. Jackson,* 293 N.C. 260 (1977); *State v. May,* 293 N.C. 261 (1977); and *State v. Riddick,* 293 N.C. 261 (1977), in which motions for reconsideration were denied, that:

> "INASMUCH as defendant did not assign as error on appeal the failure of the trial judge to place the burden of proving the absence of heat of passion or the absence of self-defense on the state . . . he has waived his right now to complain about such errors. . . ."

In each of the above cases, our Supreme Court cited footnote eight in *Hankerson, supra.* While this State does not adhere to the precise rule referenced in footnote eight, *i.e.*, that failure to object to a jury instruction results in waiver of any claim of error based thereon, the analogous North Carolina rule recognizes the same principle—a defendant must still take some affirmative step to preserve a claim of error in the instructions in order to avoid waiver thereof. In other words, there is a difference, but it does not rise to the level of a distinction that would render footnote eight's underlying principle inapplicable in North Carolina. However, in two instances in which a defendant had properly raised on appeal the question of the constitutionality of the trial court's instructions, new trials were granted. *State v. Sparks*, 293 N.C. 262 (1977); *State v. Wetmore*, 293 N.C. 262 (1977).

The principles stated in *State v. Abernathy, supra*, are fully applicable here, and in view thereof, we do not deem it necessary to review them at greater length. Suffice it to say that since defendant could have challenged the jury instructions on direct appeal, but failed to do so, he may not do so now. *See State v. Abernathy, supra*, and cases cited therein.

[3] By cross-assignment of error, defendant urges that, assuming that defendant cannot now attack his conviction based on the *Mullaney* rule and the retroactivity thereof, we are compelled to conclude that he was denied his constitutional right to the effective assistance of counsel at his 1971 trial or on his direct appeal therefrom. Defendant's argument would place upon counsel the difficult task of foreseeing change in long-established rules of law. What defendant is guaranteed is the effective assistance of counsel, not ultimately satisfactory results from defendant's point of view.

The order appealed from is

Reversed.

Judges BRITT and CLARK concur.

MILDRED P. MURRAY v. ALBERT L. MURRAY

No. 7726DC824

(Filed 1 August 1978)

Divorce and Alimony § 16.6— abandonment—jury issue

In this action for alimony without divorce, an issue as to whether defendant abandoned plaintiff was properly submitted to the jury, and the court properly denied plaintiff's motions for directed verdict and judgment n.o.v., where plaintiff testified that defendant left home purporting to go on a trip but taking most of his clothes with him, a few days later defendant called plaintiff and advised her to get a lawyer, and defendant did not return home except to pick up his personal belongings, and where defendant testified that the marriage had deteriorated, the parties had discussed separation and a division of property, plaintiff had told defendant several times to get out and not come back, and defendant thought "it was an agreement that we would split up."

Judge WEBB dissenting.

APPEAL by plaintiff from *Johnson, Judge.* Judgment entered 24 June 1977 in District Court, MECKLENBURG County. Heard in the Court of Appeals 28 June 1978.

Plaintiff instituted this action by filing a complaint on 5 November 1976 in which she alleged that she and the defendant were married on 24 November 1939 and that on 21 June 1976 the defendant wilfully abandoned her. On the basis of these allegations the plaintiff sought alimony, possession of the home and automobile, and attorney's fees for the prosecution of this action. On 21 January 1977 the defendant filed an answer in which he denied that he had wilfully abandoned the plaintiff in June of 1976 and alleged that the parties "mutually agreed to separate."

At trial, the plaintiff moved for a directed verdict at the close of all of the evidence. Her motion was denied, and the following issues were submitted to and answered by the jury as indicated:

1. Were the Plaintiff and Defendant married as alleged in the Complaint?

Answer: Yes.

2. Did the Defendant wilfully abandon the Plaintiff without just cause or provocation?

Answer: No.

The plaintiff then moved for judgment notwithstanding the verdict. The trial court denied the plaintiff's motion and entered judgment on the verdict, dismissing the plaintiff's claim with prejudice. Plaintiff appealed.

Lindsey, Schrimsher, Erwin, Bernhardt & Hewitt, by Lawrence Hewitt, for the plaintiff appellant.

Henderson, Henderson & Shuford, by David H. Henderson, for the defendant appellee.

HEDRICK, Judge.

The sole question presented on this appeal is whether the trial court erred in denying the plaintiff's motions for directed verdict and judgment notwithstanding the verdict. The plaintiff recognizes the familiar rule promulgated in *Cutts v. Casey*, 278 N.C. 390, 417, 180 S.E. 2d 297, 311 (1971), that the trial court cannot direct a verdict or enter judgment NOV "in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses." The plaintiff relies, however, on *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970), as an "exception" to the rule of *Cutts v. Casey*. In *Smith* this Court held that the trial court properly directed a verdict for the plaintiff when the defendant's own evidence established his negligence as the cause of injuries incurred by plaintiff in an automobile accident. While *Smith* was decided prior to *Cutts v. Casey*, its holding has been reaffirmed by a line of cases decided by this Court. *See e.g. Booker v. Everhart*, 33 N.C. App. 1, 234 S.E. 2d 46 (1977), *reversed on other grounds*, 294 N.C. 146, 240 S.E. 2d 360 (1978); *Price v. Conley*, 21 N.C. App. 326, 204 S.E. 2d 178 (1974); *Wyche v. Alexander*, 15 N.C. App. 130, 189 S.E. 2d 608, *cert. denied*, 281 N.C. 764, 191 S.E. 2d 361 (1972). In each of the cited cases this Court held it proper to direct a verdict for the party bearing the burden of proof because his case was not dependent upon the credibility of his witnesses, and there was no genuine issue of fact. We do not view these cases as carving an exception to the rule of *Cutts v. Casey*. In fact, while our

Supreme Court recognized that "[w]hether there is a 'genuine issue of fact' is, . . . a preliminary question for the judge," *Cutts v. Casey, supra* at 421, 180 S.E. 2d at 314, the court reasoned that the credibility of a party's own witnesses is almost always at issue.

We are faced, then, with the question of whether the defendant's abandonment of the plaintiff in June of 1976 is established by the defendant's evidence or other sources not dependent upon the credibility of the plaintiff's witnesses. For reasons which we shall point out, we answer this question in the negative. In doing so we find that *Smith* is distinguishable and hold that *Cutts v. Casey* is controlling in this case.

General Statute 50-16.2(4) provides that abandonment of the dependent spouse by the supporting spouse constitutes a ground for alimony without divorce. It has been held that "[o]ne spouse abandons the other, within the meaning of this statute, where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." *Panhorst v. Panhorst*, 277 N.C. 664, 670-1, 178 S.E. 2d 387, 392 (1971); *Bowen v. Bowen*, 19 N.C. App. 710, 713, 200 S.E. 2d 214, 217 (1973). This definition establishes three distinct elements which must be proven by the dependent spouse to entitle her to alimony on the basis of abandonment.

Our examination of the evidence in this case discloses a genuine issue of fact as to whether the defendant abandoned the plaintiff within the meaning of G.S. 50-16.2. The plaintiff's testimony tends to show that on 20 June 1976 the defendant left home purporting to go on a trip but taking most of his clothes with him; that a few days later the defendant called her and advised her "to get a lawyer"; and that the defendant did not return home except to pick up his personal belongings. On the other hand, the defendant testified as follows:

> We have had a deterioration of the marriage for quite a number of years. My wife has employed three attorneys before in connection with this problem. My wife and I have discussed separation verbally many times before June of 1976. We discussed separation, I would say around the first of the year until June, off and on. Sometime between the first of 1976 and June of 1976, my wife and I did discuss a

division of our assets. She said we would sell the house and divide it. A number of times she told me to get out and don't come back. . . . I left in June of 1976 because I thought it was an agreement that we would split up.

Assuming arguendo that the plaintiff's evidence is sufficient to raise an inference as to each of the elements of abandonment, we think it clear that defendant's testimony raises genuine issues as to whether he was justified under the circumstances in deciding not to return home and whether the separation of the parties was by mutual consent. Resolution of these issues obviously lies in the relative credibility of the two witnesses. Furthermore, this case clearly cannot be characterized as one of " 'a few situations in which the acceptance of credibility as a matter of law seems compelled.' " *Cutts v. Casey, supra* at 421, 180 S.E. 2d at 314. Therefore, we hold that the issue of abandonment was properly submitted to the jury, and the verdict was supported by the evidence. The plaintiff's assignments are overruled.

Affirmed.

Judge MORRIS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I agree with the majority's statement of the law, but I disagree as to its application in this case. As I read the evidence, all of it for both plaintiff and defendant shows that on 20 June 1976, the defendant left the marital home intending to return. Several days later, he called his wife and told her to get an attorney for he would not return. As I understand the law, this is a good definition of abandonment. The defendant's evidence in this regard is his own testimony as follows: "On this Sunday that I left I took enough clothes to go off and play golf in. . . . I am sure that I planned to come back to the home when I left and probably to live there. I don't recall what my thoughts were at that time. On that Wednesday night I called my wife and told her to get a lawyer. . . . Possibly I made up my mind that week that I was going to leave home for good. . . . It is correct that I made up my mind on the week of July (sic) 20th that I was going

to leave home for good." The defendant said he "thought it was an agreement that we would split up." How he thought there was such an agreement is hard for me to see in the light of his own uncontradicted testimony that he left home intending to return. I do not believe his conclusion that there was an agreement should be given any weight in the face of his own statements which show conclusively there was not an agreement.

It is true that the burden of proof is on the plaintiff to show that the defendant left without justification. In this case there is no evidence by the plaintiff or defendant of justification. The defendant testified the marriage had deteriorated and they had discussed separation and a division of property. Several times she told him to "get out and don't come back." I do not believe this is evidence as would likely render it impossible for the defendant to continue the marital relation with safety, health and self respect. *Caddell v. Caddell*, 236 N.C. 686, 73 S.E. 2d 923 (1952). There being no evidence of justification, I do not believe the burden of proof is on the plaintiff to such an extent that she must negate all possibilities of justification. I believe the burden of coming forward with the evidence was on the defendant to show some justification and the burden would be on the plaintiff to negate this evidence.

For the reasons stated in this opinion, I believe all the evidence in this case is that the defendant left home intending to return. He then decided not to return. There was not enough evidence of justification for his not returning to be submitted to the jury. This is abandonment and the district court committed error by not granting the plaintiff's motion for a directed verdict and for judgment notwithstanding the verdict.

AMDAR, INC. v. JIMMY DALE SATTERWHITE

No. 7710SC694

(Filed 1 August 1978)

1. Master and Servant § 11.1— covenant not to compete—consideration sufficient

Where a new contract containing a covenant not to compete was entered into annually by plaintiff employer and defendant employee, the new contract

bound the employer for an additional year, and this detriment to him was sufficient consideration to support the covenant not to compete.

2. **Master and Servant § 11.1— covenant not to compete—requirements for enforceability**

For restrictive covenants not to engage in competitive employment to be enforceable, they must be in writing, supported by valuable consideration and reasonable as to terms, time and territory.

3. **Master and Servant § 11.1— covenant not to compete—terms reasonable**

Terms of defendant's covenant not to compete were not unreasonable where defendant was prohibited from engaging in the business of teaching dancing or soliciting dancing pupils in an area within a 25 mile radius of plaintiff's business and such restriction was to last for a period of one year.

4. **Injunctions § 13.2— preliminary injunction—sufficiency of showing of irreparable injury**

In an action by plaintiff dance studio to enforce a covenant not to compete, plaintiff showed the probability of irreparable harm sufficient to entitle it to a preliminary injunction where plaintiff showed a confidentiality between it and its customers and that defendant's actions betrayed that confidence; and it showed the loss of one patron to defendant's new employer and the possibility of loss of others.

APPEAL by defendant from *Clark, Judge*. Judgment entered 21 June 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 25 May 1978.

This is an appeal from a preliminary injunction.

Plaintiff, operator of the Arthur Murray Dance Studio in Raleigh, instituted this action against defendant, a former employee, to enforce a covenant not to compete. Paragraph 7A of the employment contract, dated 3 January 1976, provides:

> ". . . that upon the termination of this contract and for a period of one (1) year thereafter, the Employee shall not in said city of Employer's studio and within a radius of twenty-five (25) miles of the Employer's studio become engaged directly or indirectly in the business of a dance studio or school, accept employment in any capacity whatsoever in any dancing studio or school, dance for hire or compensation in connection with any dancing studio or school, give instructions on dancing in any form whatsoever, solicit business for himself or anyone else in any manner relating to dancing, or dancing lessons or instructions, or compete with the business of the Employer in any other way."

Following a hearing the court found facts as follows:

1. Plaintiff and defendant entered into written contract (Staff Employment Agreement, see Plaintiff Exhibit No. 1) on January 3, 1976, by the terms of which Agreement defendant was employed as a dance instructor and salesman in the business of teaching dancing generally classified as ballroom dancing.

2. Defendant worked in said employment and obtained benefits of compensation, further training and practice and continued knowledge of and experience in the secrets and methods of plaintiff's business up until January 10, 1977, at which time defendant ceased working for plaintiff.

3. On January 3, 1977, defendant submitted a letter to plaintiff stating his intention to resign from his employment with plaintiff and stating therein that he "must move into other areas and means of employment in order to secure a brighter future."

4. Defendant, for a short time thereafter, worked in employment not associated with dancing, but in early February 1977 was contacted by Mr. Waldo Clifton, sole proprietor of the dance studio business known as "Carolina Cotillion Club". After a discussion between plaintiff and Waldo Clifton concerning defendant's contract with plaintiff (the Staff Employment Agreement, Plaintiff Exhibit No. 1), the defendant was hired by Carolina Cotillion Club as a dance instructor teaching ballroom dancing to customers of Waldo Clifton.

5. Plaintiff's dance studio is located on Hillsborough Street in the City of Raleigh, North Carolina. Carolina Cotillion Club's dance studio is located eleven blocks east of plaintiff's dance studio and also is on Hillsborough Street in the City of Raleigh, North Carolina. Carolina Cotillion Club and the defendant are and since February 1977 have been in a business in direct competition with plaintiff.

6. Customers of the plaintiff, since February 1977, have received on several occasions mailings from the defendant and Carolina Cotillion Club promoting and advertising the business of Carolina Cotillion Club and the defendant. At

least one customer of the plaintiff (and customer of defendant while employed by plaintiff) has recently become a customer of Carolina Cotillion Club and the defendant.

The court concluded as a matter of law that the contract between the parties is in writing, is supported by valid consideration, and is reasonable as to terms, time and territory; that defendant is employed with Carolina Cotillion Club which is in a business in direct competition with plaintiff and that defendant's duties with his new employer are in direct competition with the business of plaintiff; that defendant's activities with his new employer are in violation of the terms of the contract between him and plaintiff; that it is probable that plaintiff will prevail upon the merits of this action; and that plaintiff will likely suffer irreparable damage if a preliminary injunction is not issued in this cause.

Defendant was enjoined, pending the trial of this cause on its merits or until further order by the court, "from engaging directly or indirectly within a radius of twenty-five miles of plaintiff's studio on Hillsborough Street, Raleigh, North Carolina, in the business of Waldo Clifton and Carolina Cotillion Club in the business of a dance studio or school"; from accepting employment in any capacity whatsoever in any dance studio or school; from dancing for hire or receiving compensation in connection with any dancing studio or school, giving instruction on dancing in any form whatsoever, soliciting business for himself or anyone else in any manner relating to dancing or dancing lessons or instructions; or from competing with the business of plaintiff in any other way. Defendant was also prohibited from using or disclosing some or all of the trade secrets, names of pupils or other information imparted to him by plaintiff, specifically the names, addresses and telephone numbers and other information relating to plaintiff's customers and particularly plaintiff's teaching techniques and sales methods.

Boyce, Mitchell, Burns & Smith, by G. Eugene Boyce and Lacy M. Presnell II, for plaintiff appellee.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the trial court erred in finding and concluding "that the contract between plaintiff and defendant was supported by valuable consideration and reasonable as to time, terms and territory". We find no merit in this contention.

While defendant suggests in the statement of his first contention lack of valuable consideration for the contract, he does not argue that point in his brief. When defendant's counsel was questioned about this on oral argument, he admitted that evidence at the hearing showed that the agreement in question was preceded by similar annual agreements for the duration of defendant's employment with plaintiff. We therefore hold that this case differs from *Wilmar, Inc. v. Liles* and *Wilmar, Inc. v. Polk*, 13 N.C. App. 71, 185 S.E. 2d 278 (1971), *cert. denied*, 280 N.C. 305, 186 S.E. 2d 178 (1972).

In those cases the covenants not to compete were entered into after the employees had been employed for some time and the purported consideration, a pension plan and an agreement to pay one-half of the employee's gasoline bills, were held illusory as they were both subject to amendment solely within the discretion of the employer. Here, the new contract of employment binds the employer for an additional year. This detriment to him is sufficient consideration to support the covenant not to compete.

[2] Both parties concede that for restrictive covenants not to engage in competitive employment to be enforceable they must be (1) in writing, (2) supported by valid consideration, and (3) reasonable as to terms, time and territory. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964); *Paper Co. v. McAllister*, 253 N.C. 529, 117 S.E. 2d 431 (1960); *Mastrom, Inc. v. Warren*, 18 N.C. App. 199, 196 S.E. 2d 528 (1973).

[3] In his brief defendant states that he does not argue that the provisions of Paragraph 7A of the agreement are unreasonable as to duration or territory, but he insists that the terms of the agreement are unreasonable "because of the restrictions placed upon defendant's right to employment upon termination of his employment with the plaintiff". He argues that this case is controlled by *Paper Co. v. McAllister, supra*. We disagree.

In *Paper Co.*, the employee, a salesman in the fine paper trade, agreed that he would not "for a period of three years after the termination of this contract, regardless of the cause or manner of said termination, either directly or indirectly engage in the manufacture, sale or distribution of paper or paper products within a radius of 300 miles of any office or branch of the Henly Paper Company or its subsidiary divisions, nor will he aid, assist or have any interest in any such business within the limits of the territory or during said time as herein provided. . . ." The trial court denied plaintiff injunctive relief and it appealed. In affirming the trial court, the Supreme Court held that the agreement was without consideration since defendant signed it several months after he began working with the plaintiff. The Supreme Court further held that since defendant's employment was confined to the fine paper trade, a covenant that he would not engage, either directly or indirectly, in the manufacture, sale or distribution of paper or paper products in a territory extending in a 300 mile radius from any of plaintiff's divisions, embracing territory extending from Delaware to Alabama and from Indiana to the Atlantic Ocean, was unreasonable and void in that it excluded defendant from too much territory and too many activities.

In the case at hand the restraints imposed on defendant were considerably narrower from the standpoint of area and activity. We think this case is more like *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E. 2d 427 (1974), *cert. denied*, 286 N.C. 421, 211 S.E. 2d 802 (1975). We consider very appropriate the following statement by Chief Justice Stacy in *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 390, 42 S.E. 2d 352, 354 (1947), quoted in *Wilmar*:

> "There is no ambiguity in the restrictive covenant. It was inserted for the protection of the plaintiff, and to inhibit the defendant, for a limited time, from doing exactly what he now proposes to do . . . The parties regarded it as reasonable and desirable when incorporated in the contract. Subsequent events, as disclosed by the record, tend to confirm, rather than refute, this belief. Freedom to contract imports risks as well as rights. Such a covenant is lawful if the restriction is no more than necessary to afford a fair protection to the covenantee and is not unduly oppressive on the covenantor and not injurious to the interests of the public."

We hold that the covenant in question was not unreasonable.

[4] Defendant contends the court erred in granting the preliminary injunction, not only for the reasons discussed above but because plaintiff failed to show probability of irreparable harm. We find no merit in this contention.

Plaintiff argues that it showed a confidentiality between it and its customers and that defendant's actions betrayed that confidence; that it also showed the loss of one patron to defendant's new employer and the possibility of loss of others. We find this argument persuasive. Furthermore, defendant acknowledged in Paragraph 13 of the employment agreement that irreparable injury would result from a breach by him of the agreement.

For the reasons stated, the order appealed from is

Affirmed.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. DANNY ALLAN TICKLE

No. 7821SC135

(Filed 1 August 1978)

Searches and Seizures § 11— warrantless search of car—information from previously unknown informant—independent verification by officer—informant's admission of crime

An officer had probable cause to conduct a warrantless search of defendant's car for marijuana based on information received from a previously unknown informant where the informant told the officer that he had purchased marijuana and LSD an hour earlier in defendant's car, he had taken the LSD in defendant's presence and become sick, after leaving defendant's car he had asked a deputy sheriff for a ride to the hospital, and marijuana would be found under the seat and in the glove compartment of defendant's car; the informant described defendant's physical appearance, dress, and automobile in detail, and gave the license number and location of the automobile; the deputy sheriff corroborated the informant's having stopped him for a ride to the hospital; the officer personally observed that the informant was nervous and perspiring, which would tend to verify that the informant had taken a hallucinogenic drug; the officer independently verified the appearance and dress of defendant and the location, model, color and license number of defendant's car; and the credibility of the informant was enhanced by his admission that he had committed a criminal offense by buying marijuana and LSD.

APPEAL by defendant from *Long, Judge.* Judgment entered 14 December 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 June 1978.

On 28 March 1977, Officer G. L. Rose of the Winston-Salem Police Department received a radio communication directing him to go to the Forsyth Hospital and meet with a Forsyth County Deputy Sheriff. Officer Rose arrived at the hospital at approximately 3:00 p.m. and met with the Deputy Sheriff and a white male (hereinafter referred to as the informant). Officer Rose was not acquainted with the informant. The informant told Officer Rose that he had purchased marijuana and LSD from Danny Tickle, the defendant, an hour or so earlier in the defendant's car. He said the car was parked at the R. J. Reynolds Whitaker Park truck storage parking lot on Indiana Avenue. He disclosed that he had taken the LSD while in defendant's car and in defendant's presence, but the drug had made him sick so he left the marijuana in defendant's car and departed. After leaving defendant's car, the informant stopped the Deputy Sheriff who was driving by and requested a ride to the hospital. Officer Rose observed that the informant was pale, nervous and perspiring, but the informant remained alert and responsive to questions. The informant described the defendant as a white male, 5 feet 10 inches in height, weighing 140-150 pounds, having light brown hair of medium length and wearing bluejean pants and jacket and a plaid shirt. Also, the informant described the defendant's car as a 1975 maroon Monte Carlo, license number FTC-474 and indicated the car would be at the Whitaker Park parking lot until 3:20 p.m., the time defendant left work for home. He told Officer Rose that he would find marijuana under the seat and in the glove compartment of the car.

Relying on the information, Officer Rose drove to the Whitaker Park parking lot on Indiana Avenue and located a Monte Carlo fitting the description given him by the informant. He observed a man of the same appearance and dress described earlier by the informant get into the car and drive away. Officer Rose took the license number of the car and ran a check to determine the car's ownership. He was informed that the car was registered to Danny Allan Tickle. Officer Rose stopped defendant's car and told defendant he had information the car was carrying controlled substances and he would have to perform

an emergency search of the vehicle. Marijuana was found under the front seat and in the trunk of the car.

Prior to trial, defendant moved to suppress the evidence seized under the search on the grounds that Officer Rose had no probable cause to stop and search the vehicle. The motion was denied. Defendant pled guilty to felonious possession of marijuana and no contest to maintaining a vehicle for the purpose of keeping a controlled substance. The charges were consolidated for judgment and defendant was sentenced to six months in prison; the execution of the sentence suspended on the conditions that the defendant be placed on probation for five years and that he pay a fine of $500.00 plus costs. Defendant appeals.

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

Hatfield and Allman, by J. W. Armentrout, for defendant appellant.

WEBB, Judge.

Defendant contends that information from a previously unknown informant is not sufficient to constitute probable cause for a warrantless search of an automobile unless the informant also relates facts which show he is reliable and his information dependable. *See Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964); *State v. Gibson*, 32 N.C. App. 584, 233 S.E. 2d 84 (1977); *State v. Beddard*, 35 N.C. App. 212, 241 S.E. 2d 83 (1978). We will assume for argument, without deciding, that the *Aguilar* standards apply in determining probable cause for a warrantless search of an automobile, *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed. 2d 623 (1975). In general, a law enforcement officer may search an automobile without a warrant if the officer has a reasonable belief that the automobile carries contraband materials. *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1924); *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970), *rehearing denied*, 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed. 2d 94 (1970).

We hold that the warrantless search of defendant's automobile is lawful under the doctrines announced in *Draper v.*

United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959); *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1974), and *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1973). Both *Draper* and *Ketchie* involved warrantless searches and seizures based upon information from reliable informants. In each case, the informant failed to supply any underlying circumstances which would demonstrate that his information was dependable, but each court held that the minute particularity with which the previously reliable informant described the defendant and his activities and the independent verification of these details by law enforcement officers prior to the search was sufficient in itself to provide credibility and constitute probable cause to search and seize. Justice Huskins, writing for the Court in *Ketchie*, cites *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969) as approving the principle of *Draper* that when very detailed information is provided by an informant, the minute particulars of the tip make it reliable. As stated in *Spinelli*: "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." In the case at bar, we have an informant who supplied very detailed information to a police officer and an independent verification by the officer of the tip. Officer Rose met with a man who alleged that during the previous hour he had purchased marijuana and LSD from the defendant. The Deputy Sheriff was present in the car and able to corroborate the informant's stopping him for a ride to the hospital. Officer Rose personally observed that the informant was nervous and perspiring which would tend to verify that the informer had taken a hallucinogenic drug. Later, when Officer Rose arrived at the Whitaker Park parking lot, he was able to independently verify the other information, including defendant's dress and appearance, the make and license number of defendant's car. We believe that once Officer Rose had independently verified all of the information related by the informer, he could reasonably conclude that the informant's information was reliable.

We are aware that here the informant had not previously supplied reliable information as was the case in *Draper* and *Ketchie*. The informant did, however, admit to his involvement in a criminal offense, *i.e.*, possession of marijuana. As stated in *United States v. Harris*, *supra*, at 583:

> "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admission of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search."

We hold that the informant's admission that he purchased LSD and marijuana from the defendant is a circumstance showing that the informer and his information are dependable.

Defendant relies on a group of cases which hold that when a previously unknown informer provides innoccuous information that is readily available to an innocent bystander, co-worker or fellow friend of a defendant and adds to this information an allegation of criminal activity, the tip does not become reliable simply because the innocent information related is later independently verified by a police officer and contraband is in fact found after a search. *See United States v. Larkin*, 510 F. 2d 13 (9th Cir. 1974); *De Angelo v. Yeager*, 490 F. 2d 1012 (3rd Cir. 1973). The fact that a search results in the seizure of contraband materials cannot be used retroactively to corroborate an informant's tip and justify the search. *See Costello v. United States*, 324 F. 2d 260 (9th Cir. 1963), *cert. denied*, 376 U.S. 930, 83 S.Ct. 699, 11 L.Ed. 2d 650 (1964). We are sympathetic with the holdings of these cases and the cautions they echo against allowing wholesale searches of the public at large. However, the case now before this Court is not the same as that presented in *Larkin* and *Yeager* and we do not believe those cases are controlling. We believe the informant's personal involvement in a criminal transaction with defendant one hour prior to the stop and search separates the instant case from *Larkin* and *Yeager*.

We find that Officer Rose had reasonable grounds to believe the defendant was carrying contraband in his automobile when confronted with the information supplied by the informant. Defendant's motion to suppress evidence seized by the search was properly denied.

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. SOLOMON EUGENE BECTON

No. 7814SC192

(Filed 1 August 1978)

Criminal Law § 66.17— identification of defendant at police station—independent origin of in-court identification

In a prosecution for assault with intent to rape, in-court identifications of defendant by the assault victim and another person were not tainted by the victim's impermissibly suggestive viewing of defendant at the crime scene in the custody of an officer or by the victim's and the third person's impermissibly suggestive viewing of defendant through a two-way mirror at the police station, since the victim and the third person had ample opportunity to observe defendant at the crime scene; both accurately described defendant and his dress; their identifications were certain; and the time lapse between viewing defendant at the crime scene and at the police station was less than two hours.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 25 October 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 June 1978.

Defendant was charged with (1) first-degree burglary and (2) assault with intent to rape. He was convicted of (1) felonious breaking or entering and (2) assault on a female. He appeals from judgments imposing consecutive prison terms.

The State's evidence tended to show that on 5 September 1977 Toby Stein occupied a room in the Washington-Duke Motor Inn in Durham. About 3:00 a.m. she was awakened by a knock on her door. She asked several times who was there and each time was told "security." She opened the door. Defendant shoved the door open, entered, grabbed Ms. Stein, and threw her on the floor. He got on top of her and said he was going to rape and kill her. They struggled for five or ten minutes. She screamed. In an adjoining room, Ronald Mullvain heard the screams; he went to Ms. Stein's room, pushed the door open, and saw Ms. Stein on the floor and defendant holding her by the throat. Startled, they stared at each other a few seconds. Defendant ran.

The attack was immediately reported to the police. Officer Reed, patrolling near the motel, received the attack report and proceeded to drive to the motel. He saw defendant, dressed as the assailant was described in the radio report, walking on a

street near the motel. Defendant was breathing hard, as though he had been running. Officer Reed called defendant to the patrol car and told him of the attack report. Defendant said he had been at the Washington-Duke Motor Inn visiting a friend.

Officer Reed took defendant to the motel. Ms. Stein identified defendant as the attacker.

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

Herbert L. Richardson for defendant appellant.

CLARK, Judge.

First, the defendant challenges the admissibility of the eyewitness identification testimony of the prosecuting witness Toby Stein and State's witness Ronald Mullvain. When defendant was returned to the scene shortly after the alleged crime was committed, Toby Stein saw him with Officer Reed and identified him as the perpetrator. Shortly thereafter both Toby Stein and Mullvain went to the police station and saw defendant "by use of a two-way mirror."

When defendant was returned to the scene of the crime by Officer Reed shortly after the crime was committed he was in investigative custody, and judicial criminal proceedings had not been initiated. At this time Due Process protected the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968).

We concede that the "show-up" confrontation at the scene was somewhat suggestive in that defendant alone was in the custody of Officer Reed when he was shown to and identified by Toby Stein. In *Simmons v. United States, supra,* it was held that Due Process was violated by the in-court identification if the pretrial procedure had been "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 390 U.S. at 384, 88 S.Ct. at 971, 19 L.Ed. 2d at 1253. See *State v. McKeithan*, 293 N.C. 772, 239 S.E. 2d 254 (1977).

We must also concede that the identification procedure later that night at the police station, when Toby Stein and Mullvain observed defendant through a two-way mirror, was suggestive. The record on appeal reveals little about the circumstances surrounding this confrontation. It does not appear whether formal charges had been made, but we assume that at the time defendant was under arrest and in custody and, therefore, adversary criminal proceedings had been initiated. It does not appear that defendant was advised of his right to counsel. Nor does it appear that defendant was placed in a lineup. Apparently he was observed singly in a detention room through a two-way mirror by both Toby Stein and Mullvain.

The in-custody identification conducted at or after the initiation of adversary judicial criminal proceedings when defendant was not warned of his right to have counsel present during the confrontation is in violation of the Sixth Amendment. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (1967).

But the admission of the identification testimony of Toby Stein and Mullvain is not *per se* error. The recent decision in *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977), represents a modification of the ten-year-old doctrine of *United States v. Wade, supra; Gilbert v. California, supra*; and *Stovall v. Denno, supra*, cases. In *Manson*, the court ruled that even an unnecessarily suggestive identification procedure may produce admissible evidence if the court finds from the *totality of the circumstances* that the eyewitness identification possesses certain features of reliability. The totality of the circumstances test was adopted as set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), which test has the following factors: (1) the witness's opportunity to view the perpetrator of the crime, (2) the witness's degree of attention, (3) the accuracy of his description of the criminal, (4) the level of certainty demonstrated by the witness, and (5) the time that elapses between the crime and the confrontation.

The evidence in *voir dire* reveals that Toby Stein viewed the perpetrator at close quarters for about ten minutes, that she ac-

curately described him and his dress, that her identification was certain, and that the time lapse between the crime and the confrontation at the motel was about fifteen minutes and between the crime and the confrontation at the police station was not more than one or two hours.

The evidence in *voir dire* reveals that Mullvain observed the perpetrator in Toby Stein's motel room at close quarters and again in the parking lot of the motel when the perpetrator fell while running, that he accurately described the accused and his dress when he reported the crime by telephone to the police, that his identification was certain, that the time lapse between the crime and the confrontation at the police station was less than two hours.

After *voir dire* Judge Hobgood made extensive findings of fact and concluded "that the totality of the circumstances revealed no pre-trial procedures so unnecessarily suggestive or conducive to lead to irreparable mistaken identification . . . and the in-court identification of the defendant by Toby Stein and Ronald Mullvain has not been tainted in any illegal out-of-court identification procedures."

The findings and the conclusions of the trial court are supported by competent evidence. We further find that, though the one-on-one confrontations at the motel by Toby Stein and by both Ms. Stein and Mullvain at the police station were suggestive identification procedures, under the totality of circumstances test in *Manson v. Brathwaite, supra,* the eyewitness identifications by both Toby Stein and Mullvain possessed certain features of reliability, and the admission of their identification testimony was not error.

We have carefully examined the remaining assignments of error, most of which are formal, and find them to be without merit. They involve routine legal principles, and a discussion of them would have no value as a precedent.

No error.

Chief Judge BROCK and Judge WEBB concur.

DORIS PREVETTE v. WILKES GENERAL HOSPITAL, INC.

No. 7723SC499

(Filed 1 August 1978)

Negligence § 54— invitee at hospital—fall on ramp—contributory negligence

In an action to recover for injuries received when plaintiff slipped and fell on a concrete ramp leading from defendant hospital's emergency room, the trial court properly submitted an issue of plaintiff's contributory negligence to the jury where the evidence showed that such defects as may have existed in the ramp were all of a nature which should have been readily apparent to anyone who looked to see what was there to be seen; the evidence showed that plaintiff had used the ramp many times and had had the opportunity to be thoroughly familiar with it before her fall; and plaintiff testified that she "did not pay any attention to the ramp that day."

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 9 March 1977 in Superior Court, WILKES County. Heard in the Court of Appeals 9 March 1978.

Plaintiff instituted this civil action to recover damages for bodily injuries she received on 24 June 1975 when she slipped and fell on a concrete ramp leading from defendant's emergency room. She alleged that the fall was caused by negligence of the defendant in constructing the ramp with an excessive incline, in failing to provide handrails of the proper length, in failing to construct and maintain a nonslip surface (all in violation of the State Building Code), in negligently maintaining the ramp by allowing the antiskid strips on the ramp to wear through, in failing to fill in a hole near the bottom of the ramp, in failing to warn invitees of hidden dangers or unsafe conditions of which defendant had knowledge or by the exercise of due care should have had knowledge, and in failing to make reasonable inspections of the ramp to assure that it was in a reasonably safe condition.

Defendant answered, denying negligence and pleading plaintiff's contributory negligence in failing to pay proper attention to the manner in which she was walking, in using the exit ramp for the emergency room rather than the exit provided for the general public, and in using the ramp when she was familiar with its condition.

At trial before a jury, plaintiff presented evidence to show that on 24 June 1975 she went with her eight-year-old son to

Wilkes General Hospital to visit her mother, who was a patient in the hospital. She entered the hospital by the emergency room entrance and left the hospital by the same route. A concrete ramp led down from the emergency room entrance to the asphalt paved parking lot. The top of this ramp was seventeen inches higher than the ground level at the lower end of the ramp, and the ramp was fourteen feet, six inches long. There were handrails on each side of the ramp, but these did not extend for the full length of the ramp, so that at its lower end the ramp extended approximately two and one-half feet beyond the handrails. There were nonskid, abrasive strips attached across the ramp, but these were worn smooth. As plaintiff walked down the ramp, her foot started sliding when she was about two-thirds of the way down. Her foot then hit into something at the end of the ramp, causing her to fall. She had been holding to the handrail, but the rail did not extend to the end of the ramp. When she fell, she did not know what she had hit at the bottom of the ramp. However, after falling she looked back and observed "a little busted up place" at the bottom of the ramp which was "about six or eight inches long," with gravel lying around in it. The hole was "about half an inch deep, it wasn't much." The black strips across the ramp were worn out about three-fourths of the way down, and when plaintiff reached the spot where the black strips were worn out, she started to slide. Plaintiff first testified that the accident occurred at approximately 3:00 p.m., but she later testified on cross-examination that "[w]hen I fell it was in the evening and was dark but the emergency room area was lit."

On cross-examination plaintiff testified that from January to March 1975 "she was in and out of the hospital all of the time" to see her father, who died in April, and that after his death she visited her mother at the hospital; that "the only way [she] would go in was in the emergency room," although she "used the main entrance of the hospital once in a long while"; that she had been on this ramp "about a hundred times" prior to her fall; and that on the day she fell she had used this ramp to enter the hospital to visit her mother. She also testified that she "did not pay any attention to the ramp that day," that she had "never paid much attention to the surface of the ramp," that "[t]here was really no reason for [her] to pay any attention to it," and that "[t]here was no reason [she] couldn't look down and see the ramp," "[i]t is just

that when you are walking, you can't always pay attention because you can't look down all the time."

Defendant's evidence showed that the ramp was seven feet, eight inches wide, and the hole at the bottom of the ramp was five to six inches long, two inches wide, and a quarter-inch deep.

The court submitted issues of negligence and contributory negligence, both of which were answered in the affirmative. From judgment on the verdict, plaintiff appeals, assigning as error the submission of the issue of contributory negligence.

Moore & Willardson by Larry S. Moore and John S. Willardson for plaintiff appellant.

Mitchell, Teele & Blackwell by H. Dockery Teele, Jr., for defendant appellee.

PARKER, Judge.

The sole question presented by this appeal is whether the court erred in submitting the issue of contributory negligence to the jury. We find no error and accordingly affirm.

In determining the sufficiency of the evidence to justify the submission of an issue of contributory negligence to the jury, we must consider the evidence in the light most favorable to the defendant and disregard that which is favorable to the plaintiff. *Boyd v. Wilson*, 269 N.C. 728, 153 S.E. 2d 484 (1967); *Wilson v. Camp*, 249 N.C. 754, 107 S.E. 2d 743 (1959); 9 Strong's N.C. Index 3d, Negligence § 34. "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to plaintiff and others to the defendant, it is a case for the jury to determine." *Bell v. Maxwell*, 246 N.C. 257, 261-62, 98 S.E. 2d 33, 36 (1957).

The evidence in the present case discloses that such defects as may have existed in the ramp were all of a nature which should have been readily apparent to anyone who looked to see what was there to be seen. The evidence also shows that plaintiff had used the ramp many times and had had the opportunity to be thoroughly familiar with it before her fall. "Slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by

prudent persons." *Evans v. Batten*, 262 N.C. 601, 602, 138 S.E. 2d 213, 214 (1964). Plaintiff, as an invitee, had the duty to see that which could be seen in the exercise of ordinary prudence, and to use reasonable care to protect herself. *Brady v. Coach Co.*, 2 N.C. App. 174, 162 S.E. 2d 514 (1968). Plaintiff testified that she "did not pay any attention to the ramp that day." This evidence, if it did not compel, was clearly sufficient to support a jury finding that plaintiff's own negligence was a proximate cause of her injuries. Plaintiff may not justly complain that the jury was permitted to make that finding.

No error.

Judges VAUGHN and WEBB concur.

BENJAMIN F. WADE v. CARL LESLIE GROOMS, JR.

No. 7728SC777

(Filed 1 August 1978)

1. **Automobiles §§ 38, 78; Highways and Cartways § 3— SBI agent pursuing vehicle—violation of rules of road—no contributory negligence as matter of law**

In an action to recover for injuries suffered by plaintiff SBI agent when his automobile collided with a pickup truck while in pursuit of defendant, who had just robbed a bank, plaintiff's evidence that the accident occurred when plaintiff attempted to negotiate a curve at a high rate of speed while his vehicle was approximately 50% across the center line did not show that plaintiff was contributorily negligent as a matter of law, since law enforcement officers are not to be deemed negligent merely for failure to observe the rules of the road while engaged in the pursuit of lawbreakers; however, such evidence supported the submission of an issue of contributory negligence to the jury.

2. **Automobiles § 90.1— SBI agent in pursuit of vehicle—violation of rules of road—instructions on contributory negligence**

In an action to recover for injuries suffered by plaintiff SBI agent when his automobile collided with a pickup truck while in pursuit of defendant after defendant had robbed a bank, the trial court erred in instructing the jury that plaintiff was contributorily negligent if he violated rules of the road relating to reasonable lookout, exceeding safe speed, passing oncoming vehicles on the right, and driving over the center line, since a law enforcement officer is not deemed negligent merely for failure to observe rules of the road while engaged in the pursuit of lawbreakers.

APPEAL by plaintiff from *Kirby, Judge*. Judgment entered 28 June 1977 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 June 1978.

Action for damages for personal injuries suffered by plaintiff, at the time an SBI agent, who was injured when the automobile he was driving wrecked while in pursuit of defendant, who had just robbed a bank.

Evidence for the plaintiff tended to relate details of plaintiff's pursuit of defendant, including, *inter alia*, that the blue lights and siren on plaintiff's vehicle were operating; that plaintiff pursued defendant at high speed on Interstate highway 26, highway 64, through Hendersonville, and onto Clear Creek Road, a rural paved road with hills and curves; that both vehicles were traveling 60 m.p.h. or faster on Clear Creek Road, and plaintiff's vehicle was 100-150 feet behind defendant's vehicle; that at a righthand curve in the road, defendant's vehicle crossed the on-coming lane and disappeared off the road into a cloud of dust; that at that point plaintiff's vehicle was approximately 50% across the center dividing line in the road; that an on-coming pickup truck appeared as plaintiff approached the curve; that the pickup truck was partially in both lanes of the road; that plaintiff turned his vehicle to the left, and the pickup truck turned to its right; that plaintiff collided with the pickup truck and plaintiff's vehicle eventually came to rest in an open field; that the disappearance of defendant's vehicle and the appearance of the pickup truck were almost instantaneous, and the collision "occurred immediately thereafter within a split second or seconds. . . ."

Defendant's evidence consisted of the testimony of Mrs. Claire Swayngim, the driver of the pickup truck, to the effect that at no time prior to the collision was she in the opposing lane of the road, nor did she steer from one side of the road to the other prior to the collision.

The issues presented to and answered by the jury were as follows:

(1) Was the plaintiff injured and damaged as the result of the negligence of the defendant, as alleged in the complaint?

Answer: Yes

(2) If so, did the plaintiff by his own negligence contribute to his injury and damage, as alleged in the answer?

Answer: Yes

By virtue of its answer to the second issue, the jury did not reach the third issue, relating to damages.

From judgment that plaintiff take nothing from the action, plaintiff appealed. Defendant has cross-assigned error to the denial of his motion for directed verdict.

Dennis J. Winner, and Byrd, Byrd, Ervin & Blanton, by Robert B. Byrd, for the plaintiff.

Roberts, Cogburn and Williams, by Landon Roberts and James W. Williams, for the defendant.

BROCK, Chief Judge.

[1] We deal first with defendant's cross-assignment of error to the denial of his motion for directed verdict. Defendant contends that plaintiff's evidence, taken in the light most favorable to him, showed that plaintiff was traveling at a high rate of speed, on a rural road with hills and curves; that plaintiff attempted to negotiate a curve at a high rate of speed while his vehicle was approximately 50% across the center line at a place where he had no view of on-coming traffic. Thus, argues defendant, plaintiff's evidence shows contributory negligence as a matter of law. We disagree.

The standard of negligence by which plaintiff's conduct in this case is to be measured is that of a reasonably prudent man engaged in the discharge of official duties of a like nature under like circumstances. *Goddard v. Williams*, 251 N.C. 128, 110 S.E. 2d 820 (1959); *Collins v. Christenberry*, 6 N.C. App. 504, 170 S.E. 2d 515 (1969). Defendant points out that plaintiff's testimony indicates a violation of G.S. 20-146, pertaining to driving on the right side of the highway, and that such violation is negligence *per se*. However, the principle urged by defendant is not applicable to law enforcement officers, who are not to be deemed negligent merely for failure to observe the rules of the road while engaged in the pursuit of lawbreakers. *Goddard v. Williams*, *supra*; *Collins v. Christenberry*, *supra*.

We are not prepared to say that plaintiff's testimony established contributory negligence as a matter of law. Plaintiff was under a duty to attempt to apprehend the defendant; in performance of that duty plaintiff was forced to engage in a high-speed chase involving danger of an accident. Consequently, it was for the jury to decide whether plaintiff exercised such care as a prudent man would exercise in the discharge of official duties of a like nature under like circumstances. The trial court properly denied defendant's motion for directed verdict. Defendant's cross-assignment of error is overruled.

Plaintiff first argues his assignments of error numbers 1 and 3, contending that there was no evidence to support submission to the jury of the issue of plaintiff's contributory negligence. These assignments of error require little discussion. Plaintiff's own evidence was sufficient to raise a question of fact as to whether his conduct satisfied the applicable standard of care as set out *supra.*

[2] For his assignment of error number 2, plaintiff contends that the trial court erred in its charge on the issue of contributory negligence. This assignment of error has merit.

We first note that at one point in his charge, the court instructed the jury properly with regard to the standard of care applicable to a law enforcement officer engaged in the discharge of his official duties. However, the court then proceeded to instruct the jury with respect to violation of various rules of the road, to wit: failure to keep a reasonable lookout, failure to maintain proper control of vehicle, reckless driving, driving at a speed greater than reasonable and prudent under existing conditions, failure to pass on-coming vehicle on the right, and driving over the center line. The jury was told, in each instance, that violation of these rules constituted negligence, and in the final mandate, the jury was instructed that if they found the plaintiff was negligent in failing to follow one or more of these rules of the road, they would find plaintiff contributorily negligent. These instructions were clearly erroneous, since, as noted *supra,* a law enforcement officer is not to be deemed negligent merely for failure to observe rules of the road.

We cannot hold this error harmless, for although the jury had been instructed correctly at one point as to the standard of

care applicable to the plaintiff, the very real possibility exists that the jury found plaintiff contributorily negligent solely by virtue of his failure to observe one or more of the rules of the road. *See Kinney v. Goley*, 4 N.C. App. 325, 167 S.E. 2d 97 (1969). Plaintiff was entitled to instructions requiring the jury should they find from the evidence that one or more of the rules of the road were violated, to consider such violation(s) along with all other facts and circumstances, and decide whether plaintiff breached the duty of care applicable to a law enforcement officer engaged in the discharge of his official duties.

For errors in the judge's charge to the jury, plaintiff is entitled to a

New trial.

Judges CLARK and WEBB concur.

PINKIE N. ARCHER AND HUSBAND PAUL ARCHER AND BARBARA WORICK AND HUSBAND, DONALD WORICK v. DELBERT HERMAN NORWOOD, UNMARRIED, AND LEROY THOMAS NORWOOD, UNMARRIED, AND LEROY THOMAS NORWOOD, EXECUTOR OF THE ESTATE OF LEOTA N. CONSTANTINE, DECEASED

No. 7727SC596

(Filed 1 August 1978)

1. Evidence § 29.1— admissibility of letters—authenticity of instruments

In a partition proceeding in which respondent contended that he had purchased part of the land in question from decedent through lease and option agreements, letters written by respondent between July 1966 and January 1973 in which respondent discussed his claims against decedent's estate, but which failed until August 1972 to mention the purported leases and options and purported receipts for sums paid to decedent, were competent for consideration by the jury on the question of the authenticity of those instruments, and the entire letters were properly admitted where respondent lodged only a general objection to them, although the letters contained virulent attacks on petitioners.

2. Evidence § 11.3— dead man's statute—observations by witness

Petitioner's testimony that she did not observe deceased with sums of money on certain dates while deceased was residing with petitioner did not violate the dead man's statute, G.S. 8-51, since the statute does not prohibit an

interested party from testifying as to acts and conduct of the deceased where the interested party was merely an observer.

3. Evidence § 17— negative evidence—admissibility

Testimony by two witnesses that deceased did not possess large sums of money on certain dates was not incompetent negative evidence where it was shown that both witnesses were familiar with deceased's financial condition and were in a position to know whether deceased possessed large sums on the dates in question.

4. Evidence § 13— letters from attorneys—authentication by attorneys—attorney-client privilege

Testimony by attorneys authenticating letters they had written on behalf of respondent and the letters themselves did not involve confidential communications so as to fall within the attorney-client privilege.

APPEAL by respondents from *Thornburg, Judge.* Judgment entered 13 May 1977 in Superior Court, GASTON County. Heard in the Court of Appeals 22 May 1978.

Petitioners seek partition by sale of certain land held by the parties to this action as tenants in common as heirs at law of Hazeleen Norwood Johnson (hereinafter referred to as deceased), who died intestate on 10 November 1965. By his answer, respondent Leroy Norwood asserted title to parts of the land in question by virtue of his purchase of said land from deceased during her lifetime, as evidenced by two written agreements: one a twenty-year lease with option to purchase, and the other a twenty-year option contract; alleged payment of $12,450.00 to deceased as purchase price for parts of the land in question, as evidenced by signed receipts in his possession; and further alleged that the land in question could be physically partitioned.

Respondent Delbert H. Norwood accepted service and filed no answer. Respondent Leota N. Constantine filed an answer asserting, in essence, the validity of the claims of respondent Leroy Norwood. Leota N. Constantine subsequently died testate; Leroy Norwood, in his capacity as her executor, was substituted as a party respondent in the action.

Petitioners filed a reply denying respondent Leroy Norwood's allegations with respect to the purported purchase of land from Hazeleen N. Johnson.

The case was transferred to superior court for trial of the issues raised by the pleadings. At trial, petitioners presented

evidence tending to show, *inter alia*, that the signatures purporting to be those of deceased on the aforementioned lease and option agreements were not genuine. Respondents presented evidence *contra*. The issue was submitted to the jury, which answered in favor of petitioners; whereupon the trial court entered judgment declaring petitioners and respondents to be owners of the land in question as tenants in common, and retaining the issue as to whether the lands should be partitioned or sold as a whole pending determination of this appeal.

Frank Patton Cooke, by Rob Wilder, for petitioners.

Basil L. Whitener and Anne M. Lamm for respondents.

BROCK, Chief Judge.

[1] Respondents first assign error to the introduction into evidence of the contents of letters written by respondent Leroy Norwood. Respondents contend that the letters, which contained virulent attacks on petitioners Archer, were calculated to incite hostility on the part of the jury toward Leroy Norwood, and were thus prejudicial to respondents' case.

This assignment of error must be overruled. The central issue before the jury was the authenticity of the instruments purporting to lease and grant purchase options covering portions of deceased's land to Leroy Norwood. The letters in question covered a time span from July 1966 through January 1973. Portions of the letters dealt with Leroy Norwood's claims against the estate of Hazeleen N. Johnson. Yet the first mention of the contested instruments and purported receipts for payment of sums of money to deceased occurred in a letter dated August 1972. The failure of Leroy Norwood to mention sooner these instruments and receipts and the claims they represented was a circumstance for consideration by the jury in the process of determining the authenticity of the instruments.

Admittedly, large portions of the letters were irrelevant to the matter in controversy. Respondents lodged a general objection to the introduction of the letters, without requesting that the judge exclude the irrelevant portions thereof. Under these circumstances, admission of the letters in their entirety was not error. *See Clayton v. Insurance Co.*, 4 N.C. App. 43, 165 S.E. 2d 763

(1969). Respondents' assignments of error numbers 2 and 9 are overruled.

[2] Assignments of error numbers 3, 10, 14, 15 and 17 deal with the admission of testimony of petitioner Barbara Worick and another witness, Zora Armstrong, to the effect that the deceased did not possess certain sums of money on certain dates, and to the trial judge's instructions with respect to such testimony. These assignments of error are without merit.

Respondents contend that the testimony of Barbara Worick was incompetent by virtue of the dead man's statute, G.S. 8-51. We disagree. G.S. 8-51 prohibits an interested party from testifying under certain circumstances concerning a personal transaction or communication with a deceased person. However, the statute does not prohibit an interested party from testifying as to acts and conduct of the deceased where the interested party was merely an observer. *Hardison v. Gregory*, 242 N.C. 324, 88 S.E. 2d 96 (1955). The witness was asked whether she observed Hazeleen N. Johnson with sums of cash on certain dates during the period of time when the deceased was residing with the witness. The witness did not testify as to any personal transactions or communications with the deceased. Thus, the testimony of Barbara Worick was not barred by G.S. 8-51.

[3] As a second ground for objection, respondents contend that the testimony of Barbara Worick and Zora Armstrong was inadmissible negative testimony. Negative evidence is not inadmissible merely because it is negative. 1 Stansbury's North Carolina Evidence § 82, p. 252 (Brandis Rev. 1973). Upon a showing that a witness was in a position to know of the existence of a fact had it been true, negative testimony as to the non-existence of the fact is not incompetent. 6 Strong's N.C. Index 3d, Evidence, § 17. There was testimony which tended to show that both witnesses were familiar with decedent's financial condition and were in a position to know whether decedent possessed large sums of money on the days in question. The weight to be accorded this negative testimony was a question for the jury. 1 Stansbury's, *supra*, § 82.

We hold that the negative testimony of which respondents complain was properly admitted by the trial judge. It follows that instructions as to this evidence were proper. The assignments of

error discussed by respondents in their second argument are overruled.

[4] By their next grouping of assignments of error, numbers 4, 5 and 6, respondents contend that the trial court erred in admitting the testimony of three attorneys which respondents contend related to matters protected by the attorney-client privilege. This argument is without merit. The attorneys testified in order to authenticate letters written by them on behalf of Leroy Norwood. These letters were then introduced into evidence. These letters, which were sent to various of the parties to this action, and in one instance to petitioners' attorney, obviously were not confidential communications between Leroy Norwood and the respective attorney so as to fall within the attorney-client privilege. *See* 1 Stansbury's, *supra,* § 62. Respondents' assignments of error numbers 4, 5 and 6 are overruled.

We have fully and carefully examined respondents remaining assignments of error, and have found them to lack merit. Assignments relating to denial of respondents' motions for directed verdict, and to instructions to the jury, were dependent upon our agreeing with respondents as to the evidentiary questions discussed *supra.* Discussion of these and the other remaining assignments of error would be of little use to the bench or bar.

No error.

Judges CLARK and WEBB concur.

IN THE MATTER OF: RANDY LEE ASHBY

No. 7821DC90

(Filed 1 August 1978)

1. Constitutional Law §§ 40, 74— infant—no waiver of rights—statement improperly admitted—no prejudicial error

The trial court erred in permitting an officer who arrested the juvenile respondent to relate statements made by the respondent where there was no showing that respondent knowingly and intelligently waived his right to counsel; however, such error was not prejudicial since the hearing was before

the judge without a jury, the statement as related by the arresting officer was largely exculpatory in nature, and respondent testified at the hearing and his testimony was essentially the same as the statement related by the arresting officer.

2. **Burglary and Unlawful Breakings § 5.5— breaking and entering automobile—sufficiency of evidence**

Testimony by an automobile owner that respondent and his companion told the owner that they had entered the car to rest was sufficient to make out a *prima facie* case of breaking or entering against respondent.

3. **Larceny § 7.7— respondent as passenger in vehicle—sufficiency of evidence of larceny of vehicle**

Respondent's contention that there was insufficient evidence of his joint possession of a stolen automobile with his friend, the driver of the vehicle, is without merit, since an earlier incident involving the breaking and entering of a vehicle, the short period of time between the removal of the automobile from its owner's house and its discovery in the possession of respondent and his friend, the flight of the vehicle when sighted by police, and respondent's flight on foot when the car was stopped by police were circumstances giving rise to a permissible inference that respondent had a guilty mind.

4. **Larceny § 7.1— intent to deprive owner of property—sufficiency of evidence**

Evidence was sufficient to show that respondent had the intent permanently to deprive the owner of a stolen vehicle from his property and convert it to his own use, since respondent's flight from and abandonment of the vehicle put it beyond his power to return the vehicle and showed total indifference as to whether the owner ever recovered the vehicle.

APPEAL by respondent from *Alexander (Abner), Judge.* Judgment entered 21 November 1977 in District Court, FORSYTH County. Heard in the Court of Appeals 24 May 1978.

Respondent, age 15, was brought before the district court upon two juvenile petitions, one alleging that respondent broke and entered a Chevrolet station wagon with intent to steal said car, and the other alleging that respondent did feloniously steal, take, and carry away a Datsun automobile. The judge found the facts to be in accordance with the allegations and committed respondent to the Department of Human Resources for placement in a correctional school.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

Jim D. Cooley for the respondent.

BROCK, Chief Judge.

[1] The arresting officer testified: "I placed the respondent Randy Lee Ashby under arrest and informed him of his *Miranda* rights. I then asked him if he wanted to answer any questions and he stated that he would."

Defense counsel immediately objected to any testimony of what respondent may have said "on the basis that there has been no affirmative showing that respondent waived his right to counsel."

The trial judge overruled respondent's objection and the arresting officer proceeded to relate the statement respondent made to him.

The opinions of our Supreme Court "make it clear when the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel." *State v. Biggs*, 289 N.C. 522, 531, 223 S.E. 2d 371, 377 (1976). "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona*, 384 U.S. 436, 475, 16 L.Ed. 2d 694, 724, 86 S.Ct. 1602, 1628, 10 A.L.R. 3d 974 (1966).

The requirement of an affirmative showing not only that an accused was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel applies in juvenile proceedings. *In re Garcia*, 9 N.C. App. 691, 177 S.E. 2d 461 (1970). It is obvious in the present proceeding that no showing of waiver of counsel has been made. The record is silent on the question. Therefore, it was error for the trial judge to permit the arresting officer to relate the statements made by respondent. However, a showing of error is not sufficient to justify a new trial; it must be demonstrated that the error was prejudicial.

In the first place this juvenile hearing was before the judge. There was no jury involved. When the judge is sitting both as

judge and as the finder of the facts, it is presumed that he disregarded incompetent evidence in making his findings of fact. In this case there was sufficient evidence (as noted *infra*), aside from respondent's statement as related by the arresting officer, to support the findings of fact. Additionally, the statement as related by the arresting officer was largely exculpatory in nature.

In the second place, respondent testified at the hearing and his testimony was essentially the same as the statement related by the arresting officer. Both were largely exculpatory in nature.

We have examined this record carefully and have concluded that the admission of respondent's statement made to the arresting officer was nonprejudicial beyond a reasonable doubt.

[2] Respondent contends that the court erred in denying his motions to dismiss because the State failed to present sufficient evidence of his guilt of the offenses alleged in the two petitions to make out a *prima facie* case of the commission of the offenses. We disagree.

As to the breaking and entering charge relating to the Chevrolet station wagon, respondent contends that there was no evidence that he personally made an opening of (breaking) or put any part of his body inside (entering) the automobile, and that all the evidence indicated it was his friend Ronnie who had done so. However, the testimony of Mr. Davis, the owner of the car, tended to show that both boys had told him that they had entered the car to rest. This testimony was sufficient to make out a *prima facie* case of breaking or entering against respondent.

[3] Respondent next argues, as to the petition alleging larceny of the Datsun automobile, that there was insufficient evidence of his joint possession of the automobile with his friend Ronnie, the driver of the vehicle. Respondent relies on *State v. Hughes*, 16 N.C. App. 537, 192 S.E. 2d 626 (1972) and *In re Owens*, 22 N.C. App. 313, 206 S.E. 2d 342 (1974), which held that evidence merely showing that the accused was a passenger in a stolen automobile was insufficient to show that he was acting in concert with the driver of the vehicle. In the case *sub judice*, there is additional evidence which suggests that respondent was more than a chance passenger in the Datsun. The earlier incident concerning the Chevrolet station wagon, the short period of time between the

removal of the Datsun from its owner's house and its discovery in the possession of respondent and Ronnie, the flight of the vehicle when sighted by police, and respondent's flight on foot when the car was stopped by police, are circumstances giving rise to a permissible inference that respondent had a guilty mind. *See State v. Givens*, 268 N.C. 249, 150 S.E. 2d 431 (1966).

[4] Respondent further contends that even if there was sufficient evidence of joint possession, there was no evidence that he had the intent to permanently deprive the owner of the Datsun of his property and convert it to his own use. We disagree.

The intent to permanently deprive an owner of his property, which is necessary to sustain a larceny conviction, can be inferred from the fact of the taking where the evidence does not give rise to the inference that the perpetrator ever intended to return the property but instead requires the conclusion that he was totally indifferent as to whether the owner recovered his property. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966); *c.f. State v. Watts*, 25 N.C. App. 194, 212 S.E. 2d 557 (1975) (evidence of intent to return property). There is no evidence that respondent intended to return the Datsun to its owner; rather, his flight from and abandonment of the vehicle "put it beyond his power to return [the Datsun] and showed total indifference as to whether [the owner] ever recovered [it]." This is sufficient evidence of an intent to deprive permanently. *State v. Smith*, 268 N.C. at 173, 150 S.E. 2d at 200.

Affirmed.

Judges CLARK and WEBB concur.

MANNING P. COOKE v. FRANCES W. FUTRELL, INDIVIDUALLY AND AS CLERK OF THE TOWN OF RICH SQUARE AND THE TOWN OF RICH SQUARE, INC.

No. 776DC775

(Filed 1 August 1978)

Municipal Corporations § 39.2; Taxation § 26— municipal license tax on vehicles—late payment penalty—vehicles licensed by State

Under G.S. 20-97 and G.S. 160A-206, a municipality has the authority to impose a $1.00 license tax and a late payment penalty only upon a motor vehicle licensed by the State of North Carolina; therefore, the trial court erred in holding that a town could impose a $1.00 penalty on plaintiff for his failure to pay the town license tax imposed on motor vehicles within the time required by town ordinance where there was no evidence to support a finding that plaintiff's motor vehicle was licensed by the State on the date the penalty was imposed.

APPEAL by plaintiff from *Long, Judge*. Judgment entered 22 June 1977 in District Court, NORTHAMPTON County. Heard in the Court of Appeals 21 June 1978.

On 17 February 1977, plaintiff registered his automobile with the Town of Rich Square, paid $1.00 for his town license and paid an additional $1.00, under protest, as late filing penalty. Plaintiff initiated action against the defendants jointly and severally, asking $1.00 together with court costs as well as an injunction against the Town of Rich Square from assessing and collecting at any time in the future, from any person, firm or corporation, any amount in excess of $1.00 for the registration and use of any motor vehicle resident in the Town. Plaintiff alleged that the Town and its agent Futrell were in contravention of North Carolina law and both the North Carolina and United States Constitutions, which protect against unjust taxation. Plaintiff alleged that his car was not licensed by the State of North Carolina until 18 February 1977, the day after he was assessed the late payment penalty and that the Town had no authority to assess the penalty. Defendants answered, denying any contravention and pled N.C. G.S. 160A-206 as justification. Three issues were considered by the court, whether the Town was authorized by North Carolina law to impose a late penalty for failure to pay the municipal license tax imposed upon motor vehicles within the time required by ordinance, whether the amount of the penalty was reasonable and whether the imposition violated any constitutional rights.

The parties agreed that there was no argument as to the facts, that their case rested entirely on a question of law. The court answered the three issues presented in favor of the defendants. The court found:

> "That on February 17, 1977 the defendant, Frances W. Futrell, acting in her capacity as Clerk of the Town of Rich Square, and as an agent of the Town of Rich Square, and in the course and scope of her employment, did collect from plaintiff the sum of $1.00 for payment of the municipal license tax imposed upon a motor vehicle owned by the plaintiff, licensed by the State of North Carolina and resident in the Town of Rich Square, and did in addition, collect from plaintiff a penalty in the amount of $1.00 for delinquent payment of the said municipal license tax."

The court further found that plaintiff had paid the penalty under protest. The court concluded that the Town of Rich Square was authorized by G.S. 160A-206 to impose a reasonable penalty for delinquent payment of the municipal license tax, that $1.00 was a reasonable penalty, and that the penalty did not violate any of plaintiff's constitutional rights. The court ordered judgment for defendants and dismissed plaintiff's action with prejudice. From this judgment, plaintiff appeals.

Boyce, Mitchell, Burns & Smith by G. Eugene Boyce and James M. Day for plaintiff appellant.

Cherry, Cherry & Flythe by Charles Slade, Jr. for defendant appellee.

CLARK, Judge.

Plaintiff argues that the court erred in finding that his payment of the municipal license tax was delinquent because the statutory provisions granting the municipality the power to assess penalty payments make clear that delinquency in paying a municipal license tax can occur only after a reasonable time has elapsed since the vehicle was licensed with the State. Plaintiff contends that his car was not licensed with the State of North Carolina until the day after he was forced to pay the delinquency penalty and that he could not be delinquent because the municipal tax was not yet legally due. The defendants concede that if plain-

tiff's car was not licensed by 17 February 1977, the assessment of the penalty was unlawful. Thus, although the parties at hearing agreed that there was no factual dispute, that the issue was one of statutory construction and application, it is clear that what is really the threshold issue is a factual one—when was plaintiff's car licensed by the State of North Carolina? The court found as fact that plaintiff's car was licensed on 17 February 1977 but the only evidence in the record on appeal on this point was plaintiff's testimony that he bought a State license on 18 February 1977. There is no evidence as to whether this was a new license or a delinquent renewal. There is testimony that plaintiff was not assessed a late payment penalty by the State. Defendants concede that the court erred in its finding as there was no evidence to support it.

G.S. 160A-206 grants general power to cities to impose taxes as follows:

> "A city shall have power to impose taxes only as specifically authorized by act of the General Assembly. Except when the statute authorizing a tax provides for penalties and interest, the power to impose a tax shall include the power to impose . . . penalties or interest for failure to pay taxes lawfully due within the time prescribed by law or ordinance. . . ."

G.S. 20-97 authorizes cities and towns to levy not more than one dollar ($1.00) per year upon the use of any such vehicle "*licensed by the State of North Carolina. . . .*" (Emphasis added.) On 8 January 1948 the Town of Rich Square passed a resolution that "all motor vehicle owners shall purchase an [sic] exhibit on motor vehicles town license tags at $1.00 each, not later than February 15th. After that date, a penalty of $1.00 will be imposed, and if after notified, any motorist fails to purchase said tag they shall be cited to court and shall purchase tag, pay penalty and court costs." The statutory pattern thus gives a municipality power to tax and impose a penalty for late payment upon a motor vehicle licensed by the State of North Carolina. Since a municipality can tax only as specifically authorized, the Town Resolution above quoted clearly can affect only vehicles licensed by the State. The Resolution is broad on its face, but is not unconstitutional when construed as part of the statutory pattern. We define "motor ve-

hicles," subject both to the municipal tax and to the late penalty, to be motor vehicles licensed by the State of North Carolina. We are mandated to construe any legislative enactment so as to save its constitutionality, if possible, *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), *aff'd.* 294 N.C. 503, 243 S.E. 2d 338 (1978), and to avoid a strict interpretation that will result in an absurd and unconstitutional result. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). So construed, the Town Resolution clearly requires a determination that the motor vehicle being registered after 15 February is licensed with the State before assessment of the late payment penalty.

There being no evidence to support the finding of the trial court that the motor vehicle was licensed by the State on 17 February 1977, the judgment is reversed and this cause remanded for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge BROCK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. JAMES L. THOMPSON

No. 7817SC236

(Filed 1 August 1978)

1. Automobiles § 114— death by vehicle—instructions proper

In a prosecution for manslaughter where the trial court fully explained the elements of the offenses of involuntary manslaughter and death by vehicle, the court properly pointed out that with respect to the offense of death by vehicle the State was not required to prove any intentional or reckless conduct on the part of the defendant, and such instruction comported with the definition in G.S. 20-141.4.

2. Jury § 7.1— challenge to the array—method of compiling jury list proper

Defendant's contention that use of tax rolls and voter registration books to compile a jury list is unconstitutional since some segments of the population are underrepresented on these lists is without merit, and defendant's motion to quash the jury array was therefore properly denied.

3. Automobiles § 113.1— manslaughter—sufficiency of evidence

Defendant's contention that his motion to dismiss the charge of manslaughter should have been granted because there was no evidence of in-

tentional or culpably negligent conduct was without merit where the evidence tended to show that defendant was driving under the influence of alcohol at an excessive rate of speed and was weaving from one side of the highway to the other when he struck the victim's well-lighted motorcycle from behind.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 1 November 1977 in Superior Court, SURRY County. Heard in the Court of Appeals 28 June 1978.

The defendant was charged with manslaughter and operating a motor vehicle on the public highway while under the influence of intoxicating liquor. He pled not guilty to both charges, and the State presented evidence tending to show the following:

On the evening of 26 December 1976, Donna Scott was driving her automobile in a southerly direction on Highway 52 near Mt. Airy, North Carolina. A motorcycle driven by John Kiger was proceeding in the same direction ahead of Scott and was sufficiently lighted to be clearly visible from the distance at which Scott followed. Scott noticed a pickup truck approaching at a fast rate of speed from the rear. When the truck which was driven by the defendant pulled dangerously close behind her, she lightly tapped the brakes and moved to the right to signal him to pass. The truck pulled out to pass but when he was even with the front of Scott's automobile, he cut back into her lane. Scott applied her brakes to avoid collision. As Scott followed the defendant from a safe distance she noticed his truck weaving across the south-bound lanes almost across the median. She then saw some black smoke but did not see the motorcycle. The truck weaved back across the south-bound lane, onto the paved shoulder and stopped. Scott, after running over a motorcycle helmet, drove her automobile to the shoulder and stopped behind the defendant's truck. In the meantime, Kiger's motorcycle had come to rest nearby.

When Scott got out of her car the defendant, who was leaning against his truck, asked "where the cycle came from." Scott began searching for Kiger and found his body in the median of the highway approximately 1000 feet from the point of collision. Unable to feel any pulse, Scott determined that Kiger was dead.

The police arrived shortly thereafter, and the investigating officer detected a strong odor of alcohol on the defendant's

breath. He also observed that the defendant was unsteady on his feet, that his eyes were red and glassy, and that he spoke with a slur. The defendant was then asked to go to the police station and on the way he fell asleep in the back seat of the police car. Upon their arrival at the station the defendant submitted to a breathalyzer test and was determined to have .21% blood alcohol content. It was later determined that Kiger had died instantly in the collision.

The defendant presented no evidence.

The jury found the defendant guilty of both charges. From a consolidated judgment imposing 5-7 years imprisonment, the defendant appealed.

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

Renn Drum for the defendant appellant.

HEDRICK, Judge.

[1] The defendant first assigns as error the trial judge's instruction distinguishing involuntary manslaughter from the lesser-included offense of death by vehicle. In his brief the defendant contends that the following portion of the trial judge's charge was in error: "Now death by a vehicle differs from involuntary manslaughter in that the State need not prove that the defendant's violation of any safety statute was done intentionally or recklessly."

General Statute 20-141.4 which defines the offense of "Death by Vehicle" provides:

> (a) Whoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death.

In *State v. Freeman,* 31 N.C. App. 93, 228 S.E. 2d 516, *cert. denied,* 291 N.C. 449, 230 S.E. 2d 766 (1976), this Court had occasion to discuss the offense set out in the foregoing statute and its relation to the offense of involuntary manslaughter. Judge Martin, speaking for the majority, considered the common-law defini-

tion of involuntary manslaughter and concluded that "it is apparent that the intention of the legislature in enacting G.S. 20-141.4 was to define a crime of lesser degree of manslaughter wherein criminal responsibility for death by vehicle is not dependent upon the presence of culpable or criminal negligence." 31 N.C. App. at 97, 228 S.E. 2d at 519.

The trial judge in the present case fully explained the elements of the offenses of involuntary manslaughter and death by vehicle. The defendant's contention that in distinguishing between the two, the court "vastly reduced the effective scope of N.C. G.S. 20-141.4, to situations where there was no intent or recklessness" is manifestly incorrect. The trial court merely pointed out that with respect to the offense of death by vehicle the State is not required to prove any intentional or reckless conduct on the part of the defendant. This instruction comports with the definition in G.S. 20-141.4 and our opinion in *Freeman.* Therefore, this assignment of error is overruled.

[2] The defendant also assigns as error the denial of his motion to quash the jury array. Prior to trial the court conducted a voir dire hearing on the defendant's motion and at its conclusion found "that there has been no discrimination against anyone or any group of people and that the list being chosen from the tax scrolls and the voter registration books would include a fair cross-section of all citizens and would be a fair way to select a jury list." The defendant does not attack the findings of the trial court; nor does he challenge the court's conclusion that the selection process was in compliance with the North Carolina General Statutes. Instead, he argues that use of tax scrolls and voter registration books to compile a jury roll is unconstitutional since some segments of our population are underrepresented on these lists. The defendant cites no authority for his position, and the courts of this State have held otherwise. *See State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972); *State v. Foddrell,* 291 N.C. 546, 231 S.E. 2d 618 (1977).

[3] Finally, the defendant assigns as error the denial of his motion to dismiss the charge of manslaughter, arguing that there was no evidence of intentional or culpably negligent conduct. The evidence viewed in the light most favorable to the State tends to show that the defendant was driving under the influence of alcohol at an excessive rate of speed, weaving from one side of

the highway to the other when he struck Kiger's well-lighted motorcycle from behind. This evidence clearly was sufficient to submit the case to the jury and to support the verdict.

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

No error.

Judges MORRIS and WEBB concur.

STATE OF NORTH CAROLINA v. WILLIAM "BILLY" HESTER

No. 7810SC240

(Filed 1 August 1978)

1. **Criminal Law § 112.1— charge on reasonable doubt**

The trial court's charge on reasonable doubt was not insufficient in failing to include the words "satisfied to a moral certainty."

2. **Criminal Law § 104— discrepancies in State's evidence—nonsuit**

Dismissal of breaking and entering and larceny charges was not required because one State's witness testified the break-in occurred on the night of 30 March and another State's witness testified that it occurred on the night of 31 March, since discrepancies in the State's evidence do not warrant nonsuit.

3. **Criminal Law §§ 138.1, 138.7— severity of punishment—criminal record—work record—more severe sentence than accomplice**

Sentences imposed on defendant for breaking and entering and larceny were not improper because of the trial judge's statement that he had seen studies which "indicate that at the point that an individual accumulates this much record, that the likelihood of rehabilitation is very small," the trial judge's failure to consider defendant's good work record, or the disparity between sentences given to defendant and sentences given to an accomplice, since (1) the trial judge acted within his discretion in considering defendant's criminal record; (2) assuming the judge was required to consider defendant's work record, it cannot be concluded that he failed to do so inasmuch as he recommended defendant for work release; and (3) the disparity in sentences resulted from the court's consideration of defendant's criminal record.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 12 January 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 28 June 1978.

Defendant was indicted for breaking and entering and larceny, convicted by a jury, and sentenced to consecutive terms of ten years and four to ten years respectively.

Ronald Rivers testified for the State that: he knew defendant and they worked together; he and defendant got together after work on 31 March 1977, drank, and went to various clubs; they then drove to an apartment complex and broke into an apartment, stealing stereo equipment which he later sold; and he had pleaded guilty to the offenses. Iona Smith testified that she was Johnny McKinley's mother-in-law and lived near his apartment. She testified that she observed two people breaking into McKinley's house and "coming out toting stuff" about 12:30 or 1:00 a.m. on the night of 31 March 1977 and that she called McKinley. Finally, the State presented McKinley, who testified that he left certain stereo equipment in the apartment about 11:30 on the evening of 30 March and that the equipment was missing when he returned at about 7:00 the following morning.

Defendant testified that he was elsewhere on the night of 30-31 March and presented two alibi witnesses, his girlfriend and his mother.

Before the Court imposed sentence, defendant's attorney urged it to consider the fact that Rivers had not received an active sentence. The district attorney presented defendant's criminal record, which was a substantial one. The trial court imposed the sentences stated above. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General John C. Daniel, Jr., for the State.

C. D. Heidgerd, for defendant appellant.

ERWIN, Judge.

[1] Defendant contends that the trial court erred in defining "reasonable doubt" as follows in its charge:

> "A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or a lack or insufficiency of the evidence as the case may be.

> Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt."

Relying on *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954), defendant maintains that the trial court erred in failing to include "satisfied to a moral certainty" in the charge. However, a definition of "reasonable doubt" identical to the one given herein was approved by our Supreme Court in *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). Therefore, this assignment of error is overruled.

[2] Defendant observes that State's witness Rivers testified that the break-in occurred on the night of 31 March 1977, while McKinley indicated that it took place on the night of 30 March 1977. He argues that "[t]he variance between the two crucial State's witnesses . . . was sufficient to entitle the defendant to the Motion to Dismiss." We do not agree.

Our Supreme Court stated in *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972):

> "On a motion for judgment as in case of nonsuit, the evidence must be considered in the light most favorable to the State. Contradictions and discrepancies, even in the State's evidence, are matters for the jury and do not warrant nonsuit."

See also State v. Smith, 291 N.C. 505, 231 S.E. 2d 663 (1977). This assignment of error is without merit.

[3] Finally, although acknowledging that his sentences are within statutory limits, defendant contends that they should be vacated, because the trial court considered improper matters and abused its discretion in imposing the sentences. Specifically, he argues that the trial judge's stated consideration of "studies I have seen [which] indicate that at the point that an individual accumulates this much record, that the likelihood of rehabilitation is very small," his failure to consider defendant's good work record, and the disparity between his sentences and that given to Rivers make his sentences "offensive to the public sense of 'fair play.'"

Although not conclusively so, it is presumed that a sentence within statutory limits is valid. 4 Strong's N.C. Index 3d, Criminal Law, § 138.

Clearly, the trial court acted within its discretion in considering defendant's criminal record. *State v. Hegler*, 15 N.C. App. 51, 189 S.E. 2d 596 (1972), *cert. denied*, 281 N.C. 761, 191 S.E. 2d 358 (1972). Further, we cannot conclude that the trial court failed to consider defendant's good work record, even assuming it had to; in fact, the trial court recommended defendant for the "Work Release Program."

Nor does defendant's contention relating to the sentence disparity between Rivers and himself have merit. The trial court merely was taking cognizance of defendant's criminal record. There is nothing in the record to indicate that the sentences imposed herein were the result of defendant's plea of not guilty; therefore, *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977), relied upon by defendant, is not controlling.

The presumption of sentence regularity may be overcome, however, if the record reveals that the trial court considered irrelevant and improper matters. *See State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967). Such does not appear on this record. Our Supreme Court observed in *State v. Locklear*, 294 N.C. 210, 213, 241 S.E. 2d 65, 67 (1978): "It suffices to say that trial judges have a broad discretion, and properly so, in making a judgment as to proper punishment. They must not be hampered in the performance of that duty by unwise restrictive procedures." *See also State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962).

The other cases relied upon by defendant, *State v. Swinney*, *supra*, *State v. Hodge*, 27 N.C. App. 502, 219 S.E. 2d 568 (1975), and *State v. Snowden*, 26 N.C. App. 45, 215 S.E. 2d 157 (1975), *cert. denied*, 288 N.C. 251, 217 S.E. 2d 675 (1975), are not controlling. In *Swinney*, the sentence was vacated because it appeared that the trial court was influenced by *legal* conduct by defendant, but which it considered improper. Both *Hodge* and *Snowden* involved a misapprehension as to the parole process, the trial judge believing that parole was automatic upon the expiration of one-fourth of the sentence.

Trial judges in this State are encouraged to seek out information to assist them in wisely fixing sentences. *See State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966), *State v. Grant*, 19 N.C. App. 401, 199 S.E. 2d 14 (1973), *cert. denied* and *appeal dismissed*, 284 N.C. 256, 200 S.E. 2d 656 (1973).

In the trial below, we find

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. LEWIS FELTON GODFREY

No. 7811SC229

(Filed 1 August 1978)

1. Homicide § 21.9— involuntary manslaughter—sufficiency of evidence

The trial court did not err in submitting the offense of involuntary manslaughter to the jury as one of the verdicts they could return, since the evidence that decedent was killed during a scuffle after defendant "leveled" a gun at him was sufficient to support a finding by the jury that the killing was unintentional and without malice and that it proximately resulted from the commission of an unlawful act not amounting to a felony by defendant, namely, his pointing a loaded firearm at decedent.

2. Homicide § 28— involuntary manslaughter—failure to instruct on self-defense—no error

The trial court did not err in failing to instruct the jury that self-defense was a defense to involuntary manslaughter, since the jury, when it considered the crime of involuntary manslaughter, had rejected self-defense.

3. Homicide § 32.1— instruction on self-defense—harmless error

Defendant was not prejudiced by error, if any, in the trial court's instructions on self-defense where the jury found defendant guilty of involuntary manslaughter and in effect found defendant not guilty of second degree murder and voluntary manslaughter, since self-defense pertained only to the two more serious charges and was not available on the charge of involuntary manslaughter.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 13 December 1977 in Superior Court, LEE County. Heard in the Court of Appeals 27 June 1978.

Upon a plea of not guilty defendant was tried for the murder of John William Ayers on 15 January 1977. The State asked for a verdict no greater than murder in the second degree.

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

On the afternoon of the day in question, decedent went to the trailer home of his mother, Mrs. Marks. Although she and defendant were not married to each other, they were living together. Decedent and defendant drank intoxicants quite heavily and Mrs. Marks drank some.

Late in the afternoon or early evening decedent's wife came to the mobile home and an argument developed between her and decedent. Defendant and Mrs. Marks succeeded in breaking up the argument.

Thereafter, an altercation took place between decedent and defendant and defendant asked decedent to leave. When decedent refused to leave, defendant obtained a shotgun and told decedent and Mrs. Marks that he was going to kill both of them. The gun discharged, with pellets entering decedent's chest, causing his instant death. Several pellets struck Mrs. Marks but she was not seriously injured.

Mrs. Marks did not know whether or not she tried to grab the gun prior to its discharge. After the shooting she told Deputy Sheriff Currin that defendant shot her son for no reason at all.

Defendant's only evidence was his own testimony. He testified that after decedent's wife left, decedent became enraged and threatened to kill him; he then secured a shotgun to make deceased leave but that decedent refused to leave; that decedent kept "coming at him" and threatening him; that Mrs. Marks ran up beside decedent and in the ensuing scuffle, the gun went off; that decedent had pulled a knife on him prior to that date; that at the time of the shooting decedent had a hand in his pocket and defendant thought he was pulling a knife on him; that he had no intention of killing decedent when he got the gun but he meant to stop him even if it meant shooting him.

The court instructed the jury to return a verdict of second-degree murder, voluntary manslaughter, involuntary manslaughter or not guilty. The jury returned a verdict of guilty of involuntary manslaughter and from judgment imposing prison sentence of seven years, defendant appealed.

Attorney General Edmisten, by Associate Attorney Douglas A. Johnston, for the State.

Morgan, Bryan, Jones, Johnson, Hunter & Greene, by Robert C. Bryan, and Love & Ward, by Jimmy L. Love, for defendant appellant.

BRITT, Judge.

[1] Defendant contends first that the court committed prejudicial error in submitting the offense of involuntary manslaughter to the jury as one of the verdicts they could return. This contention has no merit.

Defendant argues that there was no evidence of an unintentional shooting; hence there was no evidence to support a charge of involuntary manslaughter. We disagree with this argument.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner. 6 Strong's N.C. Index 3d, Homicide § 6.1, p. 537.

G.S. 1-180 requires the trial judge in his charge to the jury to "declare and explain the law arising on the evidence given in the case". Evidence given in the case includes reasonable inferences raised by the evidence.

Defendant testified that just prior to the shooting, "Flora (Mrs. Marks) run up beside of me and in the scuffle there, the gun went off. I don't know wher're I pulled the trigger or not. . . ." On cross-examination he testified that he "leveled" the gun at decedent. Mrs. Marks testified that when the scuffle started "I threw up my hand either to grab the gun or go up against Johnny (decedent) for protection, and the gun went off."

We think the evidence and inferences therefrom were sufficient to support a finding by the jury that the killing was unintentional and without malice, and that it proximately resulted from the commission of an unlawful act not amounting to a felony by defendant, namely, his pointing a loaded firearm at decedent. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

Our Supreme Court has held that where the evidence is susceptible to the interpretation that the killing was not intentional, the trial court *must* submit the question of defendant's guilt of involuntary manslaughter. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Assuming, *arguendo*, that the court did err in submitting the charge of involuntary manslaughter, the error was favorable to defendant. *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923); *State v. Walker*, 34 N.C. App. 485, 238 S.E. 2d 666 (1977).

[2] Defendant contends next that if the trial court correctly submitted the offense of involuntary manslaughter as a possible verdict, it erred in not instructing the jury that self-defense is a defense to involuntary manslaughter. We find no merit in this contention.

After instructing the jury with respect to the law on second-degree murder and voluntary manslaughter, His Honor gave full instructions on self-defense; he did not do this following his explanation of the law on involuntary manslaughter and we do not think he was required to do so. As was said by Judge Clark, speaking for this court in *State v. Walker, supra*, page 487, "[t]he jury when it considered the crime of involuntary manslaughter, had rejected self-defense." We adhere to that statement. *See also State v. Moore, supra.*

[3] Finally, defendant contends the court erred in instructing the jury as follows:

> ". . . However, if the defendant was attacked in a manner which he could not reasonably believe to be murderous, even though he, the defendant, was in his home, he had a duty to retreat as far as he could, consistent with his own safety, before he could kill in self-defense."

We find no merit in this contention.

It is obvious that the challenged instruction pertained to self-defense. As indicated above, this defense related to second-degree murder and voluntary manslaughter. By their verdict of guilty of involuntary manslaughter, the jury in effect found defendant not guilty of the two more serious charges. Self-defense was not available to defendant on the charge of involuntary manslaughter,

State v. Moore, supra; *State v. Walker, supra*; therefore, assuming, but not deciding, that the instruction was erroneous, the error was not prejudicial.

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

No error.

Chief Judge BROCK and Judge MITCHELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 JULY 1978

CIESZKO v. TOWN OF HAVELOCK No. 773SC819	Craven (70CVS1162)	Affirmed
FOUNDRY CO. v. CONSTRUCTION CO. No. 7714SC730	Durham (71CVS5512)	Affirmed
GRIMES v. GUARANTY CO. No. 772DC696	Beaufort (76CVD186)	Appeal Dismissed
IN RE BEAUSOLIEL No. 7825DC100	Burke (77SP261)	Reversed
IN RE BROWN No. 7815DC195	Alamance (77SP306)	Affirmed
IN RE PARRIS No. 7829DC99	Polk (77SP47)	Affirmed
IN RE YELTON No. 7825DC106	Burke (77SP264)	Reversed
McCLUNEY v. PENNY No. 7719SC737	Randolph (77CVS93)	No Error
STATE v. COX No. 778SC1045	Wayne (77CR8126)	No Error
STATE v. GORE No. 7813SC75	Columbus (75CRS4306)	Affirmed
STATE v. SAUNDERS No. 785SC31	New Hanover (77CR7256)	No Error
STATE v. SMITH No. 7827SC44	Lincoln (77CRS1313)	No Error
VANN v. GREEN No. 779DC688	Warren (75CVM245)	Affirmed

FILED 1 AUGUST 1978

STATE v. ALSTON No. 7815SC203	Orange (72CRS4211)	Reversed
STATE v. HOOKER No. 7828SC212	Buncombe (77CRS10930A) (77CRS10930B)	No Error
STATE v. KNOX No. 7827SC11	Gaston (77CRS6769)	No Error

STATE v. McCARN No. 7826SC199	Mecklenburg (77CRS27757)	Vacated and Remanded
STATE v. NORMAN No. 7822SC209	Iredell (77CR8370)	No Error
STATE v. PHIFER No. 7826SC253	Mecklenburg (77CRS2384)	No Error
STATE v. RICH No. 7825SC42	Burke (77CRS3999) (77CRS4000)	No Error
STATE v. STEWART No. 7826SC89	Mecklenburg (77CRS17295) (77CRS17296)	No Error
STEWART v. STEWART No. 7722DC661	Davie (77CVD40)	Vacated and Remanded
TRUESDALE v. TRUESDALE No. 7725DC833	Caldwell (73CVD385)	Affirmed in Part; Reversed in Part; and Remanded

GEORGE J. HODGES v. FIRTH FRANKLIN HODGES AND WIFE, MAUDE E. HODGES

No. 7711SC376

(Filed 15 August 1978)

1. **Rules of Civil Procedure § 50— motion for directed verdict—waiver by introducing evidence**

By introducing evidence, defendants waived their motion for a directed verdict made at the conclusion of plaintiff's evidence.

2. **Rules of Civil Procedure § 50.3— motion for directed verdict—close of all evidence—failure to state grounds—prior motion—no fatal error**

Defendants' failure to state the specific grounds for their motion for directed verdict at the close of all the evidence as required by G.S. 1A-1, Rule 50(a) was not fatal where they stated specific grounds for their motion for directed verdict at the conclusion of plaintiff's evidence, and it must have been apparent to the court and to the plaintiff that defendants' motion was a renewal of the motion previously made and that it challenged the sufficiency of all of the evidence on the grounds previously stated.

3. **Trusts § 19— parol or constructive trust—insufficient evidence**

Plaintiff's claim that his brother held property conveyed to him by plaintiff in trust for plaintiff was not supported by evidence where there was no evidence of a fiduciary relationship between plaintiff and his brother or of any actual fraud, undue influence, breach of duty or other wrongdoing on the part of the brother, the family relationship in itself being insufficient to raise a presumption of fraud, undue influence, or other wrongdoing.

4. **Mortgages and Deeds of Trust § 1— deed and option to repurchase—insufficient evidence to show mortgage**

The evidence was insufficient to support a jury finding that plaintiff's conveyance of a one-half interest in a farm to his brother by a deed absolute in form and a contract providing plaintiff an option to repurchase constituted a mortgage where the evidence showed that plaintiff surrendered possession and control of the farm to his brother, who collected and retained all the rents, paid all the taxes on the farm, and made all necessary repairs on the buildings; the amount paid to plaintiff by his brother for the property equalled the value which plaintiff had placed on it for inheritance tax purposes; and plaintiff admitted that he was not obligated to exercise the option to repurchase.

5. **Mortgages and Deeds of Trust § 1— deed and option to repurchase—intent to create mortgage—necessary proof**

To show that an absolute deed and an option to repurchase were intended by the parties to constitute a mortgage, the plaintiff must present more than his own simple declaration but must present proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase.

6. Rules of Civil Procedure § 50.5— failure to direct verdict—absence of motion for judgment n.o.v.—no directed verdict by appellate court

An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion where the movant did not move in accordance with Rule 50(b)(1) for judgment n.o.v. and the trial judge did not, on his own motion, grant, deny or redeny the motion in accordance with Rule 50(b)(1). G.S. 1A-1, Rule 50(b)(2).

APPEAL by defendants from *Gavin, Judge*. Judgment entered 2 February 1977 in Superior Court, HARNETT County. Heard in the Court of Appeals 10 February 1978.

Plaintiff instituted this civil action on 30 June 1972 seeking judgment requiring defendants to reconvey to plaintiff a tract of land which plaintiff had conveyed to the male defendant, Firth Franklin Hodges, who is plaintiff's brother, by a deed absolute in form dated 5 April 1961. Plaintiff also seeks an accounting for the rents and profits from the land.

In his complaint as originally filed, plaintiff alleged that at the time he conveyed the property in 1961 a fiduciary relationship existed between him and his brother, and on that ground he prayed that defendants be adjudged to hold title to the lands in trust for the plaintiff. In the alternative, plaintiff alleged that the deed, while absolute on its face, was in fact given to secure an indebtedness, and he prayed that it be reformed and adjudged to be a mortgage, and that he be allowed to redeem. Defendants answered, denying that any fiduciary or trust relationship existed between the brothers or that the deed secured an indebtedness. In a further answer, defendants alleged that on 5 April 1961 plaintiff sold and conveyed the land to the defendant, Firth Franklin Hodges, for $25,000.00, that on 6 April 1961 defendants granted plaintiff an option to repurchase the land for the same price subject to certain adjustments as provided in the option contract, that plaintiff had until 10 September 1964 to exercise the option, and that he had failed to do so.

Evidence presented at the trial shows the following: On the death of their mother intestate in 1960, plaintiff (George) and his brother (Firth), inherited as tenants in common a farm of 176 acres in Harnett County, N. C. In December 1960 they divided the farm by cross deeds, each thereby becoming sole owner of a

separate tract, the tract then received by plaintiff being the land which is the subject of this action. Plaintiff testified that in his opinion the fair market value of the entire farm before it was divided was $75,000.00 and the value of the tract which he received was $40,000.00. As administrator of his mother's estate plaintiff valued the entire farm at $50,000.00 for inheritance tax purposes.

At that time plaintiff lived in Raleigh, where he was engaged in the trucking business. Being indebted to the bank and needing funds in his business, plaintiff first tried to sell his brother a part interest in the business, but Firth was not interested. After further discussions, the brothers agreed to an arrangement under which plaintiff would convey his separate tract to Firth, who would then use the entire farm as security for a loan of $25,000.00 to be obtained from Metropolitan Life Insurance Company, plaintiff would receive this $25,000.00, and Firth would give plaintiff an option to buy back his separate tract for the price of $25,000.00, the price to be adjusted upward to take into account any interest on the loan from Metropolitan, taxes, insurance, and cost of necessary improvements paid by Firth, offset by any rentals received by him from the land. There were initial discussions about making the term of the option five years, but Firth felt this was too long, and a term of three and a half years was agreed upon. Pursuant to this arrangement, plaintiff applied in Firth's name to Metropolitan for the loan, employed an attorney to certify the title and prepare all necessary papers, arranged for a survey and for title insurance, and at his own expense did everything necessary to consummate the transaction. When all papers were prepared, plaintiff flew to Detroit, where Firth and his wife were then living, taking with him the deed conveying fee simple title to the property to Firth, the note and deed of trust to Metropolitan, the $25,000.00 check from Metropolitan (which was payable to Firth and to the attorney), and the option agreement. Firth and his wife signed the note and signed and acknowledged the deed of trust and the option agreement, and Firth endorsed the check. Plaintiff then brought all documents back to North Carolina, where the deed, deed of trust, and option agreement were recorded and the loan closed. Plaintiff paid all expenses and received for his own use the entire $25,000.00 proceeds of the loan from Metropolitan.

As finally prepared by plaintiff's attorney, the option agreement, which was dated and executed 6 April 1961, provided that it should "exist and continue for a period of three and one-half years from the date of the execution of this agreement; however, in no event any later than September 10, 1964," and further provided "[t]hat if the said party of the second part [the plaintiff herein] shall fail to exercise this option on or prior to September 10, 1964, then all rights under this option are to be forfeited."

On 10 September 1964 plaintiff sent Firth the following telegram:

> September 10, 1964. This is to advise that I will be ready, willing, and able to exercise my rights contained in that certain option dated April 6, 1961, on or before the final date required under the terms of said option. You will, therefore, execute and deliver to your attorney in Dunn, North Carolina, a good and sufficient deed conveying the subject property to me in order that we may close the matter as above specified.

However, plaintiff never tendered any money in exercise of his rights under the option and no deed was ever tendered back to him by the defendants.

After delivery of the deed dated 5 April 1961 by which plaintiff conveyed fee simple title to his brother, Firth, the latter took control of the property to the exclusion of the plaintiff. Prior to the conveyance, the entire farm had already been rented to a tenant for 1961 for the annual rental of $3200.00. Plaintiff had received his portion of this rental for the year 1961 prior to delivering the deed conveying the property to Firth, and plaintiff retained this rental which he had already received. For all subsequent years, defendants exercised complete control over the property, receiving all rentals therefrom, paying the taxes thereon, maintaining insurance on the buildings, making all repairs and improvements, and paying all installments of the principal and interest on the loan from Metropolitan. This loan was finally paid and satisfied in full by the defendants on 5 January 1972. Plaintiff instituted this action on 30 June 1972.

Other evidence presented at the trial will be referred to in the opinion.

During the trial and at the close of his evidence, plaintiff moved pursuant to G.S. 1A-1, Rule 15(b), and was allowed to amend his complaint to add allegations relative to the option contract, which had not been mentioned in the original complaint, and to allege "[t]hat at the time said deed and contract were executed and delivered the relationship of debtor and creditor did exist and does now exist between the plaintiff and the defendant, Firth Franklin Hodges," and to further allege "[t]hat said deed and contract were intended to constitute and did constitute a mortgage upon the lands described therein." Defendants also moved and were allowed to amend their answer to plead the defense of laches.

Issues were submitted to the jury and answered as follows:

1. Were the deed from George J. Hodges to Firth Franklin Hodges executed April 6, 1961, and recorded in Book 398, at Page 574, and the contract and option executed by the defendants and the plaintiff on April 6, 1961, and recorded in Book 403, at Page 247, intended as security for a loan as alleged in the Complaint?

Answer: Yes

2. Do the defendants hold title to the land described in the Complaint in trust for the plaintiff as alleged in the Complaint?

Answer: Yes

The parties had stipulated that in event the jury should answer the issues in favor of the plaintiff, the accounting prayed for by the plaintiff would be conducted by a referee to be appointed by the court. In accord with this stipulation and the jury's verdict, the court entered judgment adjudging that defendants hold title to the land in controversy in trust for plaintiff, adjudging that the deed and option contract constitute a mortgage which plaintiff is entitled to redeem, and ordering that an accounting be had to determine what balance is owed between the parties. From this judgment, defendants appeal.

Johnson and Johnson by W. A. Johnson for plaintiff appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper by Richard M. Wiggins and Elmo R. Zumwalt III, and Mast, Tew, Nall & Moore by George B. Mast for defendants appellants.

PARKER, Judge.

[1] At the conclusion of plaintiff's evidence and again at the close of all evidence, defendants moved for a directed verdict pursuant to G.S. 1A-1, Rule 50. These motions were denied, and defendants now assign error to these rulings. By introducing evidence, defendants waived their first motion, *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976), and their assignment of error directed to the denial of that motion will not be considered on this appeal.

[2] Plaintiff contends that defendants are not entitled on this appeal to rely upon their assignment of error directed to the denial of their second motion, made at the close of all evidence, because in making that motion defendants failed to "state the specific grounds therefor" as required by G.S. 1A-1, Rule 50(a). Plaintiff correctly points out that this requirement is mandatory. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970). "However, the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974). In the present case, when defendants made their first motion for a directed verdict at the conclusion of plaintiff's evidence, they stated that they did so "for the reason that Plaintiff has not made a case sufficient to be submitted to the jury in that Plaintiff's evidence shows conclusively that the transaction alleged does not constitute a mortgage but rather a deed with option to purchase and there was no evidence sufficient to be submitted on the issue of a constructive trust." When defendants again moved for a directed verdict at the close of all of the evidence, it must have been apparent to the court and to the plaintiff that their motion was a renewal of the motion previously made, this time challenging the sufficiency of all of the evidence on the grounds previously stated. Hence, defendants' failure to restate the specific grounds for their motion will not be deemed fatal, and we will review the questions presented by defendants' assignment of error directed to the denial of their motion for directed verdict made at the close of all of the evidence.

[3] At the outset we note that there was no evidence to support plaintiff's claim for relief based on his allegations that a fiduciary relationship existed between him and his brother and that defend-

ants hold title in trust for the benefit of the plaintiff. On the contrary, all of the evidence shows that plaintiff and his brother, both of whom were adult businessmen, dealt with each other at arm's length throughout, each seeking to obtain the best bargain which his needs and circumstances would permit. All of the evidence shows that the two brothers had little direct contact, one living in North Carolina and the other in Michigan. The transaction occurred at plaintiff's, rather than at defendants', instance. All instruments involved were prepared by plaintiff's attorney, and plaintiff had ample opportunity to read and understand them before they were signed. There was no evidence of any actual fraud or undue influence by anyone, and the family relationship which existed between plaintiff and his brother by itself raises no presumption of fraud or undue influence. *Walters v. Bridgers*, 251 N.C. 289, 111 S.E. 2d 176 (1959); *Cornatzer v. Nicks*, 14 N.C. App. 152, 187 S.E. 2d 385 (1972). There was no evidence that plaintiff conveyed title to his brother under any express parol trust that it should be held for plaintiff's benefit, nor would such evidence, if presented, have availed to sustain plaintiff's claim, for a grantor may not impose a parol trust for his benefit on land which he conveys by deed purporting to vest absolute title in the grantee. *Willetts v. Willetts*, 254 N.C. 136, 118 S.E. 2d 548 (1961).

Nor was there any evidence to justify a court of equity in imposing a constructive trust in the present case. Describing a constructive trust, Lake, J., speaking for our Supreme Court, said:

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. [Citations omitted.] Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is *some fraud, breach of duty or other wrongdoing*

> by the holder of the property, or by one under whom he claims, the holder, himself, not being a bona fide purchaser for value.

Wilson v. Development Co., 276 N.C. 198, 211-212, 171 S.E. 2d 873, 882 (1970). (Emphasis added.) As above noted, there was no evidence in the case now before us of any actual fraud, breach of duty, or other wrongdoing by the defendants, and the family relationship gave rise to no presumption of any. Therefore, the court erred in failing to grant defendants' motion for a directed verdict as to plaintiff's claim for relief based on his allegations that defendants hold title in trust for his benefit.

[4] We now turn to plaintiff's claim for relief based on his allegations that at the time the deed and contract providing plaintiff an option to repurchase were executed and delivered the relationship of debtor and creditor existed between him and his brother, Firth, and that the deed and contract together were intended to constitute and did constitute a mortgage. Cases involving similar arrangements, but each with its own particular factual background, have many times been before the courts of this and other jurisdictions. *See Hardy v. Neville*, 261 N.C. 454, 135 S.E. 2d 48 (1964); *Ricks v. Batchelor*, 225 N.C. 8, 33 S.E. 2d 68 (1945); *Ferguson v. Blanchard*, 220 N.C. 1, 16 S.E. 2d 414 (1941); *O'Briant v. Lee*, 214 N.C. 723, 200 S.E. 865 (1939); *Watkins v. Williams*, 123 N.C. 170, 31 S.E. 388 (1898); *King v. Kincey*, 36 N.C. 187 (1840); *Trust Co. v. Morgan-Schultheiss* and *Poston v. Morgan-Schultheiss*, 33 N.C. App. 406, 235 S.E. 2d 693 (1977); Annot., 79 A.L.R. 937 (1932), *supplemented in* Annot., 155 A.L.R. 1104 (1945). Long ago, Chief Justice John Marshall, dealing with the distinction between a mortgage and a sale with option to repurchase, said:

> To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But

> the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

Conway v. Alexander, 11 U.S. (7 Cranch) 218, 236-37, 3 L.Ed. 321, 328 (1812).

Dealing with the same problem, Devin, J. (Later C.J.) speaking for our own Supreme Court in *Ferguson v. Blanchard, supra*, at 7-8, 16 S.E. 2d at 418, said:

> It is true that when a debtor conveys land to a creditor by deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and takes from the grantee an agreement to reconvey upon payment of the debt, the transaction is a mortgage. *Robinson v. Willoughby*, 65 N.C. 520. But if the agreement leaves it entirely optional with the debtor whether he will pay the debt and redeem the land or not, and does not bind him to do so, or continue his obligation to pay, the relationship of mortgagor and mortgagee may not be held to continue unless the parties have so intended. . . .
>
> Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction seems to be whether the debt existing prior to the conveyance is still left subsisting or has been entirely discharged or satisfied by the conveyance. If no relation whatsoever of debtor and creditor is left subsisting, the transaction is a sale with contract of repurchase, since there is no debt to be secured.

[5] From the foregoing authorities, it is apparent that the crucial problem in a case such as is now before us is to ascertain the true intention of the parties at the time of their transaction. If in the present case plaintiff and his brother intended to create a debt which plaintiff was obligated to repay to his brother, with the land being conveyed merely as security, then the transaction was a mortgage. If, on the other hand, they did not intend to create any debt, there would have then been no debt to secure, and the transaction would have been no more than what it purported to be on its face, *i.e.*, an absolute sale with an option granted back to the plaintiff to repurchase within a specified time. In ascertaining the real intention of the parties, however, the simple declaration of the plaintiff, who was grantor in the deed, will not suffice to show that the parties intended to create a mortgage. Quoting from earlier cases, our Supreme Court, in *O'Briant v. Lee, supra* at 731, 200 S.E. at 870, noted that:

> The intention [to create a mortgage] must be established, not by simple declaration of the parties, but by proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase; otherwise, the solemnity of deeds would always be exposed to the "slippery memory of witnesses."

Thus, although plaintiff in the present case repeatedly testified that the transaction was intended to be a loan and that the land was conveyed to his brother for the sole purpose of securing the payment of that loan, to withstand defendants' motion for directed verdict it was necessary for plaintiff to present more than his own simple declaration and to present proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute purchase. This he failed to do.

[4] The grantee in an absolute deed normally takes immediate possession of the property. A mortgagee normally does not. Here, plaintiff admitted that he completely surrendered possession and control of the farm to his brother. Plaintiff testified that "[o]n the day that I gave him the deed I gave him possession of the farm," and he did not dispute defendants' testimony that after 1961 defendants collected and retained all of the rents, paid all taxes on the farm, and made all necessary repairs on the buildings. Plaintiff's surrender of possession and control as well as his long

acquiescence in defendants' possession of the farm is more consistent with an absolute sale than a mortgage.

In a mortgage transaction, the amount of money loaned is usually substantially less than the fair market value of the property given as security. In a sale, the amount paid for the property is usually more nearly equivalent to its fair value. In the present case, witnesses gave as their estimates of fair market value of the entire farm in 1961 figures ranging from $45,000.00 to $100,000.00, but of the six estimates of value, only one was greater than $75,000.00. Plaintiff himself testified that in his opinion the fair market value of the entire farm in 1961 was $75,000.00, but he admitted that he had valued it for inheritance tax purposes at $50,000.00, a figure entirely consistent with the sale of his one-half portion for $25,000.00.

Plaintiff contends that certain language used by defendant Firth, while testifying, indicates the existence of a debt. We do not agree. In referring to the expiration of the option to repurchase, the defendant stated that plaintiff had a certain period of time within which to "pay the money off" and to "pay me back." We find these expressions as consistent with an absolute deed with option to repurchase as they are with the existence of a mortgage debt. Plaintiff also points to the testimony of his witness, Y. T. Jernigan, who had leased the farm in 1961, that he had "heard Firth say that he loaned George Twenty-Five Thousand Dollars." However, the witness did not testify when, or in what connection, he had heard this statement made. While this bit of evidence is inconsistent with the idea of a sale, it is of such scant probative value as to be insufficient, in itself, to carry plaintiff's case to the jury.

While all of the evidence of the circumstances surrounding the transaction tend to negate plaintiff's allegation that the deed and option constituted a mortgage, it is perhaps even more important that plaintiff admitted on the stand that he was not obligated to exercise the option. As above noted, the inquiry in this case focuses on the existence of a debt. If there is a subsisting debt, then plaintiff is obviously under a duty to repay the debt, and the transaction may properly be characterized as a mortgage. On the other hand, there is no debt, and thus no mortgage, if plaintiff is not obligated to repay. In this connection, on cross-examination plaintiff testified:

> I knew and understood the terms of my option and that I could exercise my rights anytime during the period of time. I also knew that *I had the right to do it or not to do it at my own choice* and I tried to do all I could to get it done. [Emphasis added.]

The effect of this testimony is an admission that plaintiff was not obligated to repay defendant, thereby negating the existence of a debt.

[6] In our opinion, and we so hold, the court should have granted defendants' motion for a directed verdict made at the close of all the evidence. We may not, however, direct entry of judgment in accordance with the motion. Defendants did not move in accordance with Rule 50(b)(1) for judgment notwithstanding the verdict, nor did the trial judge on his own motion grant, deny or redeny the motion in accordance with Rule 50(b)(1). Under these circumstances, Rule 50(b)(2) expressly provides that the appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

We do not pass on defendants' remaining assignments of error, which are primarily directed to the court's instructions to the jury and some of which appear to have merit, since in any event this case will be remanded to the superior court for a new trial at which the errors complained of are not likely to occur.

Upon a new trial, defendants will have the opportunity to present evidence in support of their defense of laches. *See Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938); *McRorie v. Query*, 32 N.C. App. 311, 232 S.E. 2d 312 (1977).

New trial.

Judges MARTIN and WEBB concur.

SALLIE WALSTON WHITE v. JAMES EDGAR WHITE

No. 777DC607

(Filed 15 August 1978)

1. **Divorce and Alimony § 19.5— consent judgment—division of property and alimony award—separability**

In this jurisdiction an agreement for division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment; however, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.

2. **Divorce and Alimony § 19.5— consent judgment—division of property and alimony award not inseparable**

Where there was nothing on the face of the record which was before the district court which would indicate that the periodic alimony payments which defendant was ordered to pay to plaintiff under the terms of an earlier consent judgment constituted reciprocal consideration for a property division and nothing on the face of the consent decree to indicate, as a matter of law, that the alimony payments were anything other than "permanent alimony," as so denominated, the district court erred in concluding as a matter of law that the property division and support provisions embodied in the consent judgment were reciprocal consideration and thus the support provision was not subject to modification.

3. **Divorce and Alimony §§ 19.2, 19.3— modification of alimony order—changed conditions alleged—specific allegations unnecessary**

The trial court erred in dismissing plaintiff's motion for a modification of a consent judgment to increase the amount of support defendant was required to pay on the ground that the only change in circumstances alleged by plaintiff was a substantial increase in defendant's income, since plaintiff also alleged that the amount of alimony as set forth in the consent judgment was "totally inadequate under the current circumstances," and specific allegations as to the basis of such inadequacy were not required.

Judge MITCHELL dissenting.

APPEAL by plaintiff from *Harrell, Judge*. Order entered 18 May 1977 in District Court, WILSON County. Heard in the Court of Appeals 25 April 1978.

Certain facts found by the court below which are not in dispute and which reveal the background of the controversy now before this Court are set out as follows:

"1. This action was originally instituted in the Superior Court of Wilson County on June 22, 1966, by the filing of a Complaint, which alleged a claim for alimony without divorce against the defendant. In apt time, the defendant answered, denied the material allegations of the complaint and alleged several defenses including the defense of adultery. Additionally, the defendant filed a cross-action for absolute divorce based upon several grounds including separation for the requisite period of time and the commission of adultery by the plaintiff. In response to the defendant's action or claim for an absolute divorce, the plaintiff in due time denied the material allegations and alleged several defenses."

* * *

"3. Subsequently, the parties resolved and settled all differences between them. Two judgments were thereafter entered. The first is dated November 17, 1969 and was filed in the Office of the Clerk of Superior Court in Wilson County on November 24, 1969. The second is dated November 18, 1969, and was filed in the Office of the Clerk of Superior Court in Wilson County on November 24, 1969.

4. The Consent Judgment dated November 17, 1969 (hereinafter referred to as the November 17th Consent Judgment), to which each of the parties and their respective counsel assented, provided, in pertinent part:

> 'And it appearing to the Court that this is an action for alimony and divorce and that a duly verified complaint and answer have been filed; and that all things and matters in controversy arising out of the actions and pleadings have been agreed upon and settled; and the Court finding as a fact that said agreement is just and agreeable with respect to both parties and adopting the agreement of the parties as its own determination of their respective rights and obligations;
>
> 'IT IS NOW, THEREFORE, ORDERED, ADJUDGED, AND DECREED:
>
> '1. That James Edgar White shall pay to Sallie Walston White as permanent alimony the following sums:

'(a) $100.00 per week beginning November 17, 1969 and $100.00 on each and every Monday thereafter as like payment until the remarriage or death of Sallie Walston White, whichever occurs first;

'(b) $1,000.00 in one (1) lump sum payment;

'2. That said James Edgar White shall convey to Sallie Walston White by warranty deed his one-half interest in their home located at 306 South Deans Street, Wilson, North Carolina, free and clear of all liens and encumbrances; and that she shall also receive all the right, title and interest in and to all the furnishings and household goods located in said home.'

This November 17th Consent Judgment was rendered and signed by J. Phil Carlton, Chief Judge of the District Court of the Seventh Judicial District. The agreement of the plaintiff and the defendant was set out by the Court in numbered paragraphs 1(a), 1(b), 2 and 3 of the November 17th Consent Judgment. Numbered paragraph 3 taxed the costs of the action to the defendant."

* * *

"6. The 'Judgment' dated November 18, 1976, (hereinafter referred to as the November 18th Judgment) grants the defendant the absolute divorce sought in his original cross-action. . . ."

* * *

"7. On October 13, 1976, the plaintiff filed a motion in which she requested that the November 17th Consent Judgment be modified by increasing 'the amount of support that the Defendant has to pay to the Plaintiff as permanent alimony.' Additionally, the plaintiff prayed for the recovery of her costs and the allocation of reasonable attorney's fees for her counsel to be paid by the defendant.

8. The only basis alleged in the October 13, 1976 motion of the plaintiff as a basis for the modification of the November 17th Consent Judgment is that the income of the defendant has substantially increased since the entry of the November 17th Consent Judgment.

9. By motion dated December 9, 1976, the defendant moved to dismiss or deny the October 13, 1976 motion of the plaintiff in that the November 17th Consent Judgment was, as a matter of law, not subject to modification or amendment by the Court."

From the above, and additional findings of fact, the district court reached the following conclusions of law, as follows:

"1. The terms of the November 17th Consent Judgment constitute a contract between the plaintiff and the defendant.

2. The entire agreement and contract between the plaintiff and the defendant as set out in the November 17th Consent Judgment would be destroyed by a modification of the support provision because the support provision and the provision for the distribution of property constitute a reciprocal consideration.

3. The support provision and the provision for the distribution of real and personal property are not separable and may not be changed.

4. The November 17th Consent Judgment is not subject to modification without the consent of both parties. Here the defendant does not consent and, therefore, it is not subject to modification.

5. Even if the November 17th Consent Judgment were subject to modification because of changed circumstances, there is not sufficient cause to modify the November 17th Consent Judgment solely because the income of the defendant has substantially increased since the entry of the November 17th Consent Judgment and for that reason alone."

Based upon its findings and conclusions, the district court denied plaintiff's motion to modify the support payments. Plaintiff excepted to the signing and entry of judgment, and appealed to this Court.

Moore, Diedrick & Whitaker, by Edgar Moore, for the plaintiff.

Farris, Thomas & Farris, by Allen G. Thomas; Biggs, Meadows, Batts, Etheridge & Winberry, by Charles B. Winberry, for the defendant.

BROCK, Chief Judge.

The district court concluded as a matter of law that the November 17th Consent Judgment constituted a contract between plaintiff and defendant; that the agreement would be destroyed by a modification of the support provision inasmuch as the support and property distribution provisions constituted reciprocal consideration and were not separable; and that the November 17th Consent Judgment was not subject to modification without the consent of both parties. We cannot affirm these conclusions based upon the record which was before the district court and which is now before us.

[1] It is clear in this jurisdiction that (1) an agreement for division of property rights, and (2) an order for the payment of alimony, within the accepted definition of that term, may be included as separable provisions in a consent judgment. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). In such a case, the alimony provision is subject to modification where it has been ordered by the district court. *Bunn v. Bunn, supra*; *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E. 2d 67 (1977). "However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." (Citations omitted.) *Bunn v. Bunn*, 262 N.C. at 70, 136 S.E. 2d at 243. Stated somewhat differently in 2A Nelson on Divorce and Annulment (2d ed. rev. 1961) § 17.03, p. 25: ". . . whether a decree or award made pursuant to an agreement or arrangement between the parties is subject to modification may depend upon whether it is in effect an award of alimony or support, or an adjustment and settlement of property rights."

[2] Applying the quoted principle, the district court concluded as a matter of law that the property division and support provisions

embodied in the consent judgment were reciprocal consideration and thus the support provision was not subject to modification.

We find nothing on the face of the consent judgment which indicates that the provision for alimony payments to plaintiff was part and parcel of a property division agreed to by plaintiff and defendant. The only North Carolina case we have found which expressly discusses the problem of whether support and property provisions are separable is *Britt v. Britt*, 36 N.C. App. 705, 245 S.E. 2d 381 (1978). In that case, a separation agreement expressly provided that its provisions were divisible. For a collection of cases from other jurisdictions dealing with the question, *see Annot.* 61 A.L.R. 3d 520, § 19-23 (1975).

The court in *Scanlon v. Scanlon*, 60 N.M. 43, 287 P. 2d 238 (1955) held an alimony provision severable from a property settlement, noting several factors which influenced its decision, including, *inter alia*:

- no showing that the property division would have been different if the support provision had not been made;
- no showing that the amount of support was determined out of any consideration of the value of any property the parties may have received under the terms of the agreement.

In *Movius v. Movius*, 163 Mont. 463, 517 P. 2d 884 (1974), factors considered by the court in finding an alimony provision severable included, *inter alia*:

- that the wife sought alimony in her pleadings, and the court awarded same;
- that the alimony was to terminate in case of wife's remarriage;
- that the wife assumed no liabilities, nor was there any evidence that she gave up anything in the way of support and maintenance in consideration of a more favorable property division.

The court went on to say:

> "In short, here there is no interrelationship between the alimony provisions and the property division that would

destroy the rest of the contract if the amount of alimony payments were modified by the court. Absent such mutual interdependency, the alimony provisions of the agreement incorporated in the decree are not an integral part of the property settlement but are in all respects separable therefrom and subject to subsequent modification by the court in its discretion on a proper showing of changed circumstances." 163 Mont. at 468, 517 P. 2d at 887.

The California courts have dealt extensively with the problem at hand. *See, e.g., Plumer v. Plumer*, 48 Cal. 2d 820, 313 P. 2d 549 (1957); *DiMarco v. DiMarco*, 60 Cal. 2d 387, 33 Cal. Rptr. 610, 385 P. 2d 2 (1963). These cases supply *indicia* that an agreement is integrated, thus precluding modification of support payments, including: agreement between husband and wife that their purpose is to reach a final settlement of rights and duties with respect to *both property and support*, that they intend that support provisions constitute reciprocal consideration for property provisions, and that they waive all rights arising out of the marital relationship except those expressly set out in the agreement.

It goes without saying that each case involving the issue at hand must be decided upon its own facts. We are, however, guided by the reasoning and principles employed by courts of other jurisdictions which have considered the question, as reflected in the above cited cases. We are unable to agree with the district court that the alimony provisions of the consent judgment were other than as denominated, *i.e.*, alimony. Much significance is attributed by the defendant to the recitals in the consent judgment and the judgment of divorce to the effect that all matters in controversy arising from the pleadings had been agreed upon. We do not consider such language determinable upon the question as to whether the support provision of the consent decree is separable, or instead constituted consideration for a property settlement. Matters in controversy which arose from the pleadings and were settled by the consent judgment included questions relating to abandonment, adultery, indignities, dependency, and support obligations, etc. Not in controversy on these pleadings were matters relating to the division of property owned jointly by the parties.

In sum, our holding is that there is nothing on the face of the record which was before the district court which would indicate that the periodic alimony payments which defendant was ordered to pay to plaintiff under the terms of the consent judgment constituted reciprocal consideration for a property division. There is nothing on the face of the consent decree to indicate, as a matter of law, that the alimony payments were anything other than "permanent alimony", as so denominated.

[3] The question remains, however, whether the trial court erred in dismissing plaintiff's motion on the alternative grounds that the only change in circumstances alleged was a substantial increase in defendant's income. Notwithstanding that the district court found as a fact that such was the only change of circumstances alleged by plaintiff in order to determine the propriety of the entry of judgment of dismissal, we have examined plaintiff's pleading to determine if the allegations contained therein were sufficient to withstand a motion to dismiss. We hold that they were sufficient.

Paragraph 6 of plaintiff's motion reads as follows:

> "That the Plaintiff Sallie Walston White is informed and believes and therefore alleges that the defendant is currently earning in excess of $100,000.00 per year, which amounts to a substantial change in circumstances warranting an increase in the amount of permanent alimony that is to be paid to her by the Defendant, *since the amount of $100.00 per week as set forth in the Judgment of November 17, 1969, is totally inadequate under the current circumstances.*" (Emphasis added.)

While plaintiff would bear the burden of showing a substantial change of circumstances at a hearing upon the question of modification, the allegations to the effect that the then-current payments were inadequate were sufficient to withstand defendant's motion. Specific allegations as to the basis of such inadequacy were not required. *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E. 2d 506 (1969).

For the reasons stated, the order of the district court dismissing plaintiff's motion in the cause is reversed and this cause is remanded for a hearing.

Reversed and remanded.

Judge HEDRICK concurs.

Judge MITCHELL dissents.

Judge MITCHELL dissenting.

I would hold that the trial court correctly interpreted paragraph 6 of the plaintiff's motion, quoted in full in the majority opinion, as alleging no change of circumstances other than an increase in the defendant's income. The majority relies upon the last clause of that paragraph which alleges that the defendant's weekly payments for the support of the plaintiff as required by the consent judgment of 17 November 1969 are "totally inadequate under the current circumstances." When the paragraph is read in its entirety, however, it is apparent that the language relied upon by the majority relates back to the remainder of the paragraph which, in my view, alleges that the "current circumstances" have been brought about *solely* by virtue of an increase in the defendant's income. The plaintiff does not allege, nor did she allege in 1969, that the payments by the defendant were not adequate when agreed upon to support her in the manner to which she had become accustomed during the marriage. Instead she relies *solely* upon her allegation of increase in the defendant's earnings. Although I have found no North Carolina case directly in point, I would hold that payments for the support of a dependent former spouse, without regard to whether they are designated as "alimony," may not be modified *solely* by virtue of improvements in the financial status of the supporting spouse. *Arnold v. Arnold*, 332 Ill. App. 586, 76 N.E. 2d 335, 18 A.L.R. 2d 1 (1947).

Additionally, in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964), Justice Sharp (now Chief Justice), spoke for a unanimous Supreme Court of North Carolina and held that:

> [A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of

> alimony would be subject to modification in a proper case. *Briggs v. Briggs*, 178 Or. 193, 165 P. 2d 772, 166 A.L.R. 666. However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties. 2 A Nelson on Divorce and Alimony (2d Ed. Rev.) § 17.03; Annot., 166 A.L.R. 693-701.

262 N.C. at 70, 136 S.E. 2d at 243.

Here, the original judgment of 17 November 1969 states on its face that the parties have consented and agreed that the judgment is just and agreeable with respect to them and that the judgment is determinative "of their respective rights and obligations." The trial court's judgment of 18 November 1969 granting the defendant an absolute divorce is made a part of the record on appeal and its terms and date of entry indicate that it was consented to by the plaintiff as consideration for the consent of the defendant to the judgment of the previous day. Where, as here, the consent judgment establishing support for the dependent spouse is consented to as consideration for other consent judgments or agreements also a part of such final settlement and states specifically that the purpose of the parties is to reach a final settlement of their rights and duties, I would hold such facts to constitute conclusive evidence that an integrated and not a separable agreement was intended and entered. *See DiMarco v. DiMarco*, 60 Cal. 2d 387, 385 P. 2d 2, 33 Cal. Rptr. 610 (1963). To permit the trial court now to modify the provisions of this agreement would destroy the whole, as it was based upon the reciprocal considerations flowing between the defendant and the plaintiff at the time of their divorce. In my view, this would violate the teaching of *Briggs* that, where such an "entire agreement" will be destroyed by modification, it is not separable and may not be changed without the consent of the parties. Nor do I find the fact that the reciprocal considerations here are contained in two judgments dealing with divorce, property settlement and support, rather than a single judgment containing reciprocal provisions for a division of property and for support, sufficient ground upon which to declare the agreement of the parties separable.

I fear the holding of the majority will encourage dependent spouses to enter agreements and consent to judgments which adequately provide for their needs in the manner to which they are accustomed at the time of their divorce, then forever review the fortunes of their former spouses with an eye toward achieving a windfall profit *solely* by virtue of the improvement of those fortunes. The supporting former spouses, having reached fair and just settlements of such matters and gone on to achieve success, at times with the help and encouragement of a new spouse and family, will never know with any certainty which fruits of their labor they may call their own. I do not find this result desirable and, for reasons previously set forth in this dissent, I would hold that such is not required by law.

I respectfully dissent from the opinion of the majority and would affirm the order of the district court dismissing the plaintiff's motion in the cause.

LORRAINE B. SPENCER v. RICHARD E. SPENCER

No. 7718DC823

(Filed 15 August 1978)

1. Husband and Wife § 10; Constitutional Law § 4— constitutionality of privy examination statute—husband's lack of standing to raise

Defendant husband had no standing to attack the constitutionality of G.S. 52-6, since a ruling of unconstitutionality would result in the elimination of the privy examination altogether, not in a requirement that married males also undergo a privy examination, and such a holding would have absolutely no effect on defendant; moreover, even if the question of constitutionality were properly before the court and the court should uphold the validity of the statute made applicable to both sexes, defendant could show no injury since evidence supported the trial court's conclusion that, because of defendant's degree of education, experience, and sophistication and his excellent legal representation, defendant would not have benefited in any way from a private examination if one had been available to him.

2. Husband and Wife § 11.2— separation agreement—amount of maintenance and support—improper determination

In an action to recover sums due under a separation agreement which provided that plaintiff should receive one-fourth of defendant's income for the preceding year, income being defined as adjusted gross income as shown on defendant's federal income tax return, the trial court erred in disallowing, for

the purpose of maintenance and support payments, adjustments to gross income due to losses on the rental of defendant's beach cottage since plaintiff, not defendant taxpayer, had the burden of proving that the property in question was not held for the production of income, and the court's findings as to part-time personal use and periods of vacancy did not support the conclusion that the acquisition and maintenance of the beach property was not an activity engaged in for profit and that defendant was entitled to deductions only under 26 U.S.C. 183.

APPEAL by defendant from *Yeattes, Judge.* Judgment entered 12 May 1977, District Court, GUILFORD County. Heard in the Court of Appeals 28 June 1978.

Plaintiff and defendant formerly were husband and wife. They entered into a separation agreement 7 June 1960. The agreement provided *inter alia* that plaintiff wife would receive, each year after 1 January 1972, in equal monthly installments, 25 percent of defendant's income for the preceding year for her maintenance and support. "Income" was defined as adjusted gross income as shown on his federal income tax return plus any capital gains deductions and any "tax-free" income. The expenses of the defendant deductible in arriving at adjusted gross income were to be "subject to reasonable additional scrutiny . . . so that the Wife shall not be subjected to unwarranted adjustments. . . ." An absolute divorce was granted in 1961.

Payments continued until 1976 when the defendant ceased making payments. Also, plaintiff contends, insofar as this appeal is concerned, that the 1975 payments were deficient in that defendant claimed an unwarranted deduction. Plaintiff sought a similar adjustment to the 1976 reported adjusted gross income for certain of that year's deductions. Plaintiff alleged, and offered evidence tending to prove, that she was entitled to the payments.

Defendant answered admitting plaintiff's allegations except for the contentions that he claimed unwarranted deductions. As a defense, defendant alleged that the agreement was void because G.S. 52-6, with which the parties had complied, unconstitutionally denied him the right to a privy exam.

At trial, the only genuine dispute as to unwarranted deductions was over deductions claimed for a beach cottage owned by defendant and his present wife. Defendant asserted that he held the cottage as rental property. He testified that he advertised the

property for rent and rented it some. He also used the property personally one to three weeks a year. The cottage remained unoccupied some of the time. Defendant's tax returns for 1974 and 1975 reflected a loss on this property.

The trial court held that G.S. 52-6 was not violative of either the United States Constitution or the Constitution of North Carolina. The court further held that, as to the beach cottage, "it cannot be concluded that the acquisition and maintenance of this property was an activity engaged in for profit. . . ." The court held that defendant could deduct only the cost of taxes and interest on the cottage. This holding was expressly pursuant to 26 U.S.C. § 183 which provides, in pertinent part:

> "In the case of an activity not engaged in for profit . . . , there shall be allowed—
>
> (1) the deductions which would be allowable under this chapter for the taxable year without regard to whether or not such activity is engaged in for profit, and
>
> (2) a deduction equal to the amount of deductions which would be allowable under this chapter for the taxable year only if such activity were engaged in for profit, but only to the extent that the gross income derived from such activity for the taxable year exceeds the deductions allowable by reason of paragraph (1)."

The court entered judgment for plaintiff for 25 percent of the unwarranted deduction claimed on the 1974 return (the amount by which the 1975 payments were affected); for the full amount of 1976 payments including the adjustment for the unwarranted deduction; and for the full amount for the first three months of 1977.

From that judgment, defendant appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff appellee.

Janet L. Covey for defendant appellant.

MORRIS, Judge.

We will address first the constitutional issues raised by defendant's appeal. Defendant alleges that G.S. 52-6 is violative of

the equal protection clauses of the United States Constitution and the Constitution of North Carolina; that G.S. 52-6 confers a valuable right upon women; and that the separation agreement would be void had the plaintiff not been subject to a privy exam. He concludes that the proper means by which to cure the constitutional defect of G.S. 52-6 is to treat him as if he were a woman who had been denied a privy exam and to declare the separation agreement void since he has been denied the valuable right of a privy exam. Plaintiff summarily dismisses defendant's argument. She contends that this case is controlled by *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915). We do not feel that defendant's arguments should be so lightly dismissed; nor do we believe that the present case is necessarily controlled by *Butler v. Butler*, supra.

In addressing defendant's argument, we must first examine the history behind G.S. 52-6. At common law, the fiction of the unity of husband and wife rendered all deeds of separation void. Our Court was especially troubled by the possibility of a separation agreement.

> "The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics—its oneness—'they shall be no longer twain but one flesh,' 'to live *together* after God's holy ordinance,' 'so long as they both shall live.' . . . It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven, their sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but *together*—the nursery of morality and piety, and the bulwarks of society.
>
> How different from this is marriage, quarrel, separation!—the anomalous condition of a husband without a wife, a wife

> without a husband, parents without children, and children without parents! Such relations too surely follow *deeds of separation*. . . .
>
> * * *
>
> Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties towards a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.
>
> * * *
>
> We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court." *Collins v. Collins*, 62 N.C. 153, 155-159 (1867).

Though the Court had earlier raised questions concerning the continuing validity of *Collins v. Collins, supra*, in such cases as *Sparks v. Sparks*, 94 N.C. 527 (1886), it was not until 1912 that the Court expressly upheld the validity of a separation agreement. In *Archbell v. Archbell*, 158 N.C. 408, 74 S.E. 327 (1912), the Court held that

> "In *Collins v. Collins*, 62 N.C., 153, the Court made definite decision 'that articles of separation between husband and wife, whether entered into before or after separation, were against law and public policy and therefore void.' Since that decision was rendered in 1867, our statutes upon 'Marriage and Marriage Settlements and Contracts of Married Women' as entitled in The Code of 1883 and contained with amendments in Revisal 1905, ch. 51, have made such distinct recognition of deeds of this character, more especially in Revisal, secs. 2116, 2108, 2107, etc., that we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds

are not void as a matter of law. This change in our public policy, which has been not inaptly termed and held synonymous with the 'manifested will of the State,' *Jacoway v. Benton*, 25 Arkansas, 634, has been already recognized in several of our decisions, as in *Ellett v. Ellett*, 157 N.C., 161; *Smith v. King*, 107 N.C., 273; *Sparks v. Sparks*, 94 N.C., 527. . . ." 158 N.C. at 413, 74 S.E. at 329.

Revisal 1905, chapter 51, section 2107, the statute which governed *Archbell v. Archbell*, supra, provided that contracts between a husband and wife would be effective to transfer any interest in real estate, including the income interest, for longer than three years, only if the wife were privately examined. (Its wording closely parallels the language of G.S. 52-6.) Section 2108 of chapter 51 of the Revisal of 1905 validated contracts executed in conformity with section 2107, and section 2116 of that same chapter conferred "free trader" status upon a woman separated under a deed of separation. These provisions parallel the earlier provisions of sections 1831, 1835, and 1836 of chapter 42 of the Code of 1883.

One can see that the forerunner of G.S. 52-6 was viewed as an act increasing the rights of women. In *Sims v. Ray*, 96 N.C. 87 (1887), the Court in discussing a deed from the wife to her husband, held as follows:

> "[W]e take it as settled, that prior to the act of 1871-'2, incorporated in *The Code*, Secs. 1835, 1836, the wife could not by deed convey to her husband, the doctrine being, as laid down in Malone on Real Property, 600, that 'unless the wife convey under power to dispose of the same, her disabilities are a bar and on her death the land descends to her heirs,' and except as authorized by Secs. 1835 and 1836 of *The Code*, this is still the law. . . ." 96 N.C. at 89.

At the time of its enactment and at the time our Supreme Court examined its constitutionality, the statute requiring a privy exam conferred a right upon women which they had previously been denied—the right to enter into separation agreements. Thus, even though the examination requirement may have restricted the exercise of that right, the courts focused upon the new right conferred by the statute.

The case which expressly addressed the issue of constitutionality,[1] *Butler v. Butler, supra,* only made the general statement that the statute was constitutional and then cited three cases which did not discuss the constitutionality of the statute. Also, we note that no question as to the statute's constitutionality was raised at trial in *Butler v. Butler, supra*; nor was the question discussed in the parties' briefs. Furthermore, since the decision in *Butler v. Butler, supra,* the United States Supreme Court has radically altered its position on the constitutionality of classifications based upon gender. Compare *In re Lockwood,* 154 U.S. 116, 14 S.Ct. 1082, 38 L.Ed. 929 (1894), where the Court held that women could be constitutionally denied admission to the bar solely on the basis of sex, with *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed. 2d 514 (1975), where the Court held a gender based classification of the Social Security Act unconstitutional even though, when enacted, it was intended to be benevolent toward women and even though it was based upon an empirically demonstrable difference.

The Constitution must be applied in the light of the facts of the case before the court. The great principles underlying our system of government cannot be sacrificed, but neither can a court ignore reality. We should feel no need to apologize when the great tides of human events demand that we reappraise and reapply our Constitution in the light of changed facts. The role of women in our society has changed drastically since 1915. At the time *Butler v. Butler, supra,* was decided, women could not vote. Today, two women are members of the Cabinet of the President of the United States; a woman is chairman of the majority political party of this State; and two women serve as members of the Cabinet of the Governor of this State. At the turn of the century, women could be denied admission to the bar on the basis of gender. Today the Chief Justice of North Carolina is a woman, as is the Chief Justice of the Supreme Court of the most populous state in the Union. At the turn of the century, women rarely left the home unescorted. Under the previous administration, a

1. Since the decision in *Butler v. Butler,* supra, the citizens of this State have twice voted to amend the State Constitution in order more specifically to provide for equality under the law, and, on one of those occasions, they specifically voted in favor of equality between the sexes. *See* Constitution of North Carolina, Art. I, sec. 19 (1970 Amendment), and Art. X, sec. 4 (1964 Amendment). The courts of this State have never ruled upon the constitutionality of the statute in light of the equal protection clause of Article I, Sec. 19 of the Constitution of North Carolina. It would appear, therefore, that the holding of the Supreme Court in *Butler v. Butler,* supra, would not be controlling in a decision as to whether G.S. 52-6, now repealed, was in violation of the Constitution of North Carolina when applied to a case arising after 1970.

woman served as the United States Ambassador to our closest ally, Great Britain. This changing role of women must be considered by courts as part of the facts of the case before it. Because of the rapid rate of change, there would be genuine distinctions in cases arising in 1915, 1960, and 1978.

In a day when women were denied education, excluded from virtually all legal and commercial matters, and sheltered in the home, we do not doubt that G.S. 52-6 could pass constitutional muster. *See Butler v. Butler, supra.* We are equally convinced, however, that the statute cannot do so any longer. *See Weinberger v. Wiesenfeld, supra*; *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed. 2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971). Whether the statute would be justifiable in a 1960 factual setting, the setting in which this case arises, is less clear. However, we do not believe that it is necessary to decide that question at this time.

If G.S. 52-6 is unconstitutional, as defendant has argued and as we believe the holding of this Court would be were the question presented,[2] what would be the appropriate remedy? Defendant contends that the right to privy exam is a valuable right and that we should, therefore, extend that right to him. We disagree. When first enacted, G.S. 52-6 (or, rather, its forerunner) conferred a right—the right to enter into a separation agreement. *See Archbell v. Archbell, supra.* The question is whether the requirement that women have a privy exam prior to entering a separation agreement is a permissible restriction. While in 1915 it was a permissible restriction, the privy exam itself is now and always has been a restriction on the exercise of a right—*not a right* in itself. This Court has previously held that freedom of contract is a valuable right. *See North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E. 2d 357 (1973). We do not believe that infringing upon the freedom of contract enjoyed by married males would be the proper means to remedy the alleged invidious discrimination of G.S. 52-6. The proper remedy, indeed, the *only* remedy, would be to strike the privy exam requirement from G.S. 52-6.

2. We note that G.S. 52-6 has been repealed effective 1 January 1978. The statute has been replaced by a new sex-neutral statute, G.S. 52-10. Also, over the years, the legislature has tried to limit the damage of G.S. 52-6 by passing curative statutes such as G.S. 52-8 as it stood at the time this suit was initiated. However, like Br'er Rabbit and the Tar Baby, the legislature found itself unable to turn the wretched creature loose. *See Boone v. Brown*, 11 N.C. App. 355, 181 S.E. 2d 157 (1971).

If at some future time the question of the constitutionality of G.S. 52-6 is properly raised, and if it is found unconstitutional, the natural and logical result would certainly be the elimination of the privy exam requirement. A woman in the defendant's situation would no longer be allowed to defend on the basis that the separation agreement was void.

[1] Our courts, both state and federal, have long held that they were prohibited from issuing advisory opinions to private litigants and that, therefore, litigants who do not have a personal and concrete stake in the outcome of a case do not have standing to litigate. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed. 2d 536 (1973); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955). Defendant has urged this Court to hold G.S. 52-6 unconstitutional. If we were to do so, the result would be to eliminate the privy examination altogether; not to require married males also to undergo a privy exam. Such a holding would have absolutely no effect on defendant. He does not have a personal and concrete stake in this issue since its resolution in favor of invalidity would not affect his interest in the case. Defendant, therefore, has no standing to raise the issue of the constitutionality of G.S. 52-6 in this Court.

We reiterate our holding on this issue for the sake of clarity. We hold only that defendant has no standing to raise the issue of the constitutionality of G.S. 52-6. Our discussion of its constitutionality serves only to clarify our holding that defendant lacks standing to raise the issue.

Additionally, on the question of defendant's standing to attack the validity of the requirement of a privy examination of the wife, it is to be noted that the court concluded that "because of defendant's degree of education, experience, and sophistication and his excellent legal representation, the court concludes that he would not have benefited in any way from a private examination if one had been available to him." The court also concluded "that defendant did not suffer any disadvantage or detriment in this case on account of plaintiff's being privately examined." To the latter conclusion, defendant did not except. Although he did except to the former, he did not bring it forward and argue it in his brief. It appears from the record that the conclusions are supported by the findings of fact and the findings of fact are amply

supported by the evidence. Even if the questions of constitutionality were properly before us and we should uphold the validity of the statute made applicable to both sexes, defendant could show no injury.

[2] The second issue raised by this appeal is whether the trial court erred in disallowing, for the purpose of maintenance and support payments, adjustments to gross income due to losses on the rental of defendant's beach cottage. The trial court found that the cottage was advertised for rent; that defendant and his wife occupied the cottage three or four weeks a year; and that it remained unoccupied for a considerable period of time. The court concluded that "it cannot be concluded that the acquisition and maintenance of this rental property was an activity engaged in for profit. . . ." The court figured deductions in accordance with 26 U.S.C. § 183 and ordered increased payments.

While these findings might support the conclusion if, as in normal tax cases, the taxpayer had the burden of proof, the findings for the purposes of this case do not support the conclusion. First of all, we note that here plaintiff, not defendant (the taxpayer), has the burden of proof. Defendant has claimed deductions under 26 U.S.C. § 212 as "ordinary and necessary expenses paid or incurred . . . for the management, conservation, or maintenance of property held for the production of income. . . ." Apparently, the Internal Revenue Service has allowed the deductions. In order to prove her entitlement to an increased payment, plaintiff must show that the property was not held for the production of income.

If the trial court had found that the primary purpose in the ownership of the cottage was recreation, and there is evidence to support such a finding, it could have properly concluded that the activity was not engaged in for a profit. The findings as they are, however, do not support the conclusion that "it cannot be concluded that . . . this . . . was an activity engaged in for a profit. . . ." The simple findings of part-time personal use and periods of vacancy do not support the conclusion that defendant is entitled to deductions only under 26 U.S.C. § 183. That portion of the judgment dealing with the increase in payments must, therefore, be vacated, and the case remanded to the trial court for further findings in this regard.

Counsel for the parties have furnished us with very well-written briefs evidencing exhaustive research. We are appreciative of their efforts. We feel compelled, however, to point out to defendant's able counsel that the efficacy of an otherwise excellent brief is greatly diminished by reason of failure to refer to either exceptions or assignments of error. This is a glaring violation of Rule 28(b)(3), North Carolina Rules of Appellate Procedure, and, but for the gravity of the question raised, would require dismissal of the appeal.

The judgment of the trial court in denying defendant's motions to dismiss and in holding defendant liable under the separation agreement is affirmed for the reasons set out previously. The judgment of the trial court, insofar as it reflects an increase in the payments due as a result of disallowing certain deductions related to the rental of the beach cottage, is vacated, and the case is remanded for further findings of fact.

Affirmed in part; vacated in part; and remanded.

Judges HEDRICK and WEBB concur.

CARROLL JOHN WILLIAMS v. DR. THOMAS B. DAMERON, JR.

No. 778SC727

(Filed 15 August 1978)

1. **Appeal and Error §§ 24, 39.1— record on appeal—absence of assignments of error—certification not timely**

An appeal was subject to dismissal where the record on appeal contained no assignments of error as required by Appellate Rule 19(c) and the record was not certified within 10 days after it was settled as required by Appellate Rule 11(e).

2. **Physicians, Surgeons and Allied Professions § 18— leaving scalpel tip in patient's body—insufficient evidence of negligence—inapplicability of res ipsa loquitur**

In an action based on the alleged negligence of defendant orthopedic surgeon in leaving the tip of a scalpel blade embedded in plaintiff's back at the conclusion of disc surgery, the doctrine of *res ipsa loquitur* was inapplicable, and plaintiff's evidence was insufficient to show negligence on the part of defendant, where such evidence tended to show that a scalpel blade is normal-

ly used to open the covering of the disc; defendant surgeon chose a No. 15 scalpel rather than the No. 10 usually used because he knew the disc had hardened and there was more scarring than normally existed; defendant exerted the necessary pressure and the tip of the scalpel broke; defendant attempted to find the tip, but in the exercise of his best medical judgment, stopped the search after some 30 minutes because he was fearful of excessive bleeding which would be difficult to control in that area and because he decided that the tip was in an area where it would not move and could not cause harm to the plaintiff; plaintiff was thereafter advised of the situation; and an x-ray affirmed defendant's conclusion as to the location of the tip.

APPEAL by plaintiff from *Graham, Judge*. Judgment entered 5 May 1977, Superior Court, WAYNE County. Heard in the Court of Appeals 31 May 1978.

Plaintiff alleged that defendant, a physician and surgeon, was negligent in the performance of surgery on plaintiff's back in that defendant left a scalpel blade embedded in plaintiff's back during the course of surgery to relieve the pain resulting from a ruptured or slipped disc.

By answer defendant admitted that "on January 2, 1973, the defendant removed an extravasated disc at the L-5-S-1 level of the plaintiff's back; it is further admitted that during the course of the surgical procedure a small portion of the tip of a scalpel broke and was allowed, after a thorough exploration and examination of the disc space, to remain in the disc space between L-5 and S-1 inasmuch as the very small piece of metal was stable, immovable, and in an entirely benign area; and it is further admitted that following the operation the defendant explained the situation fully and in detail to the plaintiff."

At the end of plaintiff's evidence, defendant moved for a directed verdict on the basis that plaintiff had shown no negligence on the part of defendant or any causal relationship between defendant's conduct, negligent or otherwise, and the pain of which plaintiff now complains. The court allowed the motion, and plaintiff appeals.

Strickland & Fuller, by Robert E. Fuller, Jr., for plaintiff appellant.

Smith, Anderson, Blount & Mitchell, by James D. Blount, Jr., and Joseph E. Kilpatrick, for defendant appellee.

MORRIS, Judge.

[1] At the outset we note that the record on appeal contains no assignments of error. Rule 10(c), North Carolina Rules of Appellate Procedure, provides that "[t]he exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient." In the record before us, there are no assignments of error whatever. The brief contains one *ARGUMENT*, which is the same as the *QUESTION INVOLVED*. The *QUESTION INVOLVED* refers to "Assignment of Error, Group I (R. p. 48)". At R. p. 48, we find plaintiff's exception No. 4, to the oral ruling of the court on the defendant's motion for directed verdict. There is no assignment of error. After the question is presented, under *ARGUMENT* appears the following: "This assignment of error is preserved in Exceptions No. 4 (R. p. 48)." Another violation of the Rules is also present. Rule 11(e) requires that the record shall be certified within 10 days after it has been settled. Here the record was not certified for some 30 days after it had been settled. The appeal is clearly subject to dismissal. Nevertheless we choose to address the merits of the appeal in view of appellant's obvious attempt to comply with the spirit of the Rules.

Plaintiff's evidence is summarized as follows: Plaintiff testified that he injured his back when he jumped off a combine. Dr. Cecil Johnson treated him for a short time and referred him to defendant. Defendant prescribed some exercises, but plaintiff's condition worsened. Defendant then prescribed bed rest, but this did not improve his condition. Defendant then told plaintiff that surgery for the removal of a disc seemed imperative. He told plaintiff that plaintiff would probably be in the hospital from seven to ten days, back at work running his tractor in three

months, and back to normal in six months. The morning after surgery plaintiff talked with defendant. On the second day he again talked with defendant and at that time defendant told him that the scalpel blade had broken and a part of the blade was in the bone area, and he didn't think it would ever bother him. He did not again discuss the situation with respect to the scalpel tip. After his discharge from the hospital, plaintiff continued to experience pain. Dr. Dameron told him to continue his exercises and that he would get better. In March, he again visited Dr. Dameron. Medication which had been prescribed by another doctor for a kidney infection had reacted adversely causing a stinging feeling over his body. His back was not hurting quite as badly. He was advised to walk a mile each day. In April he continued to have pain. Dr. Dameron said he was not improving as rapidly as he had hoped but again prescribed walking. He was discharged by Dr. Dameron in April but obtained appointments in June and twice in August because of the severe pain. In August Dr. Dameron suggested a brace. Plaintiff testified that two years after the surgery he was still able to do very little other than supervise. Three years after the surgery, he could run the tractor for about an hour at the time on level ground. He said he could possibly have run the combine a little but of that he was not sure. No doctor has ever related the pain he has suffered to the scalpel tip left in his back. He has been seeing a chiropractor who says his problem is pinched nerves and that he doesn't see how the presence of the scalpel tip could help from bothering him. He has been seen by Dr. Hardy, a neurosurgeon, at the request of defendant's counsel. Dr. Hardy performed tests and made x-rays and was of the opinion that plaintiff had no problem. Plaintiff had also been seen by Dr. Harrellson, an orthopaedic specialist at Duke. These visits were at the request of his own counsel. Dr. Harrellson diagnosed his problem as degenerative disease rather than the scalpel tip which was causing his problem and that the problem was higher up in his back, and he did not believe the scalpel blade was causing his problem.

Dr. Dameron testified that he did not tell plaintiff, but plaintiff had developed some weakness in his foot which could have led to paralysis. Defendant does approximately 50 operations of this type each year and has been practicing for 24 years. The procedure used in this surgery is as follows:

". . . Prior to the surgery, the patient was given an anethesia and intubated and turned on his abdomen for the surgery. The back is washed with Phisohex to kill germs. The patient is then strapped, then draped by sterile sheets and towels, and then Vidrape, a cellophane type material with sticky stuff on it, is used to protect against infection. Infection is a main concern in this type of operation.

An incision is then made at the spinous processes down to the bone and then the muscles are moved off the bone. The ligament is then removed and one is then able to see the spinal cord which is moved out of the way. The disc [sic] were then examined and it was found that one of the disc have blown out of its normal base. A piece of the disc, a gristle type substance had come out of its normal place and was pressing on a nerve. This was the reason there was a loss of the use of the foot. The nerve was then freed. Where the blowout had occurred the disc area had already sealed over. Since there was a concern there might be more gristle inside that would be hidden, a little incision was made in the covering of the disc and the disc material was removed by an instrument called a Pituatary Rongeurs. This work was very near the spinal cord and so Dr. Dameron testified that he had to be careful about injuring the spinal cord. Since the Pituatary Rongeurs was too large because of the scarring which had occurred where the disc had gone out before, a smaller blade, a Number 15 blade, was used. In trying to make an incision in that disc covering so the Pituatary Rongeurs could be put in there the tip of the blade broke off. This had happened before. However, usually when that happens you can reach in with the Pituatary Rongeurs and bring it out. In this case we went ahead and removed the disc, the particles of disc, and we could not get that little tip out. . . ."

Dr. Dameron further testified that in looking for the scalpel tip, he looked in places where it might possibly do some harm. In attempting to be certain that the tip was in a location where it was not going to do any harm, he spent 30 minutes looking for it and stopped at the point at which they felt that to go on would cause more bleeding, because it is difficult to control the bleeding in that area. "When the scalpel blade broke, no x-ray pictures were made. X-ray machines are available to the operating room. We

could have gotten an x-ray machine into the operating room, but it would not have taken a picture of this." Subsequent x-rays revealed that the scalpel tip was in the gristle of the bone called the cartilaginous plate. It was sort of like a filling in a tooth. It does not do any harm there. "It is metal, like we put metal joints in people now to hold a joint. As a matter of fact when I first started in orthopaedics we used to routinely put a little metal clip right in the center of this plate." Normally a No. 10 blade is used, but because of the narrowing and scarring and because of plaintiff's anatomy, a No. 15 blade was chosen. The scalpel blade is used to open the covering of the disc with a criss-cross incision. The scalpel blade is also used to "push through in there". Pressure has to be applied to break through—especially in this case because it was more tight than is normally the case. The scarring had caused the disc to be tough and harder to get to. The spinal cord is only 1/16" away and one can't be "jabbing". Pressure must be applied. That was when the scalpel blade broke.

> ". . . The cartilaginous plate is approximately one inch from the spinal cord, and at certain points is right adjacent to it. The blade is located about one-half inch from the spinal cord. As Mr. Williams gets older there will be some wear and tear in this area as he moves around. The cartilaginous plate would be approximately two and a quarter inches in diameter. Fifteen to twenty percent of the plate was removed during the operation. The plate is scooped away. That causes more fibrous tissue. This seals it off from the spinal cord. That way the ruptured disc will not come out and cause more trouble. This area was particularly sealed off in Mr. Williams because of that scalpel tip in there."

After the surgery, Dr. Dameron told plaintiff about the tip in his back and talked with him 15 or 20 minutes telling him that he did not think it would ever cause trouble. On a second occasion, he told him the same thing and plaintiff acted normally. Plaintiff remained in the hospital for six days. Dr. Dameron testified that some three weeks later he examined plaintiff who complained that he was tense, nervous, felt bad, hurt if he sat for long periods of time and hurt in his back. He was advised to walk more, avoid prolonged sitting and not to lift anything heavy. On his next examination, plaintiff said he was doing great, but Dr. Dameron testified that he was improving slowly. Plaintiff said he

felt bad in his face, his scalp, his arms and hands and his legs generally. He last saw plaintiff in August. Plaintiff said he hurt everywhere. Dr. Dameron testified that he felt this was not due to the surgery but to plaintiff's general tension and nervousness. Plaintiff seemed unusually concerned. The reflex test revealed that the left leg was better than it had been but not as good as normal, which is typical. Dr. Dameron further testified that he did not first put plaintiff on exercises but prescribed bed rest. He further testified that he would remove the tip for plaintiff if it bothered him but not otherwise, that it could leave the area in which it was lodged, that it had not, and in his opinion it will not move from its present location.

If there is no evidence of negligence on the part of defendant, or if there be evidence of negligence but no evidence that that negligence was a proximate cause of the pain and suffering of which plaintiff complains, the plaintiff's motion for directed verdict was properly granted.

Dr. Dameron testified that he chose a No. 15 blade, rather than a No. 10 (a larger blade) normally used in this surgery, because of the fact that the blade usually used was too large due to the scarring. There was absolutely no testimony, expert or otherwise, that this was not the right blade to use and that Dr. Dameron should have known that. There was absolutely no evidence, expert or otherwise, that Dr. Dameron was negligent in any respect. The complaint alleged that defendant negligently left the tip of a scalpel blade in plaintiff's back, and "[t]hat the defendant was negligent in his performance of his duties to this plaintiff as a patient, and had the defendant exercised due and reasonable care and used the skill and knowledge of a physician, he would not have left the scalpel blade embedded in the plaintiff's backbone and subjected the plaintiff to this additional physical pain and suffering as well as mental pain and suffering." There simply is no evidence that defendant was negligent in the performance of his duties. Plaintiff urges, however, that the doctrine of *res ipsa loquitur* is applicable. He relies on *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957); *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E. 2d 242 (1941); and *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932). In each of those cases, the surgeon was not aware that anything was amiss in the surgical procedure performed, and it was not until quite some time later

that the damage became apparent. The operation was concluded, the foreign object left in the patient's body, and the surgeon was without knowledge of how the mishap occurred. In *Mitchell v. Saunders, supra,* a gauze sponge used during the surgical procedure, was left in the wound. The defendants testified that they used that type sponge during the procedure but that they carefully felt around to be sure none was left. The Court said: "The fact itself, that is, the leaving of a sponge within the body of the patient, is so inconsistent with due care as to raise an inference of negligence." 219 N.C. at 184, 13 S.E. 2d at 246. In *Shearin v. Lloyd, supra,* a lap-pack was left in plaintiff's side during an appendectomy. It was not discovered for several months when plaintiff began to suffer severe pain in the area of the surgery. X-ray revealed "a twisted opaque marker, of the kind in a lap-pack so that the presence of a lap-pack in the body would show on an X-ray film." Two additional operations were performed on plaintiff by defendant but the infection continued. In ruling that the trial court erred in granting defendant's motion for involuntary nonsuit, the Court again stated that the "leaving of such a foreign substance in the patient's body at the conclusion of an operation 'is so inconsistent with due care as to raise an inference of negligence.' [Citations omitted.]" 246 N.C. at 366, 98 S.E. 2d at 511, *citing Mitchell v. Saunders, supra.* In *Pendergraft v. Royster, supra,* defendant performed surgery on plaintiff to correct a misplaced womb and other problems. Several months later, a portion of a glass tube worked itself out of plaintiff's vagina. On subsequent occasions over a 12 month period, other pieces of glass were discharged from her vagina. Defendant testified that the cat gut used in surgery came in a small sealed tube; that the tube was broken by the nurse but at a different table than the table on which the vaginal packing was placed; that he did not break any tube and could not account for the glass having been left in plaintiff's womb. The Court held that the court correctly instructed the jury with respect to the application of the doctrine of *res ipsa loquitur.*

[2] We think these cases are inapposite to the case *sub judice.* Here defendant was aware that the disc had hardened and that there was more scarring than normally existed. For that reason he chose a No. 15 scalpel, rather than the No. 10 usually used. He exerted the necessary pressure, and the tip of the scalpel broke.

He attempted to remove it, but in the exercise of his best medical judgment, stopped the search after some 30 minutes because he was fearful of excessive bleeding which would be difficult to control in that area and having decided that the tip was in an area where it would not move and could not cause harm to the patient. Plaintiff was advised of the situation and x-ray affirmed defendant's conclusion as to the location of the tip. This is simply not a situation requiring or meriting the application of the doctrine of *res ipsa loquitur.*

Defendant's motion for directed verdict was based on the absence of evidence of negligence and the absence of evidence of causal relationship between any of defendant's conduct, even if negligent. We agree on both counts. We do not reach the second ground, and discussion of it is unnecessary. Suffice it to say the court correctly allowed defendant's motion.

Affirmed.

Judges VAUGHN and MARTIN concur.

RAY SIPE v. ESPIE D. BLANKENSHIP AND BEULAH MELO BLANKENSHIP AND RAY SIPE v. ESPIE D. BLANKENSHIP, BEULAH MELO BLANKENSHIP; AND TROY AUTON

No. 7722SC330

(Filed 15 August 1978)

1. Boundaries § 15.1; Trespass § 7— processioning proceeding—damages for cut timber—directed verdict properly denied

The trial court did not err in denying defendants' motion for directed verdict in a processioning proceeding and in a civil action to recover damages for trees cut by defendants from plaintiff's property, since a bona fide dispute existed as to the true location of the dividing line between the parties' properties, making this action a true processioning proceeding which could not be dismissed by a directed verdict, and since the evidence was sufficient to permit the jury to determine what trees, and the value thereof, which each party had cut across the boundary line on the land of the other.

2. Adverse Possession § 25.1— *possession for less than twenty years*—possession under belief that property is described in deed—no adverse possession

The trial court in a processioning proceeding did not err in refusing to submit an issue to the jury as to whether defendants and those under whom they claimed had acquired title to a disputed area by adverse possession since defendants failed to show either that they themselves possessed the disputed area for twenty years or that they were in such privity with their mother from whom they acquired the land as would in law entitle them to tack their possession to hers; moreover, it is the rule in this State that a grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it was covered by the description in his deed will not be considered adverse, and defendants' possession therefore could not be considered adverse since defendants exercised possession over the disputed area solely because they believed, mistakenly as it turned out, that it was included in the description contained in their deed.

APPEAL by defendants from *Graham, Judge*. Judgment entered 17 December 1976 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 8 February 1978.

Plaintiff Sipe and defendants Blankenship own adjoining tracts of land, the eastern boundary line of the Sipe tract being contiguous with the western boundary line of the Blankenship tract. This case arose because of a dispute as to the correct location of that line. The deed by which plaintiff Sipe acquired title to his land described his tract as follows:

> Beginning at a post oak, Northwest corner of the Home Tract; thence South 190 poles to a chestnut oak near Simon Cline's; thence East 120 poles to a post oak, Icenhour's corner; thence North 31 poles to a hickory; thence East 22 poles to a stone; thence North 178 poles to a pine knot by the road; thence West 144 poles to the Beginning, containing 177 acres, more or less.

The deed by which defendants Blankenship acquired title to their land described their tract as follows:

> Beginning on a black oak, George Bowman's corner; and runs West 158 poles to a pine knot by the side of the road; thence South 198 poles to a stone in Icenhour's line; thence East 20 poles to a stake, Icenhour's corner; thence North 10½ poles to a stake; thence East 121 poles to a hickory; thence North 159 poles to the Beginning, containing 129 acres, more or less.

At a pretrial conference, the parties stipulated that the correct distance of the second call in the deed to defendants Blankenship was 178 poles rather than 198 poles. Thus, the eastern boundary line of the Sipe property as described in his deed is the fifth call therein which is given as running from a stone "North 178 poles to a pine knot by the road," while the western boundary line of the Blankenship property as described in their deed is the second call therein which, as corrected by stipulation, is the line described as running from a pine knot by the side of the road "South 178 poles to a stone in Icenhour's line."

A dispute having arisen as to the correct location on the ground of the divisional line, plaintiff Sipe on 17 July 1974 instituted Case No. 74SP36 as a processioning proceeding under G.S., Chap. 38 against defendants Blankenship to establish the true location of the dividing line. On the same date, plaintiff Sipe instituted Case No. 74CVD237 as a civil action against defendants Blankenship and against defendant Auton, who had contracted with defendants Blankenship to cut timber from their tract. In his complaint in the civil action plaintiff alleged that the defendants had trespassed on his land by cutting and removing timber therefrom. Plaintiff prayed for an injunction to restrain defendants from cutting and removing trees from his land and for recovery of damages in double the value of the trees already cut as provided in G.S. 1-539.1. (The rights of defendant Auton are not directly involved on this appeal and the pleadings and evidence relating to plaintiff's claim against Auton and to Auton's counterclaim against plaintiff will not be set forth herein.)

Defendants Blankenship filed answer in the processioning proceeding, Case No. 74SP36, in which they disputed the correctness of plaintiff's eastern boundary line as he had alleged it to be in his petition. By way of further answer and defense (as finally amended), defendants also alleged that they and their predecessors in title had been in continuous, open, notorious, and adverse possession of the tract described in their deed under known and visible lines and boundaries for twenty years and for seven years under color of title. Defendants Blankenship also filed answer in the civil action, Case No. 74CVD237, in which they denied the allegations in plaintiff's complaint and alleged in a counterclaim that during the month of February 1974, plaintiff trespassed upon defendants' tract of land by cutting and remov-

ing trees therefrom, for which defendants sought recovery of damages from plaintiff in double the value of the trees cut.

The parties stipulated that the processioning proceeding, Case No. 74SP36, and the civil action, Case No. 74CVD237, should be consolidated for trial, and accordingly the two cases were consolidated and tried together before a jury in the superior court. At the trial there was introduced a court map which had been prepared by the registered surveyor appointed by the court to survey the contentions of the parties. The parties stipulated that plaintiff claims the true dividing line is the line shown on the court map as beginning at Point 1 and terminating at Point 2, while defendants claim the true dividing line is the line shown on the court map as beginning at Point A and terminating at Point B. Point A and Point 1 mark the southern termini while Point B and Point 2 mark the northern termini of the respective lines. The court map shows that Point A is 49.79 feet west of Point 1 along the southern boundary of the property and Point B is 115.45 feet west of Point 2 along the northern boundary. The line from Point 1 to Point 2, being the line contended for by the plaintiff, is a straight line. The line between Point A and Point B, being the line contended for by the defendants, is not a straight line but has a number of slight turns to take in certain trees and other objects which defendants contended to the court-appointed surveyor marked or fell on their side of the boundary line. The area between the two lines, being the area in dispute, is a long, narrow strip of land containing 6.16 acres according to the court map.

After presentation of evidence by both parties, the jury returned verdict finding that the location of the true boundary line between plaintiff and defendants is the line from Point 1 to Point 2 as shown on the court map, being the line contended for by plaintiff, that defendants had cut timber of the value of $680.00 from the land of the plaintiff, and that plaintiff had cut timber of the value of $400.00 from the land of the defendants. From judgment in accord with the verdict, defendants appealed.

Max F. Ferree, P.A., by William C. Gray, Jr., and Jerry A. Campbell for plaintiff appellee.

Sanders & London by Robert G. Sanders and J. Andrew Porter, and James B. Ledford for defendants appellants.

PARKER, Judge.

[1] Appellants first assign error to the denial of their motions for a directed verdict. In this there was no error. The pleadings and evidence make clear, and appellants in their brief filed on this appeal acknowledge, that the western line of the defendants is the same as the eastern line of the plaintiff. That a bona fide dispute exists as to the true location of that line is manifest. Therefore, this is in fact as well as in form a true processioning proceeding under G.S. Chap. 38, the primary purpose of which is to establish the correct location of the disputed dividing line. Such a proceeding may not be dismissed by a directed verdict. *Cornelison v. Hammond*, 225 N.C. 535, 35 S.E. 2d 633 (1945). Plaintiff had the legal right to have the line ascertained and fixed by judicial decree regardless of the sufficiency of his evidence to establish the line as contended for by him. Moreover, in this case plaintiff's evidence was sufficient to support the jury's verdict finding the true line to be as contended for by him. The remaining issues in the case, being those raised by the pleadings in the civil action in which each party charged the other with trespass by cutting timber across the line, could only be resolved by first determining the true location of the divisional line. Only then could the jury determine what trees, and the value thereof, which each had cut across the line on the land of the other. In our opinion, the evidence was sufficient to enable the jury to make that determination, and the court did not err in denying defendants' motions for a directed verdict, either in the processioning proceeding or in the civil action. Defendants' first assignment of error is overruled.

[2] Appellants' only remaining assignment of error is directed to the court's refusal to submit an issue to the jury as to whether defendants Blankenship and those under whom they claim had acquired title to the disputed area by adverse possession under known and visible lines and boundaries for more than twenty years. We find no error in the refusal of the court to submit this issue. In this connection, defendants Blankenship presented evidence to show that they acquired title to their tract in 1963 by deed from their mother, who in turn had acquired title in 1890 in connection with the division of her father's estate. In 1916 or 1917 their mother and her brother, who then owned the tract now owned by plaintiff Sipe, had the line between their tracts

surveyed and placed a fence on the line. Remains of this fence in the form of downed fence posts and barbed wire were still visible when the survey was made for the court map in this proceeding in 1975, and these are shown as lying along the line from Point A to Point B on the court map. Their mother pastured cattle on the east side of the fence, and her brother pastured sheep on the west. Their mother also had timber cut on her tract up to the A-B line. The property was checked two or three times each year, and she cut what needed to be thinned out. She had timber cut during the past fifteen years. After they acquired title from their mother, defendants Blankenship also had timber cut on their tract.

Obviously, if the jury had answered the first issue in defendants' favor and had found the correct location of the divisional line to be from Point A to Point B as contended by defendants, then defendants would have obtained title to the disputed area by virtue of the deed from their mother and no issue as to their obtaining title by adverse possession could have arisen. Therefore, it was only to take care of the eventuality that the jury might, as it in fact did, answer the first issue against them that defendants requested the court to submit an issue as to whether they had obtained title to the disputed area by adverse possession. "[I]n pursuing the method of proving title by adverse possession, under color of title, a deed offered as color of title is such only for the land designated and described in it." *Williams v. Robertson*, 235 N.C. 478, 483, 70 S.E. 2d 692, 696 (1952). In the present case, the jury by its verdict on the first issue determined that the description in defendants' deed does not embrace the disputed area. Therefore, defendants could not and do not now contend that they obtained title to the disputed area by adverse possession for seven years under color of title under G.S. 1-38. Rather, they contend that they, and their mother under whom they claim, adversely possessed the disputed area under known and visible lines and boundaries for twenty years so as to give them title under G.S. 1-40. More specifically, they contend by their second assignment of error that the evidence was such as to entitle them to have an issue submitted to the jury on this question and that the refusal of the court to submit such an issue was error entitling them to a new trial. We do not agree.

At the outset we note that there was no evidence that defendants Blankenship themselves ever exercised possession over the disputed strip of land at any time prior to receiving the deed to their tract from their mother in 1963. Therefore, it is obvious they could not themselves have had possession of the disputed area for the requisite twenty years required to ripen title in them by adverse possession unless they can show such privity between themselves and their mother as would in law permit them to tack their possession to hers. On the present record the only privity shown between defendants Blankenship and their mother was that created by the deed given in 1963, the description in which, according to the jury's verdict on the first issue, does not include the disputed area. Although a grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title may tack his grantor's possession of such land to that of his own for the purpose of establishing adverse possession for the requisite period, "the rule with us is that a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed." *Newkirk v. Porter*, 237 N.C. 115, 120, 74 S.E. 2d 235, 238 (1953). Thus, on the present record defendants Blankenship have failed to show either that they themselves possessed the disputed area for twenty years or that they are in such privity with their mother as would in law entitle them to tack their possession to hers. For this reason alone the court ruled correctly in refusing to submit an issue as to adverse possession.

For quite another reason, also, the court was correct in its ruling. It is the rule in this State that a grantee's occupation of land beyond the boundary called for in his deed under the mistaken belief that it was covered by the description in his deed will not be considered adverse. Thus, where a grantee goes into possession of a tract of land conveyed and also takes possession of a contiguous tract under the mistaken belief that the contiguous tract is also included within the description of his deed, no act on his part, however exclusive, open, and notorious, will constitute adverse possession of the contiguous tract prior to the time he discovers that the disputed area was not covered by the descrip-

tion in his deed. *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951); *Garris v. Butler*, 15 N.C. App. 268, 189 S.E. 2d 809 (1972); *see* Annot., 80 A.L.R. 2d 1171 (1961). *But see Dawson v. Abbott*, 184 N.C. 192, 114 S.E. 15 (1922). In this connection, defendant Espie D. Blankenship testified:

> I am not claiming any of Mr. Sipe's land. Just ours. I'm claiming where the old line was set up. What's always been the old line. My mother pointed out to me where this old line was.
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> * * * * *
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> . . . Sipe's east line and Blankenship's west line are the same by deeds. Out of the same corner. They are supposed to have the same corners. Says a pine knot and a stone in the Icenhour line in the south.

In view of this testimony, it is clear that the defendants Blankenship exercised possession over the disputed area solely because they believed, mistakenly as it turned out, that it was included in the description contained in their deed. Under *Price v. Whisnant*, *supra*, and *Gibson v. Dudley*, *supra*, such possession may not be considered adverse. For this reason also the court did not err in refusing to submit an issue as to adverse possession. Appellants' second assignment of error is overruled.

No error.

Judges MARTIN and ARNOLD concur.

BETTY B. ARNOLD v. MAX W. SHARPE AND COMMUNITY BANK OF CAROLINA

No. 7718SC843

(Filed 15 August 1978)

1. Libel and Slander § 2— libel per se

A publication is libelous per se if it tends, without aid of extrinsic proof, to expose the plaintiff to contempt or ridicule or to induce an evil opinion of him in the minds of people who hold to normal mores.

2. Libel and Slander § 5.1— writing that employee is trouble maker and gossip—libel per se

It is libelous per se to write of an employee that she is a trouble maker and gossip who cannot get along well with other employees.

3. Libel and Slander § 6— libelous memorandum—publication

There was sufficient evidence for the jury to conclude that a libelous typewritten memorandum prepared by a bank vice president was communicated to the bank president where the vice president testified that the memorandum was delivered to the president, since the jury could reasonably conclude that the president of a bank would read a memorandum submitted to him by a vice president of the bank.

4. Libel and Slander § 10.1— memorandum about employee—qualified privilege—malice

Qualified privilege was a defense to a former bank employee's action for libel based on a bank vice president's memorandum about the employee sent to the bank president if the vice president acted in good faith and without malice; however, the jury could conclude that the vice president's memorandum was induced by actual malice where there was evidence tending to show that the vice president had approved of the way plaintiff did her job prior to the day she was discharged as a bank employee, that on that day the vice president became angry with plaintiff because she reported to the president that the vice president took no action with regard to malingering employees, and that the vice president then wrote the memorandum which led to plaintiff's discharge.

5. Libel and Slander § 15— libel action—financial condition of defendant—punitive damages

Financial statements of a bank were admissible on the question of punitive damages in an action against the bank for libel.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Walker (Hal H.), Judge.* Judgment entered 26 May 1977 in Superior Court, GUILFORD County. Heard in the Court of Appeals 28 June 1978.

This is an action by the plaintiff for libel and for blacklisting the plaintiff in violation of G.S. 14-355. No evidence was presented as to blacklisting. The plaintiff's evidence was to the effect that in February 1975, she was employed by Community Bank of Carolina and that Max W. Sharpe was a vice president of the bank. She reported to him that some of the employees of the bank were taking more than an hour for lunch and having other employees punch them in on the time clock. Mr. Sharpe told her "it was none of her business." When she reported this again to Mr. Sharpe and he again did nothing about it, she reported the matter to the president of the bank on 24 February 1975. Following conferences between Mr. Sharpe and the bank president and

between Mr. Sharpe and Mrs. Arnold, Mrs. Arnold was that day discharged. Betty B. Arnold testified that prior to the day she was discharged Max W. Sharpe had never criticized her, but had only praised her. She testified further that when Mr. Sharpe returned from his conference with the bank president he seemed "very upset." He told her she had gone over his head and after some conversation "he got mad" and called her a "divorcee." Mary Jane Moore testified that she was employed by the bank in February 1975. Mr. Sharpe's desk was in an open area facing the people whom he supervised. It had drawers and it was not surrounded by any type of enclosure. Mary Jane Moore testified further that on 24 February 1975, Sarah Williams said something to her about a paper that was lying on Mr. Sharpe's desk and Mary Jane Moore walked over and glanced at it. It said "something to the effect that she gossiped and she could not get along well with employees and that she was a troublemaker. . . As to whether anyone was named in the handwritten document I don't recall." Three other employees of the bank—Mrs. Perry, Mrs. Williams, and Mrs. Taylor—were present when Ms. Moore looked at the paper and she heard the paper discussed in the bank "lots of times." The defendant Max W. Sharpe was called as a witness by the plaintiff and testified that he prepared a handwritten memorandum in regard to the plaintiff from which a typed memorandum was made which was delivered to the president of the bank. The handwritten memorandum was then destroyed. At the close of the plaintiff's evidence the defendant's motion for a directed verdict was allowed and the plaintiff has appealed.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, Michael K. Curtis and Jonathan R. Harkavy, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey and Hill, by William L. Stocks and Robert D. Albergotti, for defendant appellees.

WEBB, Judge.

For reasons stated in this opinion, we reverse the judgment of the superior court.

Libel is one of the two torts of defamation, the other being slander. It is an invasion of the interest in reputation and good name and requires that something be communicated to a third person that affects that interest of the plaintiff. To be libelous, the communication must usually be in writing although other

types of communication not germane to this case have been held libelous. *See* Prosser, W., Handbook of The Law of Torts (4th Ed. 1971), Chap. 19, § 112. Libels may be divided into three classes: (1) libel per se; (2) publications which are susceptible to two reasonable interpretations, one of which is defamatory and the other is not, and (3) libel per quod which are publications not obviously defamatory, but which become so when considered in connection with innuendo, colloquim and explanatory circumstances. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) and *Robinson v. Nationwide Insurance Co.*, 273 N.C. 391, 159 S.E. 2d 896 (1968). Unless a publication is actionable per se, the plaintiff must prove special damages. Special damages were not proved in this case, and the directed verdict was proper unless the publication by defendant Sharpe was libelous per se.

[1] A publication is libelous per se if it tends, without aid of extrinsic proof, to expose the plaintiff to contempt or ridicule or to induce an evil opinion of him in the minds of people who hold to normal mores.

In *Flake v. Greensboro News Co., supra*, at 786, the Supreme Court said:

> "It may be stated as a general proposition that defamatory matter written or printed, or in the form of caricatures or other signs, may be libelous and actionable *per se*, that is, actionable without any allegations of special damage, if they tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace and to induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse and society.
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> . . . But defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. The imputation must be one tending to affect a party in a society whose standard of opinion the court can recognize."

[2] We hold that it is libelous per se to write of an employee that she is a trouble maker, a gossip and could not get along well with other employees. We believe these words are susceptible of but one meaning and tend to expose the plaintiff to contempt,

ridicule or aversion by a recognized standard of opinion in society.

Words which have been held actionable per se are: "Do you know Captain McCall of the Charlotte Police Department? Call him and he can tell you about all the shady deals Mr. Badame has pulled." *Badame v. Lampke*, 242 N.C. 755, 89 S.E. 2d 466 (1955); allegations that a minister who as a member of a church "had been a disorderly member thereof in the sense that he was unwilling to cooperate in maintaining peace and the right spirit in the church but caused trouble amounting to a continuous upheaval and disrupted the peace and harmony of the church and therefore was excluded therefrom." *Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660 (1954); the statement by a butcher that his competitor had slaughtered a mad dog-bitten cow, *Broadway v. Cope*, 208 N.C. 85, 179 S.E. 452 (1935). A publication was said to be actionable per se which permitted inferences that (1) plaintiff, secretary and treasurer of the Duplin County Farm Bureau, did not pay certain women fees which they were due, (2) she did so because she had no records, (3) that the records had been missing for some time, (4) that important records of the Farm Bureau, which should have been in plaintiff's custody, were missing without explanation, and (5) the sheriff was called in to investigate the matter of the missing records. *Bell v. Simmons*, 247 N.C. 488, 101 S.E. 2d 383 (1958). A publication was held libelous per se which said of an ordained minister that there was not in this generation "a more ignorant man . . . or one less charitable toward men who might honestly disagree with him." *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616 (1927). It has been held to be libel per se for a newspaper to publish that the plaintiff was the leader of a strike and had been arrested for trespassing on mill property. The Court said this statement was calculated to injure the plaintiff and to prevent him from securing employment as a textile worker. *Lay v. Gazette Publishing Co.*, 209 N.C. 134, 183 S.E. 416 (1936). Words which have been held not to be actionable per se are: the plaintiff had "infavorable [sic] personal habits"; *Robinson v. Nationwide Insurance Co., supra.* "The plaintiff had Negro blood in his veins"; *Deese v. Collins*, 191 N.C. 749, 133 S.E. 92 (1926). From a reading of these cases, we believe it is libelous per se to publish of a person words which tend to deprecate a person in his or her job or profession. We believe that is what the memorandum of Mr. Sharpe tended to do for the plaintiff.

[3] Having determined that the publication by defendant Sharpe was libelous per se, we turn to the question of communication. Unless the defamatory words were communicated to a third person they are not actionable. The plaintiff contends there were communications when Mary Jane Moore read the handwritten memorandum and when the bank president read the typewritten memorandum.

Considering first the reading of the handwritten memorandum by Mary Jane Moore, there is no direct evidence that Mary Jane Moore saw the plaintiff's name on the memorandum. Max W. Sharpe testified that he prepared, at his desk, a handwritten memorandum in regard to Mrs. Arnold, but he did not remember whether he left it on his desk. He said it was substantially the same in content as the typewritten memorandum which he delivered to the bank president. Mary Jane Moore testified that after being told of a memorandum by other employees of the bank, she read a part of it while it was lying on Mr. Sharpe's desk. Mary Jane Moore testified she did not recall seeing the plaintiff's name. The question then is whether Mary Jane Moore could know from other evidence that the memorandum referred to the plaintiff. She testified she heard the memorandum discussed in the bank "lots of times", but she did not testify that anyone told her Mrs. Arnold's name was on it. We hold that there is evidence from which the jury could find that Mrs. Arnold's name was on the memorandum, but there is no evidence from which it could be concluded that Mary Jane Moore knew the memorandum was referring to the plaintiff. For this reason, we hold there was not a communication to Mary Jane Moore.

[4] We hold that there is sufficient evidence for the jury to conclude that the typewritten memorandum was communicated to the bank president. Mr. Sharpe testified it was delivered to the president. We believe the jury could reasonably conclude that the president of the bank would read a memorandum submitted to him by a vice president of the bank. As to this communication to the bank president, the defendants have pleaded and rely on a qualified privilege as a defense.

50 Am. Jur. 2d, Libel and Slander, § 195, at pages 698-700 says:

> "Conditional or qualified privilege is based on public policy. It does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege, and makes a showing of falsity and actual malice essential to the right of recovery.
>
> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right, or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty. The transmitter must have an interest or duty in the subject matter, and the addressee must have a corresponding interest or duty, but such duty may be moral or social, rather than a legal one. The defense of qualified privilege does not extend to a publication to the general public."

Max W. Sharpe's position as vice president of the bank and the occasion on which he delivered the memorandum to the president of the bank were sufficient to protect the parties from liability if Max Sharpe was acting in good faith. In order to overcome the defense of qualified privilege, the plaintiff must prove that Max Sharpe's action was induced by actual malice. *Jones v. Hester*, 260 N.C. 264, 132 S.E. 2d 586 (1963). We have held that the communication is libelous per se. The Supreme Court of North Carolina has said that defamatory charges which are actionable per se raise a presumption of malice. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971). We do not rest on this presumption. We hold there is evidence in this case from which the jury could conclude that Max W. Sharpe's communication was induced by actual malice. There is evidence that prior to the day she was discharged, he had approved of the way plaintiff performed her job, that on that day he became angry with her because she reported to the president that he took no action in

regard to malingering employees, and that he then wrote the memorandum which led to her discharge. We believe this was sufficient for the jury to infer actual malice.

[5] The last question presented by this appeal is in regard to a matter of evidence. The plaintiff offered in evidence and the court excluded the financial statements of the bank. We hold this was error. If the jury should find there was actual malice, they should be allowed to award punitive damages. *Stewart v. Nation-Wide Check Corp., supra.* On the question of punitive damages, evidence relating to the defendants' financial condition is admissible. *Roth v. Greensboro News Co.*, 217 N.C. 13, 6 S.E. 2d 882 (1940).

Reversed and remanded.

Judge MORRIS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion the written memorandum of and concerning the plaintiff allegedly communicated to the bank president by the defendant Sharpe was not libelous per se. Furthermore, I disagree with the majority that the evidence raises an inference that the defendant acted out of malice so as to destroy the qualified privilege which the evidence revealed existed as a matter of law.

STATE OF NORTH CAROLINA v. RONNIE LEE BEAVER AND JOHNNY LAWRENCE WILLIAMS

No. 7825SC150

(Filed 15 August 1978)

Searches and Seizures § 11— warrantless search of vehicle—item in plain view—no probable cause to believe item contraband—search and seizure improper

Since an officer, who had stopped defendants' vehicle because of a defective taillight, had neither a good faith belief that white powder residue in a shot glass held by one defendant between his legs was contraband or evidence

of a crime or reasonable grounds to form such a belief, he did not have probable cause to seize the shot glass, even though it was in plain view, and the trial court therefore erred in admitting the shot glass and its contents into evidence; moreover, the arrest of defendants and the later search of their persons and vehicle clearly arose from and were based upon the information obtained by virtue of the unlawful seizure of the shot glass and its contents, and the evidence seized by virtue of these arrests and searches was the product of actions not authorized by law and, thus, "fruits of a poisonous tree" which should have been excluded from evidence.

ON writ of certiorari to review orders of *Ferrell, Judge*, entered 26 May 1975. Judgments entered 29 May 1975 in Superior Court, CATAWBA County. Heard in the Court of Appeals 2 June 1978.

The defendants were each charged with one count of felonious possession of marijuana with intent to distribute. The defendant, Ronnie Lee Beaver, was additionally charged with misdemeanor possession of amphetamines. Upon their pleas of not guilty to all charges, the jury returned verdicts of guilty as charged in each case. We allowed the defendants' petitions for writs of certiorari to review the judgments of the trial court sentencing each defendant to imprisonment for not less than three nor more than five years on the marijuana charge and sentencing Beaver to a concurrent sentence of imprisonment for two years on the amphetamine charge.

Evidence introduced by the State in the trial court tended to show that on 31 October 1974, at about 11:00 p.m., Deputy Sheriff Gary Poovey of the Catawba County Sheriff's Department was patrolling Highway #16 south of Newton, North Carolina, in the company of another officer. He observed an automobile with one taillight out leave the parking lot of a closed service station. He stopped the vehicle and asked the driver, the defendant, Johnny Lawrence Williams, for his operator's license. Williams stated he did not have the license with him. He got out of the vehicle and stood beside it with Officer Poovey. Although Williams did not have his driver's license in his possession, Poovey did not at that point have any intention of arresting him or issuing a citation of any type.

While standing near the open door of the vehicle, on the driver's side, Poovey observed the defendant, Ronnie Lee Beaver, sitting on the passenger side of the front seat and holding a "shot

glass" between his legs. Officer Poovey also observed a transparent type cup with a handle in the vehicle. The shot glass "had a white powder substance in it." On "impulse upon seeing the white substance in the glass, [Poovey] realized that it could be a controlled substance." He then bent over on the driver's side of the car, reached across the seat and picked up the glass. The time which elapsed between his observing the defendant Beaver and his picking up the glass constituted less than one minute.

Neither defendant had been placed under arrest at the time Officer Poovey picked up the glass. They made no threats, and Officer Poovey observed no weapons. Although officer Poovey had to bend somewhat to see inside the vehicle, he did not recall any movements by Beaver of his legs or hands. After seizing the glass, Officer Poovey could observe that the "white powder was stuck to the glass as if it had been wet and stuck there with dampness or something in the glass." He further testified that a film of a white substance covered the inside of the glass, but none would pour out.

Prior to being stopped, the driving of the defendant Williams had been more or less normal and, with the exception of the inoperative taillight, not unlawful. Officer Poovey had received no report of a breaking or entering of the service station at which he first observed the vehicle. There was no damage to the station, and Officer Poovey indicated that he had no reason to believe the building had been broken into.

Officer Poovey testified that he had not specialized in the field of narcotics and had no creditable training in the identification of narcotics, although he had been involved in prior drugs arrests. He stated that he could not determine what the white powder substance was solely by sight. He smelled the substance and still could not make such a determination.

Officer Poovey did not seek permission to search the vehicle before seizing the glass. His later request for permission to search the vehicle was denied by Williams. Having been denied permission to search the vehicle, Officer Poovey informed the defendants that he "was going to take them up to the office." Williams rode with Officer Poovey in the sheriff's department car, and the officer accompanying him rode with Beaver in the defendants' vehicle.

At no time did either defendant attempt to conceal the shot glass. Officer Poovey did not indicate that either defendant made any furtive movement or engaged in other conduct leading him to feel they had probably committed a criminal act or were armed or dangerous.

On the way to the sheriff's office, Officer Poovey called a narcotics agent, Officer Grady Conners, and asked him to meet them there and give assistance. Upon arrival at the sheriff's office, Conners was given the shot glass and performed a field test on the white powder residue. Upon his conclusion that the powder was an amphetamine substance, he searched the defendants and found a small amount of marijuana on Beaver.

Based upon these facts, Officer Conners typed an affidavit, which was then signed by Poovey, upon which a warrant to search the defendants' vehicle was obtained. In searching the vehicle pursuant to this warrant, five pounds of marijuana were discovered and seized.

The defendants in apt time moved to suppress evidence obtained as a result of the seizure of the shot glass and the resulting arrests and searches. This motion was denied by the trial court and the evidence previously referred to herein was admitted.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Roberts and Planer, P.A., by Joseph B. Roberts, III, and Childers, Fowler & Whitt, by Max L. Childers, for the defendant appellants.

MITCHELL, Judge.

We must initially consider whether the seizure of the shot glass by Officer Poovey was lawful. If it was not, the subsequent arrests of the defendants and searches of their persons and of the vehicle, based upon the fruits of the unlawful seizure, were not made lawful by the later determination that the powder contained in the shot glass was a type of amphetamine or by the finding of marijuana on the person of one of the defendants and in the automobile. The fruits of an unlawful search are not made lawful by the resulting discovery of contraband. *Mapp v. Ohio*, 367 U.S.

643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). Protection against unlawful searches and seizures extends to the guilty as well as to the innocent, and an unlawful search or seizure may not be made lawful by the resulting discovery or identification of incriminating evidence.

The State has not contended at trial or on appeal that the seizure of the shot glass containing the white powder residue was incident to a lawful arrest or pursuant to a search conducted under the authority of a search warrant. It is the State's contention, however, that the shot glass containing the white powder residue was in plain view between the legs of the defendant Beaver and was properly seized under the "plain view" exception to the requirement of a search warrant. We do not agree.

We recognize that the constitutional guarantee against unreasonable searches and seizures does not apply where materials identifiable as contraband are fully disclosed and open to the eye and hand and, thus, in plain view. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974), *cert. denied*, 421 U.S. 987, 44 L.Ed. 2d 477, 95 S.Ct. 1990 (1975). In the present case, Officer Poovey testified that he could readily see the shot glass containing the film of white powder substance between Beaver's legs from the outside of the vehicle at the time he lawfully stopped it due to the defective taillight. The mere fact that an officer does not have to search in order to see an item does not entitle him to seize that item. Any inquiry into the lawfulness of the seizure must go further, as the limits of reasonableness which are placed upon searches are equally applicable to seizures. Whether a seizure is reasonable, and therefore constitutional, is to be determined upon the facts giving rise to the individual case. 11 Strong, N.C. Index 3d, Searches and Seizures, § 1, p. 485. An object in plain view may be seized in a constitutional manner only when the officer seizing it has probable cause to believe that the object constitutes contraband or evidence of a crime. *See Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. denied*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971).

Here, Officer Poovey observed only a shot glass containing a film of a white substance appearing to be some type of white powder. We cannot say that sighting such a glass, nothing else appearing, gave rise to a reasonable belief that the white powder

substance was contraband or evidence of a crime. We note that Officer Poovey did not testify that, by virtue of his training as a law enforcement officer or his familiarity with controlled substances and those using them in his community, he had any particular reason to know that shot glasses or other types of glasses were commonly used in connection with the use or sale of narcotics in such manner as to leave a similar white film residue. The State could not contend, therefore, in this case that Officer Poovey was possessed of special training or experience in the area of the sale or use of narcotics which could have caused him to form a reasonable belief, and thereby probable cause to believe, that the white powder residue film in the shot glass indicated that the powder was probably contraband or evidence. A good faith belief is not enough to constitute probable cause, unless the " 'faith is grounded on facts within knowledge of the [officer] which, in the judgment of the court, would make his faith reasonable.' " *Carroll v. United States*, 267 U.S. 132, 161-162, 69 L.Ed. 543, 555, 45 S.Ct. 280, 288 (1925).

Additionally, in the present case, Officer Poovey did not testify that he formed a belief, reasonable or otherwise, that the white powder residue in the shot glass was contraband or evidence of a crime, until a field test was performed upon the residue after the glass had been seized. Officer Poovey testified only that, upon seeing the glass, he realized that it *could* have been a controlled substance. Later in his testimony he stated that, at the time he seized the glass, he thought it *might* contain a controlled substance. Officer Poovey did not testify, and the trial court did not conclude in its order, that he had reasonable grounds to believe or in fact believed that the white powder film in the shot glass was contraband or evidence, and the evidence would not have supported such finding. As Officer Poovey had neither a good faith belief that the white powder residue was contraband or evidence or reasonable grounds to form such a belief, he did not have probable cause to seize the shot glass, even though it was in plain view. The trial court therefore erred in admitting the shot glass and its contents into evidence. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975, *reh. denied*, 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970); *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790 (1925).

We do not think that our opinion in *State v. Wolfe*, 26 N.C. App. 464, 216 S.E. 2d 470, *cert. denied*, 288 N.C. 252, 217 S.E. 2d 677 (1975), may be taken as requiring a different conclusion than that we have reached. In *Wolfe* we held a "plain view" seizure of a transparent plastic bag containing small tin foil packets to be constitutional. The sight of such packets together and in such a container would, we feel, cause any individual with training in the field of police science or experience in police work to form a reasonable belief that, when found in a motor vehicle, they contained a controlled substance. It is a fact of general knowledge or, in any event, a fact of police science so notoriously true as not to be subject to reasonable dispute that those who sell and use heroin and other controlled substances package them in this manner with great frequency. We, like the trial courts, may take judicial notice of such facts. 6 Strong, N.C. Index 3d, Evidence, § 3, p. 12. In the present case, however, we cannot say that a white powder residue in a glass gives rise to facts of general knowledge or facts of a particular science so notoriously true as to support a reasonable belief on the part of the seizing officer that he was seizing contraband or evidence of a crime. We think that, absent specific testimony indicating particular knowledge on the part of the officer making a belief that the white powder in the glass was contraband and establishing the basis for that knowledge, a white powder residue in a glass must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct. Such would give rise to a mere suspicion, which will not support a finding of probable cause. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963). We find that *Wolfe* is, therefore, distinguishable from the present case and neither required nor permitted the admission of the shot glass or its contents into evidence.

The arrest of the defendants and the later search of their persons and vehicle clearly arose from and were based upon the information obtained by virtue of the unlawful seizure of the shot glass and its contents. The evidence obtained by virtue of these arrests and searches was the product of actions not authorized by law and, thus, "fruit of the poisonous tree" which should have been excluded from evidence. *See Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963), *and Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

For the reasons previously set forth, we hold that, as to all charges, each defendant is entitled to and must be granted a

New trial.

Judges PARKER and HEDRICK concur.

HELEN J. RUSSELL v. JACK W. TAYLOR

No. 7726SC762

(Filed 15 August 1978)

1. **Rules of Civil Procedure § 41— nonjury trial—motion for dismissal**

The trial court in a nonjury trial was not compelled to make determinations of facts and pass upon a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) at the close of plaintiff's evidence but could decline to render judgment until the close of all the evidence, and no motion for involuntary dismissal at the close of all the evidence is provided for by Rule 41(b).

2. **Appeal and Error § 26— exception to signing of judgment—sufficiency of evidence not presented**

An exception to the signing of the judgment did not present the question of the sufficiency of the evidence to support the court's findings of fact.

3. **Trover and Conversion § 4— conversion of personalty—damages—common law**

The trial court properly ruled, under the common law, that the measure of damages for a wrongful conversion of personal property was the fair market value of the chattel at the time and place of conversion, and the evidence supported the court's award of $4,000 compensatory damages for conversion of a mobile home and its contents.

4. **Trover and Conversion § 4— conversion of mobile home and contents—punitive damages**

Plaintiff was not entitled to punitive damages under the common law for conversion of a mobile home and its contents where there was no finding or conclusion that the wrong was "done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights"; nor was plaintiff entitled to punitive damages under the provisions of G.S. 99A-1.

APPEAL by defendant from *Martin (Harry C.), Judge*. Judgment entered 7 July 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 June 1978.

In her complaint plaintiff alleges that defendant sold a mobile home to her and her husband; that thereafter defendant wrongfully took possession of and converted the mobile home and its entire contents; and that she is entitled to recover actual and punitive damages from defendant pursuant to G.S. 99A-1. Plaintiff's husband did not join in the action but assigned his cause of action to plaintiff.

Defendant answered, asserting that he rented the mobile home to plaintiff and her husband but never sold it to them; and that he took possession of the property when plaintiff and her husband became delinquent in their rental payments. Defendant also filed a counterclaim, alleging that plaintiff had wrongfully caused him to be arrested for his taking possession of the mobile home and that no probable cause had been found for his arrest.

Following a trial without a jury, the court made findings of fact summarized in pertinent part as follows:

On or about 1 September 1971 plaintiff and defendant entered into an agreement whereby defendant agreed to sell to plaintiff a 1966 Mascot mobile home in consideration of plaintiff paying the nineteen remaining payments thereon in amount of $72.19 each and also paying plaintiff $2,000.00. Plaintiff took possession of the mobile home and removed it to Boiling Springs Lakes, N.C., where it was placed on a lot which plaintiff had purchased. Plaintiff spent approximately $1,295.43 for improvements to the lot.

On or about 29 September 1972 plaintiff executed to defendant a note (for $4,000) and as security therefor executed a second deed of trust on plaintiff's residence in Charlotte. In return, defendant paid plaintiff $2,000 in cash and applied the remaining $2,000 to payment of the $2,000 due defendant on the mobile home.

Plaintiff paid the 19 installments on the mobile home, either to the bank holding the security instrument thereon or to defendant in reimbursement for payments made by him, but defendant never delivered the title to the mobile home to plaintiff.

During the fall of 1973 plaintiff failed to make payments on the note secured by the second deed of trust aforesaid and defendant instituted foreclosure proceedings against plaintiff's

residence in Charlotte. At the foreclosure sale defendant bid $3,750 on said property and thereafter he was given a deed for the same by the trustee named in the deed of trust.

In early December 1973 defendant demanded that plaintiff return and surrender the mobile home located at Boiling Springs Lakes; plaintiff informed defendant that under no circumstances could he have the mobile home as it was serving as a permanent residence for her and three of her children who were attending school at Boiling Springs Lakes. Plaintiff told defendant that she owned the mobile home free and clear of all liens.

On or about 2 January 1974, while plaintiff and her family were in Charlotte, defendant, without the knowledge or consent of plaintiff, moved said mobile home and all of its contents to Myrtle Beach, South Carolina.

Upon learning of said act by defendant, plaintiff's husband, on 18 January 1974, obtained a warrant for defendant charging him with feloniously breaking into and entering the mobile home with intent to steal property located therein. Defendant was subsequently arrested and at a trial held on 18 February 1974 the court found no probable cause.

The value of the contents of the mobile home moved by defendant was approximately $2,069.25 and defendant has not returned said personal property or mobile home to plaintiff.

Upon said findings of fact, the court concluded as a matter of law that plaintiff was entitled to the immediate possession of the mobile home and all contents therein; that defendant had converted the mobile home and contents to his own use; that pursuant to G.S. 99A-1 plaintiff could recover actual and punitive damages from defendant; that the measure of actual damages for conversion of the property was its fair market value at the time and place of conversion; and that defendant was not entitled to recover anything from plaintiff because of his counterclaim.

The court adjudged that plaintiff recover of defendant $4,000 compensatory damages and $2,500 punitive damages; that defendant's counterclaim be dismissed; and that defendant pay the costs of the action.

Defendant appealed.

Davis & Postlethwait, by Raymond W. Postlethwait, Jr., for plaintiff appellee.

James B. Ledford and C. B. Merryman, Jr., for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends the court erred in failing to grant his motions for dismissal as to compensatory damages and punitive damages interposed at the close of plaintiff's evidence and at the close of all the evidence. This assignment has no merit.

Plaintiff's motions for dismissal purportedly were made pursuant to G.S. 1A-1, Rule 41(b), which provides in pertinent part:

> ". . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. . . ."

In *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E. 2d 1 (1973), Justice (now Chief Justice) Sharp, speaking for the court regarding Rule 41(b) said: "The judge is not compelled to make determinations of facts and pass upon a motion for involuntary dismissal at the close of plaintiff's evidence. He may decline to render any judgment until the close of all the evidence and, as suggested by Phillips, 'except in the clearest cases' he should defer judgment until the close of all the evidence. . . ." The court further stated that "[t]here is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event. . . ."

In *Reid v. Midgett*, 25 N.C. App. 456, 213 S.E. 2d 379 (1975), this court held that Rule 41(b) does not provide for a motion for involuntary dismissal made at the close of all the evidence.

Furthermore, since the questions which defendant attempts to raise by his first assignment are hereinafter considered under another rule, we perceive no prejudice in the denial of his motions for involuntary dismissal.

[2] In his second assignment of error defendant contends that the evidence does not support the findings of fact and the judgment "pronounced thereon". This assignment is supported by Exception No. 6 which is at most an exception to the signing of the judgment. In 1 Strong's N.C. Index 3d, Appeal and Error § 28, p. 253, we find: "An exception to the findings of fact and conclusions of law and the judgment of the court, without exception to a particular finding, is a broadside exception which does not present for review the admissibility of the evidence on which the findings were made or the sufficiency of the evidence to support the findings. . . ."

We hold that the question of sufficiency of the evidence to support the findings of fact is not presented.

Nevertheless, Rule 10 of the Rules of Appellate Procedure, 287 N.C. 679, 699, provides, *inter alia*, that when an appeal is duly taken from a final judgment, any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the findings of fact and conclusions of law, notwithstanding the absence of an exception or assignment of error in the record on appeal. Since defendant discusses the sufficiency of the findings of fact and conclusions of law to support the judgment awarding compensatory damages and punitive damages, we proceed to pass upon those questions.

We determine first if the common law permitted compensatory and punitive damages under the findings and conclusions made in this case.

[3] The theory of plaintiff's action and the premise of the judgment is wrongful conversion of personal property. The trial court properly ruled, under the common law, that the measure of damages for a wrongful conversion of personal property is the fair market value of the chattel at the time and place of conversion. (Interest is also allowable.) *Crouch v. Trucking Company*, 262 N.C. 85, 136 S.E. 2d 246 (1964); *Seymour v. Sales Company*, 257 N.C. 603, 127 S.E. 2d 265 (1962); *Fagan v. Hazzard*, 29 N.C. App. 618, 225 S.E. 2d 640 (1976).

In the case *sub judice*, the findings of fact and conclusions of law fully support the award of $4,000 compensatory damages. The finding that while plaintiff and her family were in Charlotte, and without her knowledge or consent, defendant moved the mobile home and contents from Boiling Springs Lakes to Myrtle Beach supports the conclusion that defendant converted the same to his own use. The findings that plaintiff paid nineteen payments at $72.19 each, a total of $1,371.61; that defendant accepted a note from plaintiff for $4,000, secured by a second deed of trust on real estate in Charlotte, $2,000 of which was in payment of the obligation on the mobile home; that plaintiff spent approximately $1,295.43 for improvements to the lot (preparatory to locating the mobile home thereon); and that the value of the contents of the mobile home moved by defendant was approximately $2,069.25, were more than sufficient to show that the fair market value at the time and place of conversion was $4,000.00.

[4] We now turn to the question of punitive damages which are generally defined or described as "damages which are given as an enhancement of compensatory damages because of the wanton, reckless, malicious or oppressive character of the acts complained of." 22 Am. Jur. 2d, Damages § 236, p. 322. Under the common law of this State punitive damages may be awarded "when the wrong is done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights." 5 Strong's N.C. Index 3d, Damages § 11, p. 27.

We do not think the findings and conclusions justified an award of punitive damages under the common law. There was no finding or conclusion that the wrong was "done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights."

We now determine if a statute permitted plaintiff to recover compensatory and punitive damages under the findings and conclusions made in this case.

Plaintiff alleged in her complaint, and the court concluded, that she was entitled to recover actual and punitive damages by virtue of G.S. 99A-1. This statute provides as follows:

§ 99A-1. Recovery of damages for interference with property rights.—Notwithstanding any other provisions of the General Statutes of North Carolina, when personal property is wrongfully taken and carried away from the owner or person in lawful possession of such property without his consent and with the intent to permanently deprive him of the use, possession and enjoyment of said property, a right of action arises for recovery of actual and punitive damages from any person who has, or has had, possession of said property knowing the property to be stolen.

An agent having possession, actual or constructive, of property lawfully owned by his principal, shall have a right of action in behalf of his principal for any unlawful interference with that possession by a third person.

In cases of bailments where the possession is in the bailee, a trespass committed during the existence of the bailment shall give a right of action to the bailee for the interference with his special property and a concurrent right of action to the bailor for the interference with his general property.

Any abuse of, or damage done to, the personal property of another or one who is in possession thereof, unlawfully, is a trespass for which damages may be recovered. (1973, c. 809.)

We find it very difficult to interpret this statute. We have investigated the legislative history of the statute (Ch. 809, 1973 S.L., S.B. 751) and find, among other things, that the original bill was rewritten by a Senate Committee and that the committee substitute was amended twice by floor amendments in the House of Representatives. The title of the bill is "AN ACT TO CREATE A RIGHT OF ACTION FOR RECOVERY OF ACTUAL AND PUNITIVE DAMAGES BY MERE POSSESSION OF PROPERTY FROM THIEVES, FENCES AND BUYERS OF STOLEN MERCHANDISE." "Where the meaning of a statute is in doubt, reference may be had to the title and context of the act as legislative declarations of its purpose. However, the title does not control the text." 7 Strong's N.C. Index 2d, Statutes § 5, p. 77.

It is reasonably clear that the first paragraph of the act is fairly consistent with the title, that the owner of stolen property may collect actual and punitive damages from one who is criminally guilty of receiving the stolen property. Paragraphs two and three merely create rights of action in agents of the owners and bailees of the personal property the possession of which has been unlawfully interfered with.

Since there was no finding of fact that defendant received the mobile home and contents in question, "knowing the property to be stolen", actual or punitive damages could not be awarded pursuant to the first paragraph of the statute.

The remaining question is whether the last paragraph of the act authorizes actual and punitive damages under the findings of fact. The strongest finding by the court was that while plaintiff and her family were in Charlotte defendant, without her knowledge or consent, moved the mobile home and contents to Myrtle Beach. Assuming, *arguendo*, that this was an "unlawful" abuse of or damage to the property which would support the recovery of any kind of damages pursuant to the act, we do not think it would support a recovery of punitive damages.

Statutes in derogation of the common law and statutes imposing a penalty must be strictly construed. *Ibid*, page 74. While the last paragraph of G.S. 99A-1 provides for the recovery of damages for an "unlawful" abuse of or damage to the personal property of another, whatever that means, it says nothing about *punitive* damages. Black's Law Dictionary, Deluxe Fourth Edition, page 1399, defines punitive thusly: "Relating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty."

Applying a strict construction to the last paragraph of G.S. 99A-1, as we are compelled to do, we hold that it does not authorize the recovery of punitive damages. Therefore, since, under the findings and conclusions made by the trial court in this case, punitive damages are not authorized by the common law or said statute, we hold that the court erred in awarding punitive damages.

For the reasons stated, the judgment awarding plaintiff $4,000 compensatory damages is affirmed but the judgment awarding $2,500 punitive damages is reversed.

Affirmed in part, reversed in part.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. KENNETH MICHAEL LANCASTER AND RALPH KENNETH FLACK

No. 7826SC53

(Filed 15 August 1978)

1. **Criminal Law § 88.1— scope of cross-examination—discretionary matter**

Where defendants were permitted to cross-examine a State's witness with respect to promises of leniency or immunity, and one defendant was permitted to ask questions designed to attack the credibility of the State's witness, further questioning on the matters was left to the sound discretion of the trial judge, and he did not abuse his discretion by limiting cross-examination in this case.

2. **Embezzlement § 6— employee not a trespasser—sufficiency of evidence of embezzlement**

In a prosecution for embezzling nuts and bolts, defendant employee's contention that the State did not prove the crime of embezzlement since defendant was on his employer's premises after normal working hours and was therefore a trespasser is without merit where the evidence tended to show that it was not unusual for defendant's employment to require his presence on the employer's premises after the working day of other employees had ended; at the time of the alleged crime the working day had just ended, and defendant was therefore not a trespasser on the date in question.

3. **Indictment and Warrant § 17.1— no variance between indictment and proof —lesser offense proven—nonsuit properly denied**

One defendant's motion for nonsuit on the ground of variance between the crime alleged in the bill of indictment, embezzlement, and the proof produced at trial, aiding and abetting the other defendant in embezzlement, was properly denied, since defendant was adequately notified in the indictment that he would be put on trial for the embezzlement of nuts and bolts taken from a named business establishment during a certain period of time, and defendant could not have been misled or prejudiced by being convicted of a lower grade of the principal offense charged.

4. Embezzlement § 6.1; Criminal Law §§ 117.4, 119— request for special jury instruction—scrutiny of accomplice's testimony—jury instructions proper

In a prosecution for embezzlement, the trial court did not err (1) in failing to charge the jury from special instructions submitted by one defendant, since the instruction given contained in substance most of the instructions in defendant's special request; (2) in failing to instruct the jury that it should carefully scrutinize the testimony of an accomplice, since no request for such an instruction was made; and (3) in repeatedly using one defendant's name in charging the jury as to the other defendant's aiding and abetting in the crime charged, since the court was not thereby expressing an opinion but was simply discharging his duty of applying the law to the evidence.

5. Embezzlement § 6.1— embezzlement of nuts and bolts—items sufficiently identified in jury instructions

In a prosecution for embezzlement of nuts and bolts where the only nuts and bolts alluded to at trial were the kegs of nuts and bolts loaded onto pallets and taken from Mint Fasteners, Inc., the court's charge was sufficient to require the jury to find that the nuts and bolts taken from the Mint Fasteners, Inc. warehouse were the nuts and bolts delivered and stored at one defendant's warehouse, and the instruction could not have confused the jury or prejudiced defendant.

6. Criminal Law § 101.4— exhibits sent into jury room—no expression of opinion by court

The trial judge's sending of exhibits into the jury room, absent a request from the jury and consent by defendants, did not amount to an expression of opinion on the truthfulness of the exhibits which would prejudice the jury's deliberations.

APPEAL by defendants from *Kirby, Judge*. Judgment entered 8 September 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 May 1978.

The defendants, Kenneth Michael Lancaster and Ralph Kenneth Flack, Jr., were charged with feloniously embezzling from Mint Fasteners, Inc. nuts and bolts valued at $10,000. Their cases were consolidated for trial.

The evidence for the State tended to show that defendant Lancaster was employed as the warehouse manager of Mint Fasteners, Inc. in Charlotte from 15 September 1976 until 15 January 1977. His responsibilities included the supervision of all the shipping and receiving of materials at the Mint Fasteners, Inc. warehouse. The defendant Flack is a salvage dealer who owns several stores across the state, including a warehouse in Gaston County. On 10 January 1977, defendant Flack and one of

his employees, Timothy Strange, drove a truck to the Mint Fasteners, Inc. warehouse. They arrived at the warehouse after normal working hours had ended. The defendant Lancaster was present at the warehouse and he loaded the truck with pallets containing kegs of nuts and bolts. The nuts and bolts were taken to the warehouse in Gaston County owned by defendant Flack.

The defendants offered evidence of an alibi. The defendant Flack offered evidence which tended to show that he left North Carolina on 7 January 1977 to attend a National Housewares Association and Businessmen's Show in Chicago, Illinois. He returned to North Carolina on 13 January 1977. The defendant Lancaster offered evidence which tended to show that he was visiting at the home of Mrs. Ruth Surratt in Spencer, North Carolina on 10 and 11 January 1977, where he assisted her in painting her home.

The jury returned a verdict of guilty of embezzlement against both defendants. Defendant Lancaster was sentenced to prison for a term of not less than three nor more than five years. Defendant Flack was sentenced to prison for a term of not less than seven nor more than ten years. Both defendants appeal.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

James H. Carson, Jr., for defendant appellant Ralph Kenneth Flack.

Yates and Talford, by Robert M. Talford, for defendant appellant Kenneth Michael Lancaster.

WEBB, Judge.

Both defendants raise four assignments of error on appeal. For brevity, we will group the assignments of error common to both defendants.

[1] Defendants first contend that the trial court erred by restricting the cross-examination of the State's witness, Timothy Strange. Both argue that they should have been allowed to question Timothy Strange about promises of immunity or leniency in return for his testimony. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). Defendant Lancaster also contends that he was

prevented from effectively cross-examining the State's witness as to the trustworthiness and credibility of his testimony. We are unable to agree with defendants' contentions. With respect to promises of leniency or immunity, Timothy Strange testified as follows:

On direct examination:

"I have been charged in a bill of indictment along with Mr. Flack and Mr. Lancaster for embezzlement. I have pleaded guilty, but have not been sentenced at this time."

On cross-examination:

"I have not been sentenced yet. . . . I do not have an arrangement with the district attorney. If I plead guilty and testify, the district attorney will make certain recommendations. I don't know what the arrangement is. I am now awaiting sentencing.

* * *

No promises were made to me. I gave a statement to the law enforcement center. I don't remember the date.

* * *

State's Exhibit 1 is the transcript of my guilty plea in superior court on July 21st. It contains the agreement between the State, my lawyer and me."

We hold the record shows that both defendants were allowed to cross-examine the State's witness, Timothy Strange, as to promises of leniency or immunity. Once the defendants were afforded their right to question the witness in regard to promises of leniency in exchange for testimony, further questioning on the matter was left to the sound discretion of the trial judge. *See* 4 Strong, N.C. Index 3d, Criminal Law, § 88.1, p. 409. We do not believe the trial judge abused his discretion by limiting further questions concerning deals with the district attorney. Defendant Lancaster additionally argues that prohibiting an extensive cross-examination of Timothy Strange amounted to a denial of cross-examination concerning credibility and trustworthiness. Again, defendant Lancaster was allowed to ask questions designed to attack Timothy Strange's credibility. We do not find an abuse of discretion from limiting the scope of the questions asked.

[2] Defendants next contend that the trial court erred in not granting motion for nonsuit as to each defendant at the close of the State's evidence and again at the close of all the evidence. It is well settled that upon a motion for nonsuit, all the evidence admitted is considered in the light most favorable to the State; the State's evidence is taken as true; inconsistencies or contradictions therein are disregarded, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. 4 Strong, N.C. Index 3d, Criminal Law, § 104, p. 541. Defendant Lancaster argues that the State has not proved the crime of embezzlement since the defendant Lancaster was on his employer's premises after normal working hours and was therefore a trespasser. He argues that if he has committed a crime, it would be larceny and not embezzlement. We disagree. Lewis Moore, president of Mint Fasteners, Inc., testified that "Mr. Lancaster's hours varied, but usually were from 8 in the morning until 5 in the evening. His job description and specific duties were that he would have total responsibility for the warehouse, including hiring and firing, shipping and receiving. . . ." He further testified that defendant Lancaster "had a key to the door and was usually the first one there in the morning and the last one to leave in the evening." Timothy Strange testified that on the date of the incident he saw the defendant Lancaster at 6:30 p.m. or 7:00 p.m. He further testified that "When I got there, I guess they were fixing to close, because a lot of people were leaving at the time I arrived. It was turning dark when Ken Lancaster came out. . . ." When we examine this evidence in the light most favorable to the State, we believe it shows that it was not unusual for defendant Lancaster's employment to require his presence on the premises of Mint Fasteners, Inc. after the working day of other employees had ended; that on the day of the incident the working day had just ended, and therefore, defendant Lancaster was not a trespasser on the date in question.

[3] Defendant Flack contends his motion for nonsuit should have been granted for a variance between the crime alleged in the bill of indictment, embezzlement from Mint Fasteners, Inc., and the proof produced at trial, aiding and abetting defendant Lancaster in embezzlement from Mint Fasteners, Inc. The requirement that indictments be stated with sufficient certainty is rooted in the notion that a defendant needs to know the crime charged to allow

proper preparation of a defense. *State v. Daye*, 23 N.C. App. 267, 208 S.E. 2d 891 (1974). It also identifies the crime for jeopardy to attach and for the court to proceed to judgment. We believe the defendant was adequately notified in the indictment that he would be put on trial for the embezzlement of certain nuts and bolts taken from Mint Fasteners, Inc. during a certain period of time. We do not see how he could be misled or prejudiced by being convicted of a lower grade of the principal offense charged. In *State v. Ogleston*, 177 N.C. 541, 98 S.E. 537 (1919), the Court upheld the conviction of two defendants for aiding and abetting in the manufacture of spiritous liquors where the defendants had been charged with the manufacture of spiritous liquors. We cannot distinguish the complaint of defendant Flack from the holding in *Ogleston*.

[4] Both defendants have assigned error in the charge to the jury. Defendant Lancaster argues that the trial court erred when it failed to charge the jury from special instructions he submitted. The special instructions were designed to point out the distinctions between larceny and embezzlement. We note that the charge given contained in substance most of the instructions in defendant Lancaster's special request for instructions. *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). No specific request was made for a charge on larceny and we believe the trial judge was correct in charging the jury on embezzlement since the evidence at trial supported such a charge. We do not find any prejudice to defendant Lancaster in the instructions as given. Error is also assigned to the trial judge's failure to instruct the jury that it should carefully scrutinize the testimony of Timothy Strange, an accomplice in the embezzlement. No request was made by defendant Lancaster for such an instruction and absent a request, we find no error in the charge. *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970). As his final objection to the jury charge, defendant Lancaster contends the court expressed an opinion on the evidence when defendant Lancaster's name was repeatedly used in charging the jury as to defendant Flack's aiding and abetting in the embezzlement. There is no merit in this argument. The trial judge is under a duty to apply the law to the evidence. G.S. 1-180. The repeated use of defendant Lancaster's name was entirely proper.

[5] Defendant Flack contends the court erred in its charge on embezzlement by not instructing the jury that it must find that the nuts and bolts taken from Mint Fasteners, Inc. and received by defendant Flack were the nuts and bolts referred to in the trial. In the charge, the trial judge instructed that the jury should find from the evidence and beyond a reasonable doubt that "pallets were loaded on the truck by Lancaster . . ." and that "Kenneth Flack returned and drove the truck on the return trip to Gastonia, North Carolina to the warehouse of Kenneth Flack. . . ." The only nuts and bolts alluded to at trial were the kegs of nuts and bolts loaded onto the pallets and taken from Mint Fasteners, Inc. We believe the court's charge requires the jury to find that the nuts and bolts taken from the Mint Fasteners, Inc. warehouse were the nuts and bolts delivered and stored at defendant Flack's warehouse. We do not believe the jury was confused or the defendant prejudiced by the instructions.

[6] As his final assignment of error, defendant Flack contends it was error for the trial judge to instruct the jury to take exhibits into the jury room when they retired for deliberations, absent a request to do so from the jury and consent from the defendants. Defendant Flack alleges this conduct amounted to an expression of opinion as to the veracity of the exhibits. Even if we assume for argument that the trial judge's action was improper, the defendant has failed to show how the exhibits prejudiced the verdict of the jury. *See State v. Haltom*, 19 N.C. App. 646, 199 S.E. 2d 708, *appeal dismissed*, 284 N.C. 619, 201 S.E. 2d 691 (1973); 2 N.C. Practice and Procedure, McIntosh, § 1545 (Phillips Pocket Part). We do not find the trial judge's sending of exhibits to the jury room to be an expression of truthfulness of the exhibits prejudicing the jury's deliberations.

In the trial of defendant Lancaster and defendant Flack, we find

No error.

Chief Judge BROCK and Judge CLARK concur.

LINDA M. PASSMORE v. SHIRLEY COLSTON WOODARD AND WIFE, MAVIS ODELL WOODARD

No. 7713DC782

(Filed 15 August 1978)

1. **Vendor and Purchaser § 5.1— option contract—inability of vendors to convey clear title**

The trial court did not err in concluding that plaintiff was not entitled to specific performance or partial specific performance of an option contract where the court found that defendants were unable to convey clear title to plaintiff because the land subject to the option was encumbered by a mortgage and a lappage, and no evidence was presented from which the trial court could have determined a proper reduction in the purchase price or from which the court could have assessed damages had the contract been affirmed.

2. **Rules of Civil Procedure § 41— nonjury trial—motion for dismissal**

In a trial by the court without a jury, the judge is not compelled to find facts and pass upon a motion for dismissal at the close of plaintiff's evidence but may decline to render any judgment until all of the evidence is in, and, except in the clearest cases, he should follow that procedure.

3. **Evidence § 45— testimony as to value—foundation**

The trial court properly refused to admit testimony by the male defendant with respect to "the value of improvements, or lack of value of alleged improvements" made by plaintiff to the property in question where no foundation was laid for the testimony by showing that the witness was familiar with the property on which he professed to put a value and that he possessed sufficient knowledge and experience intelligently to value it.

4. **Husband and Wife § 3— agency of husband for wife**

Agency of the husband for his wife may be shown by evidence of facts and circumstances which support a reasonable inference that he was authorized to act for her, and the wife's retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to such an inference.

5. **Betterments § 3; Vendor and Purchaser § 8— option contract—inability to convey clear title—recovery of payments under option—betterments**

Where defendant vendors were unable to convey to plaintiff clear title to land pursuant to an option contract, the trial court properly ruled that plaintiff was entitled to recover the $7,500 which she had paid under the option agreement; however, the trial court erred in awarding plaintiff $5,000 for betterments where the court found that plaintiff had spent $5,000 for work and improvements necessary to ready the land for her intended use, but the court made no finding with respect to the extent that improvements made by plaintiff enhanced the value of the land, and the cause must be remanded for a new trial to determine the amount that the improvements made by plaintiff enhanced the value of the land.

APPEAL by defendants and cross appeal by plaintiff from *Wood, Judge*. Judgment entered 28 April 1977 in District Court, BRUNSWICK County. Heard in the Court of Appeals 21 June 1978.

In this action plaintiff seeks specific performance or partial specific performance by defendants of an option agreement to sell certain real property to plaintiff or, in the alternative, damages in the form of reimbursement of all sums paid by plaintiff pursuant to the agreement plus $5,000 for improvements made to the property by plaintiff.

In their answer defendants admitted executing the option agreement but alleged that plaintiff had never tendered to them the purchase price prior to the expiration date of the option.

Jury trial was waived and evidence presented by plaintiff is summarized in pertinent part as follows:

In July 1975 plaintiff and defendants entered into a six months' option agreement providing that upon receipt of $500 from plaintiff, plus $250 per month during the term of the option, defendants would grant to plaintiff the right to purchase an 81.9 acre farm from them for $25,000; that the option could be renewed for a period of six months by plaintiff's payment of $5,000 plus continued $250 monthly payments; that all payments made pursuant to the option agreement were to be applied to the purchase price should plaintiff elect to purchase the property; and that defendants would deliver to plaintiff a warranty deed conveying clear title to the property upon plaintiff's tender of the remainder of the purchase price anytime during the option term.

Plaintiff made the intitial $500 payment, all of the monthly payments through July 1976 and the renewal payment in January 1976; however, plaintiff gave the last two $250 checks to the closing attorney as trustee because she had become aware at that time of two clouds on defendants' title to the property, one being an outstanding mortgage on the property and the other being a claim by adverse possession on approximately 16 acres of the land. Plaintiff also gave to the closing attorney as trustee a check for the balance of the purchase price.

Upon the receipt of each of the payments the closing attorney notified defendants. Two days before expiration of the option agreement, he had defendants come to his office where he

tendered to them the checks in exchange for a warranty deed to the property, free from all encumbrances. Defendants were unable to deliver a deed to the entire tract free from encumbrances and refused to adjust the purchase price and convey to plaintiff that portion of the tract to which they could give clear title by paying off the mortgage.

Defendants did agree to allow the closing attorney some additional time to clear up the title problem, but one week later they informed him that they no longer felt obligated to comply with the terms of the option.

Plaintiff paid a total of $7,750 to defendants under the agreement and expended, with defendants' knowledge and consent, $5,000 in clearing part of the land and renovating a house on the property.

Defendants' evidence tended to show that they had informed plaintiff of the mortgage on the property prior to execution of the option contract; and that the closing attorney had never tendered to them the balance of the purchase price but had attempted to pay them a lower purchase price than agreed upon. They attempted to introduce opinion testimony regarding the value of the improvements made to the property by plaintiff but that testimony was excluded by the court.

The court made extensive findings of fact, primarily as contended by plaintiff. The court found that plaintiff had fully performed her obligations under the agreement, had made a good and sufficient tender of the balance of the purchase price to defendants and, with the knowledge and consent of defendants, had expended $5,000 on improvements necessary for her intended use of the property.

The court concluded as a matter of law that plaintiff was not entitled to specific performance of the option agreement, but that she was entitled to recover the sums paid by her to defendants under the agreement and the value of the improvements made by her to the betterment of defendants' land.

The court adjudged that plaintiff recover of defendants the sum of $7,750, representing the payments made to them under the agreement, and also recover $5,000, representing the value of improvements made by plaintiff to the land.

Defendants appealed from the award of judgment against them for the amounts aforesaid and plaintiff cross appealed from the denial of the court to grant specific performance.

Frederick D. Anderson for plaintiff appellee.

Ray H. Walton and Elva L. Jess for defendant appellants.

BRITT, Judge.

PLAINTIFF'S CROSS APPEAL

[1] Plaintiff contends the trial court erred in concluding as a matter of law that she was not entitled to specific performance of the option agreement. We find no merit in this contention.

An option is not itself a contract to sell but is transformed into such a contract upon acceptance by the optionee in accordance with its terms. The contract then becomes specifically enforceable if it is otherwise a proper subject for such equitable relief. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Byrd v. Freeman*, 252 N.C. 724, 114 S.E. 2d 715 (1960). However, "[s]pecific performance does not follow as a matter of course merely from the establishment of the existence and validity of the contract involved, even though the contract is one in which the remedy is apposite. . . ." 12 Strong's N.C. Index 3d, Specific Performance § 1, pp. 8-9.

In the instant case the court found that defendants were unable to convey good title to plaintiff as the land subject to the option was encumbered by a mortgage and a lappage. "Specific performance of a contract to convey land will not be decreed when the vendor cannot make a good title to the land sold, or when his title thereto is doubtful, *Trimmer v. Gorman*, 129 N.C., 161, 39 S.E., 804; *Triplett v. Williams*, 149 N.C., 394, 63 S.E., 79; 24 L.R.A., 514, and *Thompson v. Power Co.*, 158 N.C., 587, 73 S.E., 888. . . ." *Park, Inc. v. Brinn*, 223 N.C. 502, 514, 27 S.E. 2d 548 (1943).

A purchaser may elect to take whatever title and quantity of land the vendor is able to convey and seek damages for any deficiency in his estate. *Goldstein v. Trust Co.*, 241 N.C. 583, 86 S.E. 2d 84 (1955); *Emerson v. Carras*, 33 N.C. App. 91, 234 S.E. 2d 642 (1977). However, a purchaser may not specifically enforce a con-

tract in a method different from that which the contract specifies. *Development Corp. v. Woodall*, 21 N.C. App. 567, 205 S.E. 2d 592 (1974). *See also McLean v. Keith*, 236 N.C. 59, 72 S.E. 2d 44 (1952), 13 Strong's N.C. Index 3d, Vendor and Purchaser § 5, p. 254.

Plaintiff did not elect to affirm the contract but chose instead to seek partial specific performance of it and demanded reduction in the purchase price. She is not entitled to have the court rewrite the contract made by her with defendants. The record discloses no evidence from which the trier of fact could have determined a proper reduction in the purchase price or from which he might have assessed damages had the contract been affirmed.

We hold that in the absence of such evidence the trial judge properly denied specific performance.

DEFENDANTS' APPEAL

Defendants contend first that the trial court erred in denying their motion for dismissal made at the close of plaintiff's evidence. This contention has no merit.

G.S. 1A-1, Rule 41(b), provides in pertinent part:

> . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). . . .

[2] In a trial by the court without a jury, the judge is not compelled to find facts and pass upon a motion for dismissal at the close of plaintiff's evidence. He may decline to render any judgment until all of the evidence is in, and, except in the clearest cases, he should follow that procedure. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

[3] Defendants contend next that the court erred in refusing to admit testimony by the male defendant with respect to "the value of improvements, or lack of value of alleged improvements" made by plaintiff to the subject property. This contention has no merit.

At the time the trial judge refused to admit the testimony in question, he stated that the witness had not laid a proper foundation for the testimony. We think the testimony was properly excluded and for the reason stated by the trial judge. To place valuation testimony into evidence requires a proper foundation. At the minimum it must be shown that the witness is familiar with the thing on which he professes to put a value and that he possesses sufficient knowledge and experience to intelligently value it. *Britt v. Smith*, 6 N.C. App. 117, 169 S.E. 2d 482 (1969). Defendants failed to lay a foundation for the introduction of their valuation testimony.

Defendants contend the court erred in its finding of fact No. 11 for the reason the finding is not supported by the evidence. We find no merit in this contention.

The challenged finding relates primarily to conversations and transactions between the closing attorney and "defendants" a short while before the option period expired. Defendants argue that the evidence does not show that the feme defendant engaged in any conversation or transaction with the closing attorney on or about that date.

Technically, defendants' argument is correct but finding No. 11 has to be considered in its relation to and as a part of the other findings of fact. In finding No. 15, to which defendants do not except, the court found that all times germane to this action, the male defendant was acting as agent for, and in concert with, the feme defendant who enjoyed the benefits derived from all payments made by plaintiff under the option agreement.

[4] Agency of the husband for his wife may be shown by evidence of facts and circumstances which authorize a reasonable inference that he was authorized to act for her. *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E. 2d 334, *rev. on other grounds* 285 N.C. 418, 206 S.E. 2d 162 (1974). The wife's retention of benefits from a contract negotiated by the husband is a factual circumstance giving rise to such an inference. *Norburn v. Mackie*, 262 N.C. 16, 136

S.E. 2d 279 (1964). Notice to and knowledge of an authorized agent is imputed to the principal even though the agent does not inform the principal thereof. 10 Strong's N.C. Index 3d, Principal and Agent § 8. But the record in this case is replete with evidence that the feme defendant received notice that the closing attorney held plaintiff's checks for defendants and that plaintiff was demanding delivery of a warranty deed from them.

Defendants contend the court erred in its findings of fact Nos. 16, 17 and 18 for the reason that said findings are not supported by the evidence. Suffice it to say, we have carefully reviewed the record and conclude that the findings are supported by the evidence.

Defendants contend that the court erred in entering the judgment awarding monetary damages to plaintiff for the reason that "plaintiff's evidence and all the evidence established as a matter of law that the plaintiff was not entitled to the relief demanded". They also contend that the findings of fact were not sufficient to support the conclusion of law "that plaintiff is entitled to recover the monies paid by her to defendants under the option contract and the value of the improvements made by her to the betterment of defendants' land".

[5] We hold that the trial court did not err in entering judgment in favor of plaintiff against defendants for $7,750, the sums paid by plaintiff under the option agreement. The record clearly shows that defendants' title as to part of the land was in doubt. "If the vendor at the time fixed for conveyance is unable to convey the title stipulated for or implied by law, the vendee, if himself, ready, able, and willing to perform, may ordinarily elect to rescind and recover back amounts paid on the contract." 77 Am. Jur. 2d, Vendor and Purchaser § 505, p. 632.

But we hold that the trial court did err in awarding plaintiff judgment for $5,000 purportedly representing "the value of improvements made by Plaintiff to the land owned by Defendants, all to the betterment thereof."

While we have been unable to locate authority directly in point, we think the situation in *Carter v. Carter*, 182 N.C. 186, 108 S.E. 765 (1921), is analogous. In that case, the plaintiff entered upon the lands in question under a parol contract to convey. The

owner refused to comply with the contract and pled the statute of frauds. The court restated the principle that in such cases the plaintiff is entitled to recover not only the purchase price paid by him, "but compensation for his improvements to the extent *that they have enhanced the value* of the land". (Emphasis added.) Numerous cases are cited in *Carter* in support of the quoted principle.

Although defendants in the case at hand did not refuse absolutely to comply with their agreement as was the case in *Carter*, they in effect did so when they refused to work with plaintiff in removing the clouds from their title or in adjusting the purchase price to allow for the claim of a third party to the 16 acres in dispute.

It is true that the trial court concluded as a matter of law that plaintiff was entitled to recover "the value of the improvements made by her to the betterment of Defendants' land" but this conclusion is not supported by a finding of fact. The finding that comes closest to supporting the conclusion is No. 18 which reads as follows:

> 18. That during the term of the option period, Plaintiff and her husband made and performed various work and improvements *necessary to ready for their intended use* the land owned by Defendants and the subject of said option contract, all with the knowledge and consent of Defendants; and that Plaintiff and her husband expended the sum of five thousand ($5,000.00) dollars therefor. (Emphasis ours.)

Thus it is clear that the trial court found that plaintiff spent $5,000 for work done on the land but never made any finding with respect to the extent that improvements made by plaintiff enhanced the value of the land. The increase in value of the land, rather than the sum of money expended is the proper measure of damages for these improvements. *Carter, supra.* For that reason, we hold that the part of the judgment awarding plaintiff $5,000 should be, and the same hereby is, set aside; and this cause is remanded to the district court for a new trial solely for the purpose of determining the amount that the improvements made by plaintiff enhanced the value of the land and entry of judgment based on that determination.

Affirmed in part, reversed in part and cause remanded.

Judges ARNOLD and ERWIN concur.

SHELIA DISHMAN (MASSEY) v. LEONARD PAUL DISHMAN

No. 7722DC709

(Filed 15 August 1978)

1. Infants § 5— child outside State—jurisdiction of court in custody proceeding

In a child custody proceeding the trial court had jurisdiction over the child, though she was not present in the State, since the court in a child custody proceeding has continuing jurisdiction to do anything necessary at any time to supervise the welfare of the minor child, though the child is not actually before the court. G.S. 50-13.5(c)(3).

2. Infants § 6.2— motion to set aside child custody order—visitation rights not considered

In a hearing on plaintiff's motion to set aside a child custody order, the trial court did not err in refusing to consider visitation rights, since such consideration would be a modification of the prior order's grant of exclusive custody to defendant; the court could modify custody or visitation only upon a showing of changed circumstances and on adequate motion in the cause; and plaintiff's motion to set aside the custody order was not an adequate motion for this purpose.

3. Rules of Civil Procedure § 60— child custody order—final order from which relief may be had

An order awarding custody of the parties' child to defendant was a "final order" under G.S. 1A-1, Rule 60(b), though the order could be changed subsequently upon a proper showing of change of circumstances under G.S. 50-13.7.

4. Rules of Civil Procedure §§ 52, 60— motion to set aside judgment for excusable neglect—findings not required

A court need not make findings as to meritorious defense after a hearing on a motion to set aside a judgment for excusable neglect when it concludes there was no excusable neglect shown, but it would be the better practice to make such findings.

5. Rules of Civil Procedure § 60.2— motion to set aside judgment—excusable neglect—neglect of attorney not imputed to plaintiff

In a hearing on plaintiff's motion to set aside a child custody order on the ground of excusable neglect, the trial court's findings that plaintiff had been served with process, was notified of the date of the hearing, employed and conferred with counsel, but did not appear at the hearing were insufficient to support the court's conclusion that there was no excusable neglect, since the

evidence showed that the case did not appear on the printed calendar but was handwritten onto the add-on calendar by a deputy clerk; it was the duty of plaintiff's attorney to notify the court properly that he represented plaintiff and to determine whether the hearing was to be held on the date specified in the notice served upon her; and the attorney's negligence in failing to perform this duty should not be imputed to plaintiff.

APPEAL by plaintiff from *Olive, Judge*. Order entered 2 June 1977 in District Court, IREDELL County. Heard in the Court of Appeals 30 May 1978.

Plaintiff appeals from an order denying her motion to set aside a 26 April 1977 court order which transferred child custody from her to the defendant. Child custody provisions were included in an 8 October 1973 divorce decree, which, in turn, was based on a 2 October 1972 consent judgment giving custody of the parties' minor child, a daughter, to plaintiff-wife, granting the defendant-husband certain visitation privileges. The 1972 consent judgment required that neither party remove the child from North Carolina without the court's permission if the parties themselves could not agree on the purpose of the removal. The 26 April order found a change of circumstances and awarded custody to defendant-husband in a hearing on his motion for custody. That court also found, in part, that plaintiff-wife had removed the child from North Carolina to Nebraska in violation of court order and was living with the child in open adultery with a man she publicized as the child's stepfather. Neither plaintiff nor her counsel appeared at the hearing. Plaintiff filed a Rule 60(b)(1) motion to set aside the 26 April order on the grounds of excusable neglect, and, in the alternative, on the grounds that the court did not have jurisdiction over the child.

At the hearing on her motion plaintiff offered evidence tending to show that she had moved to Nebraska with the child with defendant's knowledge and permission, that she there received notice of defendant's motion to have custody changed to award him her daughter and of the date for hearing on defendant's motion, 26 April 1977. She immediately contacted and employed an Iredell County attorney and mailed a $50.00 retainer. The attorney advised her that she need not come to court. She called him on 26 April and he assured her that the matter would not be heard on that date because it was not on the calendar. Plaintiff

had no knowledge of the adverse court order until defendant arrived in Nebraska on 29 April and took physical custody of the child as she was walking to school. Plaintiff immediately tried to contact her attorney and was told he was out of town. When she was able to contact him on 2 May, he was unable to explain what had happened. She dismissed him and retained new counsel, who filed the Rule 60(b)(1) motion for her.

It was stipulated as follows:

> ". . . the case as captioned to wit: *Shelia Dishman Massey, Plaintiff vs. Leonard Paul Dishman, Defendant*, File Number 72 CVD 1269, Office of the Clerk of Superior Court for Iredell County did not appear on the printed trial calendar for the non-jury session of April 26, 1977, but that the case was handwritten onto the add-on calendar for that date by the Deputy Clerk of Superior Court for Iredell County on the morning of April 26, 1977 at the request of L. Hugh West, Attorney for Leonard Paul Dishman."

Under cross-examination, plaintiff admitted that she and the child had been living with a Gary Beaver in Nebraska although she was still married to Ronald Massey whom she married after her divorce from defendant. She testified that she would marry Beaver after her divorce from Massey. She also admitted that the original consent judgment of 1972 granting her custody did state that neither party could take the child out of North Carolina without permission but she testified that the 1973 divorce order did not incorporate that restriction and, further, that defendant knew and acquiesced in her removing the child to Nebraska. Plaintiff's mother and father testified that they would keep the child in North Carolina, near her father, until plaintiff and Beaver could return to North Carolina as they were planning to do.

The court denied plaintiff's motion, refused her request to have reasonable visitation privileges as that matter was not properly before the court, and found, in pertinent part, that a copy of defendant's motion to have custody changed to him because of changed circumstances was served by registered mail on plaintiff, that she was therefore notified that hearing would be held on 26 April, that plaintiff contacted a local attorney, conferred with him, and did not appear at the hearing. The court made no find-

ings as to whether plaintiff had presented a meritorious defense in this hearing to the 26 April order. The court concluded:

> ". . . (1) That the plaintiff had legal and adequate notice of the hearing of April 26, 1977, in Iredell County, North Carolina. (2) That the Court had jurisdiction on April 26, 1977, to enter an order concerning custody of the minor child, Kimberly Dawn Dishman. (3) That there is no justifiable reason to set aside the court order of April 26th, 1977."

Homesley, Jones, Gaines & Dixon by Wallace W. Dixon for plaintiff appellant.

L. Hugh West, Jr. for defendant appellee.

CLARK, Judge.

[1] Plaintiff's argument that the 26 April court did not have jurisdiction over the "*res*," the child, because the child was not present, overlooks the rule that in a child custody proceeding the court has continuing jurisdiction to do anything necessary at any time to supervise the welfare of the minor child, though the child is not actually before the court. G.S. 50-13.5(c)(3); *Phipps v. Vannoy*, 229 N.C. 629, 50 S.E. 2d 906 (1948); *In re Greer*, 26 N.C. App. 106, 215 S.E. 2d 404 (1975). The court had jurisdiction at the time of the 1972 consent judgment and never lost it, regardless of where the child was from time to time.

[2] Nor did the court, in the case *sub judice*, err in refusing to consider visitation rights, as such consideration would be a modification of the prior order's grant of *exclusive* custody to defendant and the court may modify custody or visitation only upon a showing of changed circumstances and on adequate motion in the cause. G.S. 50-13.7(a). Plaintiff's motion to set aside the 26 April order was not an adequate motion for this purpose.

[3] Plaintiff's motion and her appeal from the adverse ruling does raise the question of whether the trial court erred in concluding that there was no excusable neglect. G.S. 1A-1, Rule 60(b) allows relief from "a final judgment, order, or proceeding." We find that the custody order of 26 June was a "final order" under the Rule, though the order could be changed subsequently upon a proper showing of change of circumstances under G.S. 50-13.7.

[4] In the order appealed from, the court made no finding of meritorious defense. A court need not make findings as to meritorious defense after a hearing on a motion to set aside a judgment for excusable neglect when it concludes there was no excusable neglect shown. Whether or not there was a meritorious defense is immaterial in such case. *Whitaker v. Raines*, 226 N.C. 526, 39 S.E. 2d 266 (1946); *Johnson v. Sidbury*, 225 N.C. 208, 34 S.E. 2d 67 (1945).

However, although it is not necessary that a court make findings as to meritorious defense when it finds adequate notice and concludes that there was no excusable neglect, it would be the better practice to make such findings. A court's conclusion as to excusable neglect is a conclusion of law and is reviewable and reversible. *Powell v. Weith*, 68 N.C. 342 (1873); *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). The court's findings are generally conclusive on appeal if supported by any competent evidence, *Carter v. Anderson*, 208 N.C. 529, 181 S.E. 750 (1935); *Wynnewood, supra*, but findings made under a misapprehension of the law are not binding and if the findings are insufficient to support the conclusion the order will be reversed. *Hanford v. McSwain*, 230 N.C. 229, 53 S.E. 2d 84 (1949); *Ellison v. White*, 3 N.C. App. 235, 164 S.E. 2d 511 (1968). Thus, a court may have its conclusion of no excusable neglect reversed, and, because it made no finding of the issue of meritorious defense, will have to make such findings on remand. It is better practice to make them at the initial hearing on the motion.

Rule 60(b)'s grounds for vacation of a prior judgment or order for "mistake, inadvertence, surprise or excusable neglect" are the exact grounds spelled out in former G.S. 1-220, and cases decided under the former statute remain good authority. *Doxol Gas v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971); Shuford, North Carolina Practice and Procedure, § 60-6, pp. 507-508. What constitutes "excusable neglect" depends on what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances. When a litigant has not properly prosecuted his case because of some reliance on his counsel, the excusability of the neglect on which relief is granted is that of the litigant, not of the attorney. The neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. *Kirby v. Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d

407 (1971); *Shuford, supra.* The law does not demand that a litigant in effect be his own attorney, when he employs one to represent him. The litigant must exercise proper care. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. den.* 291 N.C. 176, 229 S.E. 2d 689 (1976). But the litigant who employs counsel and communicates the merits of his case may reasonably rely on his counsel and counsel's negligence will not be imputed to him unless he has ample notice either of counsel's negligence or of a need for his own action. *Norton, supra.* Where a litigant fails to appear and a default judgment is rendered against him the law of "excusable neglect" is controlled by two old cases. Where it appeared, upon the defendant's motion to set aside a default judgment, that the same had been regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, his attorney's negligence was imputed to him. His neglect was not excusable. *Gaster v. Thomas*, 188 N.C. 346, 124 S.E. 609 (1924). But where no laches are attributable to the client, he will be granted relief. *Geer v. Reams*, 88 N.C. 197 (1883).

[5] In the case *sub judice*, the court's conclusion that there was no excusable neglect was based on the findings that plaintiff was served with process and notified that the hearing on defendant's motion would be heard on 26 April and that she employed counsel and conferred with him and did not appear at hearing. These facts are supported by competent, uncontroverted evidence. However, they are insufficient to support the court's conclusion. In *Gaster, supra*, it was held that negligence in failure to appear was inexcusable in view of the fact that the case was duly calendared and the movant had actual knowledge. In the case *sub judice*, it was stipulated that the case did not appear on the printed trial calendar but was handwritten onto the add-on calendar by a deputy clerk. It does not appear from the record on appeal whether this calendaring procedure conformed to the rules arranged by the chief district judge under the provisions of G.S. 7A-146, but this is not determinative of the issues on appeal in view of actual notice to plaintiff, who relied on her attorney's advice to disregard the notice. It was the duty of her attorney to notify the court properly that he represented plaintiff and to determine whether the hearing was to be held on the date specified in the notice served upon her. His negligence in failing

to perform this duty should not be imputed to her. Her failure to appear was understandable and excusable since she had the right to rely upon her counsel's representation that the case would not be heard on the date specified in the motion served upon her.

Because the trial court erred in its conclusion that there was no justifiable reason to set aside judgment, *i.e.*, because there was no excusable neglect, the court's order denying plaintiff's motion is reversed and the cause is remanded for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge BROCK and Judge WEBB concur.

PARKE CONSTRUCTION COMPANY v. CONSTRUCTION MANAGEMENT COMPANY

No. 7726SC632

(Filed 15 August 1978)

1. **Arbitration and Award § 1— arbitration provision—construction**

A provision of a joint venture agreement stating that "Any and all disputes of any kind under or in connection with this Agreement will be submitted to" a named person "for absolute and final decision" did not pertain only to on-the-job management and administrative decisions during the course of the work but required that any dispute arising under the joint venture agreement be resolved in binding arbitration, including any amount allegedly owed to plaintiff by defendant under the terms of the agreement.

2. **Arbitration and Award § 3— arbitration provision—connection of named arbitrator with one party—knowledge by other party**

A provision for binding arbitration in a joint venture agreement between plaintiff and defendant was not unenforceable as violating the public policy of this State and the Federal Arbitration Act because the person named in the agreement to be arbitrator was the president of defendant's parent company where plaintiff knew of the nature of the relationship between the named arbitrator and defendant at the time it entered the agreement with defendant.

APPEAL by plaintiff from *Griffin, Judge*. Order entered 22 April 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 April 1978.

Plaintiff filed its complaint alleging that defendant owed it $54,945.32 in fees due under the provisions of a "Joint Venture Agreement" and a "Supplemental Agreement" pertaining to certain construction in Charlotte. Defendant answered and counterclaimed for $140,840, at the same time filing a motion to dismiss, asserting that binding arbitration clauses in the agreements provided plaintiff's only remedy.

The trial court ordered that the action be stayed pending completion of arbitration. Plaintiff appeals.

Fleming, Robinson & Bradshaw, by Russell M. Robinson II, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by Ross J. Smyth and William C. Livingston; Alston, Miller & Gaines, Atlanta, Georgia, by Oscar N. Persons and Peter M. Degnan, for defendant appellee.

ERWIN, Judge.

The following order of Judge Griffin gives rise to this appeal:

"THIS CAUSE coming on to be heard and being heard before The Honorable Kenneth A. Griffin, Judge Presiding over the March 28, 1977, Schedule D Mixed Session of Superior Court of Mecklenburg County, on the Defendant's Motion, which the Court construes as being to dismiss or in the alternative to stay the above-styled action pending arbitration of the claims asserted by Plaintiff and Defendant in their pleadings filed in this action, and counsel for all parties being present;

After hearing argument and receiving evidence, this Court finds as follows:

FINDINGS OF FACT

1. Plaintiff Parke Construction Company (hereinafter 'Parke') and Defendant Construction Management Company (hereinafter 'CMC') entered into a Joint Venture Agreement (hereinafter 'Joint Venture Agreement') and a Supplemental Agreement (hereinafter 'Supplemental Agreement') entered as of August 29, 1972, copies of which were introduced into the record and marked as D-1 and D-2, respectively.

2. Paragraph X of the Joint Venture Agreement provides that 'Any and all disputes of any kind under or in connection with this Agreement will be submitted to Mr. Ira Hardin for absolute and final decision. In the event of his unavailability, Mr. A. H. Sterne shall so serve.'

3. The last sentence of the first unnumbered paragraph of the Supplemental Agreement provides that 'The terms and conditions of that Joint Venture Agreement are incorporated herein by reference.'

4. The arbitration provision contained in Paragraph X of the Joint Venture Agreement and incorporated by reference into the Supplemental Agreement has not been modified or altered in any manner from the date that said Agreements were entered into through and including the date of this hearing.

EXCEPTION NO. 6

5. The language contained in the Joint Venture Agreement and Supplemental Agreement is clear and unambiguous and compels the submission of all disputes arising under or in connection with said Agreements to Mr. Ira Hardin for binding and enforceable arbitration.

EXCEPTION NO. 7

6. In any event, the evidence presented established that it was the intent of the parties at the time that the Joint Venture Agreement and Supplemental Agreement were executed to provide for the submission of any and all disputes arising under or in connection with said Agreements to Mr. Ira Hardin for binding and enforceable arbitration, in accordance with Paragraph X.

EXCEPTION NO. 8

7. Parke and CMC stipulated that the Joint Venture Agreement and Supplemental Agreement involved 'interstate commerce' within the meaning of that term as used in Sections 1 and 2 of the Federal Arbitration Act, and the Court also so finds.

8. Based upon the evidence and arguments of counsel, the Court finds that the Federal Arbitration Statute, 9 U.S.C. Sections 1-14, governs the enforceability of the arbitration

clause contained in Paragraph X of the Joint Venture Agreement and incorporated by reference into the Supplemental Agreement.

EXCEPTION NO. 9

9. The claims asserted in the Complaint filed by Parke and the counterclaims asserted by CMC fall within the scope of the binding and enforceable arbitration agreement contained in Paragraph X of the Joint Venture Agreement and incorporated by reference into the Supplemental Agreement.

EXCEPTION NO. 10

10. Parke had knowledge of the extent and nature of the relationship which exists between Mr. Ira Hardin and CMC at the time that Parke entered into the Joint Venture Agreement and Supplemental Agreement.

11. CMC has tendered to Parke submission of the claims contained in the Complaint and counterclaims to binding and enforceable arbitration, as called for by Paragraph X, and Parke has refused to so arbitrate.

EXCEPTION NO. 11

CONCLUSIONS OF LAW

1. The terms and conditions of the Joint Venture Agreement, including the arbitration clause contained in Paragraph X of said Agreement, were incorporated by reference into the Supplemental Agreement.

EXCEPTION NO. 12

2. The Federal Arbitration Act created substantive national law which supersedes conflicting state provisions and provides for the validity, irrevocability and enforceability of arbitration agreements contained in contracts relating to interstate commerce, including the agreements at issue here.

EXCEPTION NO. 13

3. The arbitration provision in Paragraph X of the Joint Venture Agreement is under the Federal Arbitration Act, valid, binding, irrevocable and enforceable and requires the parties to submit the claims alleged in the complaint and counterclaims to binding, irrevocable and enforceable arbitration by the arbitrator designated in said Paragraph X.

EXCEPTION NO. 14.

ORDER AND JUDGMENT

Based on the foregoing findings of fact and conclusions of law and on the record and the evidence in this action,

IT IS HEREBY ORDERED THAT THIS ACTION BE STAYED, pending the completion of arbitration by Mr. Ira H. Hardin (or his Paragraph X successor if Hardin is unavailable) between Parke and CMC of the claims contained in the Complaint filed by Parke and the counterclaims filed by CMC in this action.

IT IS SO ORDERED this 22 day of April, 1977.

EXCEPTION NO. 15

/s/ Kenneth A. Griffin"

[1] Plaintiff first contends that the trial court erred in finding that the parties had agreed to arbitrate such disputes as the one over plaintiff's fee. Plaintiff earnestly maintains that Paragraph X of the Joint Venture Agreement is not an agreement to arbitrate at all, but is merely an agreement that defendant ("CMC") as majority partner in the joint venture, ". . . would have the traditional right to make on-the-job management and administrative decisions regarding the 'running of the work' as the job progressed."

The defendant contends these contractual provisions provide simply and clearly that any dispute arising under the Joint Venture Agreement or Supplemental Agreement must be resolved by binding arbitration as determined by Judge Griffin.

We agree with the defendant and affirm the order entered by the trial judge.

Our Supreme Court has held: "The heart of a contract is the intention of the parties, which is ascertained by the subject matter of the contract, the language used, the purpose sought, and the situation of the parties at the time." (Citations omitted.) *Pike v. Trust Co.*, 274 N.C. 1, 11, 161 S.E. 2d 453, 462 (1968). "Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 261 N.C. 764, 766, 136 S.E. 2d 81, 83 (1964), and "All contemporaneously executed written instruments be-

tween the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E. 2d 477, 482 (1969).

In the contracts before us, the words are plain; the language is clear; and the intent of the parties is ascertainable. The term, "any and all disputes," is all embracing and includes the utmost possible. As far as these contracts are concerned, there is not any dispute excluded from arbitration.

The record reveals a letter from C. P. Street of McDevitt & Street Company of Atlanta, Georgia, dated 30 October 1971 to Allen S. Hardin, President of Ira H. Hardin Company, Atlanta, Georgia, stating that Ira H. Hardin Company and McDevitt & Street Company will join a joint venture to construct the subject project (NCNB-Charlotte, N. C.), with the following language stated:

> "4) In the event of disagreement between representatives of the two companies which cannot be satisfactorily resolved by these representatives, information concerning the areas of disagreement is to be submitted to Mr. Ira H. Hardin for final decision. In the event that Mr. Ira H. Hardin is incapacitated and cannot act in this capacity as Chief Arbiter, the parties hereto will choose another arbiter in his place."

C. P. Street, on 23 October 1971, forwarded his memorandum to P. C. Gaskell, E. R. Street, and J. E. Sebrell (President of Parke Construction Company, plaintiff) stating the following:

> "I told Allen that we would be glad to have his father, Ira H. Hardin, as arbiter of differences of opinion instead of Frank Carter, but that either one would be acceptable to us."

Where the terms of a contract are established, prior negotiations are merged. Evidence of prior negotiations may be competent, as here, to show the intent of the parties. We cannot find any evidence that would limit Paragraph X to the traditional right to make on-the-job management and administrative decisions regarding the "running of the work."

[2] Plaintiff contends that the Joint Venture and the Supplemental Agreements are unenforceable in that they violate the public policy of this State and of the Federal Arbitration Act.

We note that the defendant in its answer alleged the agreement to arbitrate the claims presented by plaintiff in its complaint and the defendant's claims alleged in its first counterclaim. The plaintiff's reply is silent on the position of Ira H. Hardin, arbiter, and Paragraph X of the Joint Venture Agreement.

The plaintiff states in its brief:

> "There is a generally prevailing public policy against permitting one of the parties to a dispute serve as the arbitrator thereof:
>
> > 'If parties are to be encouraged to arbitrate, arbitration proceedings must be conducted with the same degree of impartiality as the courts afford. Public policy requires, therefore, that arbitrators not only be completely impartial but also that they have no connection with the parties or the dispute involved which might give the appearance of their being otherwise. Obviously a person is disqualified to act as an arbitrator if he is himself a party to the dispute.' 5 Am. Jur. 2d, Arbitration and Award § 99 at 595."

We judge from this that the plaintiff has concluded that Ira H. Hardin is not and will not be impartial in the performance of his duties pursuant to Paragraph X of the Joint Venture Agreement. This is assumed by the plaintiff without any allegations or evidence that would support such assumption. A search of the record before us reveals that Thomas Crawford, Jr., President of CMC, testified that:

> "Mr. Ira Hardin is the Chairman of the Board of Ira H. Hardin Company, which is the parent company of Construction Management Company. It is correct that Mr. Hardin was designated by the parties to be the arbitrator, and he is the Chairman of the Board of the company that owns Construction Management Company."

Judge Griffin found as a fact that Parke (plaintiff) had knowledge of the extent and nature of the relationship which exists between Mr. Ira Hardin and CMC (defendant) at the time that Parke entered into this Joint Venture Agreement and Supplemental Agreement. Neither party objected to this finding of fact.

The United States Supreme Court held in *United States v. Moorman*, 338 U.S. 457, 460-1, 94 L.Ed. 256, 259, 70 S.Ct. 288, 290 (1950):

> "[A]nd in *Martinsburg & Potomac R. Co. v. March*, 114 US 549, 29 L ed 255, 5 S Ct 1035, this Court enforced a contract for railroad grading which broadly provided that the railroad's chief engineer should in all cases 'determine the quantity of the several kinds of work to be paid for under the contract, . . . , decide every question which can or may arise relative to the execution of the contract, and his estimate shall be final and conclusive.' Id. (114 US at pp 551, 552, 29 L ed 256, 5 S Ct 1035). In upholding the conclusions of the engineer the Court emphasized the duty of trial courts to recognize the right of parties to make and rely on such mutual agreements. Findings of such a contractually designated agent, even where employed by one of the parties, were held 'conclusive, unless impeached on the ground of fraud, or such gross mistake as necessarily implied bad faith.' Id. at p 555."

Our Supreme Court held in *Pearson v. Barringer*, 109 N.C. 398, 400, 13 S.E. 942, 943 (1891):

> "It is earnestly insisted that the award should be set aside because Bristol, the arbitrator chosen by the plaintiff, was a surety on the prosecution bond, and therefore an interested party.
>
> It is well settled, that parties 'knowing the facts, may submit their differences to any person, whether he is interested in the matters involved (*Navigation Co. v. Fenton*, 4 W. & S. [Pa.], 205), or is related to one of the parties, and the award will be binding upon them.' (6 Wait's Act. & Def., 519; Morse on Arbitration, 105). But if the submission be made in ignorance of such incompetency, the award may be avoided. No relief, however, will be granted unless objection is made as soon as the aggrieved party becomes aware of the facts, and if after the submission he acquires such knowledge and permits the award to be made without objection, it is treated as a waiver and the award will not be disturbed."

The Federal Courts have followed *Martinsburg & Potomac R. Co. v. March, supra,* without substantial modification, and the courts of North Carolina have followed *Pearson v. Barringer, supra,* for many years. On the record before us, we are not permitted to interfere with the contractual rights of the parties when each was aware and understood the contracts it entered into.

We find no merit in the contention that the trial court erred in excluding some of the evidence offered by the plaintiff to show the purpose and intent of the so-called "arbitration agreement." The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written agreement. *See Root v. Insurance Co.,* 272 N.C. 580, 158 S.E. 2d 829 (1968).

The order of Judge Griffin is affirmed.

Affirmed.

Judges BRITT and CLARK concur.

ALFRED S. NUGENT, JR. AND REGINA M. NUGENT v. WALLACE BECKHAM AND ANN L. BECKHAM

No. 771SC812

(Filed 15 August 1978)

1. Rules of Civil Procedure § 56— summary judgment motion—affidavit not considered

In an action for specific performance of a contract to sell a house, defendants' contention that the affidavit of one defendant should have been accepted as evidence that defendants tendered to plaintiffs a deed pursuant to the contract and that plaintiffs rejected the deed is without merit, since the affidavit in question did not show affirmatively that it was based upon the personal knowledge of the affiant or that he was otherwise competent to testify to the matters stated therein, and, absent such a showing, the trial court could not, consistent with the requirements of G.S. 1A-1, Rule 56(e), consider the affidavit upon plaintiff's motion for summary judgment.

2. **Vendor and Purchaser § 5— action for specific performance—breach of contract—no material issue of fact**

In an action for specific performance of a contract to sell a house, there was no genuine issue of material fact as to whether the house in question was located in violation of certain ordinances and restrictive covenants, and the trial court properly granted summary judgment for plaintiffs on the issue of breach of contract.

3. **Vendor and Purchaser § 5— specific performance of contract to convey land—no prayer for abatement and accounting in complaint—abatement and accounting properly granted**

Though plaintiffs in an action for the specific performance of a contract to convey land did not specifically pray for an abatement and accounting in their complaint, they did set forth a simple and unambiguous statement of the essential facts setting forth a claim for relief for specific performance, an abatement and an accounting, and the trial court therefore did not err in granting specific performance, abatement and an accounting after determining that no issue of fact existed as to breach of contract.

4. **Vendor and Purchaser § 8— breach of contract to convey land—items of damage considered by jury**

In an action for specific performance of a contract to convey land, evidence as to the cost involved in bringing the property in question into compliance with local ordinances and restrictive covenants was one factor which could properly be considered by the jury in its efforts to determine the difference between the fair market value as contemplated by the parties upon entering their contract and the fair market value of the property the defendants were actually able to convey.

5. **Vendor and Purchaser § 8— seller's refusal to convey land—interest denied to all parties—no error**

Though the general rule is that the buyer is entitled to rents and profits during the period in which the seller has refused to convey and has wrongfully kept the buyer out of possession, while the seller is entitled to interest on the purchase price, denial of interest to all parties in the discretion of the trial court was proper in this case, since in this case the interest sought on the purchase price would exceed the amount awarded the plaintiffs by the jury and would result in a net gain to defendants in the form of a reward for their failure or refusal to comply with the terms of their contract.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 25 May 1977 in Superior Court, DARE County. Heard in the Court of Appeals 27 June 1978.

This action was commenced by the plaintiffs, Alfred S. Nugent, Jr., and Regina M. Nugent, seeking specific performance of a contract by and damages against the defendants, Wallace Beckham and Ann L. Beckham. By complaint filed in November,

1973, the plaintiffs alleged a breach by the defendants of a contract to sell a certain lot and house in Dare County to the plaintiffs. The plaintiffs alleged that they had tendered the full purchase price agreed upon to the defendants on the closing date in July, 1973, as required by the contract. The plaintiffs further alleged that the defendants refused to accept the tender and to convey the property due to the fact that the house was situated on the property in violation of certain restrictive covenants and county subdivision ordinances governing setback and sideline requirements. By their answer, the defendants admitted entering into the contract to sell and refusing to convey the property, for the reasons stated in the complaint, upon the plaintiffs' tender of the purchase price. They denied, however, any bad faith on their part and counterclaimed for various damages.

The action was first heard by Judge Robert R. Browning upon motions by both parties. The plaintiffs' motion for summary judgment on the issue of the existence of a contract was allowed and the court found the parties had entered a contract. The defendants were granted leave to and did amend their answer and counterclaim.

The action was next heard by Judge Robert A. Collier, Jr., in April of 1977 upon additional motions for summary judgment. A partial summary judgment order was entered on 15 April 1977 declaring the plaintiffs were entitled to specific performance of the contract and that trial should be had upon the issues of the amount of abatement of the purchase price and rents and profits due the plaintiffs since 1973. The defendants in apt time excepted to this order.

The action was tried before Judge Bradford Tillery and a jury. The plaintiffs presented evidence tending to show that they had intended to spend approximately four weeks each year in the house and to rent it for the remainder of each year. As a result of the defendants' breach of the contract, the plaintiffs lost rents and profits and suffered other specified damages. The defendants offered evidence tending to show that they had paid taxes and insurance and incurred various other losses on the property since the intended closing date in July of 1973. The jury awarded the plaintiffs $5,500 in abatement of the purchase price of the property and $9,000 for rents and profits with a setoff of $6,800 in defendants' favor.

The trial court, with the consent of the parties, deferred final judgment until the parties submitted briefs upon the question of whether interest should be allowed either party. The trial court in its discretion declined to award interest to either party and entered judgment against the defendants on 25 May 1977. The defendants appealed.

Other pertinent facts are hereinafter set forth.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P. A., by Norman W. Shearin, Jr., and Roy A. Archbell, Jr., for plaintiff appellees.

Aldridge & Seawell, by Christopher L. Seawell and Daniel Duane Khoury, for defendant appellants.

MITCHELL, Judge.

[1] The defendants first assign as error the granting of the plaintiffs' motion for summary judgment as to specific performance, abatement of the purchase price and an accounting. In support of this assignment, the defendants contend that there was an issue of material fact as to whether the plaintiffs were entitled to specific performance. The defendants contend that the affidavit of the defendant, Wallace L. Beckham, should have been accepted as evidence that the defendants tendered to the plaintiffs a deed to the property pursuant to the contract and at the time set for closing, and that the plaintiffs rejected the deed and are not, therefore, entitled to specific performance. We do not agree.

At no point does the affidavit in question show affirmatively that it was based upon the personal knowledge of the affiant or that he was otherwise competent to testify to the matters stated therein. Absent such a showing, the trial court could not, consistent with the requirements of G.S. 1A-1, Rule 56(e), consider the affidavit upon the plaintiffs' motion for summary judgment. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). The trial court was, however, free to consider the admissible affidavit of the former counsel for the plaintiffs tending to show that neither of the defendants were present at the time of the plaintiffs' tender of the purchase price, and that the plaintiffs' tender was made to counsel for the defendants out of the defendants' presence. This assignment of error is overruled.

[2] The defendants also contend that a genuine issue of material fact was presented as to whether the house in question was located in violation of certain ordinances and restrictive covenants. They therefore contend that Judge Collier erred in determining that no issue of material fact was presented and that the house was in fact so located. We have thoroughly reviewed the pleadings, including the defendants' original and amended answers, together with the interrogatories and exhibits filed by the parties. We find no indication therein that a genuine issue existed regarding the location of the house in violation of the ordinances and restrictive covenants. That part of the order of Judge Collier granting summary judgment for the plaintiffs as to the existence of a contract and its breach was, therefore, proper.

[3] The defendants next contend that Judge Collier erred in granting specific performance, abatement and an accounting, after determining that no issue of fact existed as to breach of contract. In support of this contention the defendants note that the plaintiffs did not specifically pray for an abatement and accounting in their complaint.

An order for specific performance of a contract to sell real property, together with an abatement of the purchase price, is proper where the title proves in some way defective or the estate differs from that which the owner agreed to convey. *Goldstein v. Trust Co.*, 241 N.C. 583, 86 S.E. 2d 84 (1955); 71 Am. Jur. 2d, Specific Performance, § 129, pp. 165-66. Here, the plaintiffs' complaint set forth a simple and unambiguous statement of the essential facts setting forth a claim for relief for specific performance, an abatement and an accounting, as they alleged among other things that the defendants were possessed of a title which was defective in some particular or were possessed of an estate different from that which they had agreed to convey.

Nevertheless, the defendants contend that G.S. 1A-1, Rule 8, required the plaintiffs specifically request an abatement and accounting in addition to specific performance. We do not agree. G.S. 1A-1, Rule 54(c) contemplates judgments granting the relief to which the party in whose favor they are rendered is entitled without regard to whether such relief has been demanded in that party's pleadings. Additionally, to give Rule 8 the strict construction urged by the defendants would frustrate the intent of the rule, as expressed in section (f) thereof, that all pleadings be con-

strued so as to do substantial justice. Here, the plaintiffs specifically demanded judgment in the form of specific performance of the contract and set forth a plain statement of a claim for relief for specific performance, abatement and an accounting. The directive contained in Rule 8(a)(2) that a party demand the relief to which he deems himself entitled requires no more, and this assignment is overruled.

[4] The defendants assign as error the action of the trial court in permitting the jury to consider evidence relating to the cost of moving the house in question as evidence concerning the proper amount of any abatement of the purchase price. We find that evidence as to the cost involved in bringing the property into compliance with local ordinances and restrictive covenants was one factor which could be properly considered by the jury in its efforts to determine the difference between the fair market value as contemplated by the parties upon entering their contract and the fair market value of the property the defendants were actually able to convey.

The defendants have also contended that other evidence admitted by the trial court and relating to the issue of fair market value was improper. Without restating each of those contentions separately, we have reviewed them and find each without merit. The evidence admitted by the trial court was proper and did not constitute error.

[5] Finally, the defendants contend that the trial court erred in declining in its discretion to award them interest on the purchase price of the property, as the plaintiffs had the use of the purchase price until judgment requiring specific performance. It is true that the general rule is that the buyer is entitled to rents and profits during the period in which the seller has refused to convey and wrongfully kept the buyer out of possession, while the seller is entitled to interest on the purchase price. *Harper v. Battle*, 180 N.C. 375, 104 S.E. 658 (1920); *Stern v. Benbow*, 151 N.C. 460, 66 S.E. 445 (1909). We do not think, however, that the seller's right to interest on the purchase price in such cases is absolute as a matter of law. *See* 81A C.J.S., Specific Performance, § 198, pp. 169-70.

Here, the interest sought on the purchase price would exceed the amount awarded the plaintiffs by the jury and would result in

a net gain to the defendants in the form of a reward for their failure or refusal to comply with the terms of their contract. We do not feel the general rule is so inflexible as to require a court of equity to reach such results. Rather, we find the denial of interest to all parties in the discretion of the trial court to have been proper in this case.

The defendants having received a fair trial free from prejudicial error, we find

No error.

Judges VAUGHN and MARTIN concur.

W. C. COSTNER, AND WIFE, LEVADA COSTNER v. CITY OF GREENSBORO

No. 7718SC469

(Filed 15 August 1978)

Ejectment § 6; Eminent Domain § 13; Municipal Corporations § 43— city's construction of street on plaintiffs' land—damages action barred—no right of ejectment

Plaintiffs who were legally barred from suing a city for damages for construction of a permanent public street on their land could not maintain an action to eject the city from the land since a taking of the land for a public street was within the city's power of eminent domain, and plaintiffs' only remedy was to seek permanent damages.

APPEAL by plaintiffs from *Walker (Hal H.), Judge*. Order entered 25 March 1977 in Superior Court, GUILFORD County. Defendant cross-assigned error. Heard in the Court of Appeals 8 March 1978.

Plaintiffs instituted this civil action on 14 August 1973 by filing their complaint alleging that: plaintiffs are the owners of certain real property in the City of Greensboro fronting on West Wendover Avenue; the defendant is a municipal corporation, having the power of eminent domain to condemn private property for public use; on 7 November 1969, the defendant took possession of a strip of plaintiffs' land to widen West Wendover Avenue (graded, paved and constructed curbs and gutters thereon) without

their consent. Plaintiffs demanded that defendant surrender possession of the land to the plaintiffs in its former condition. On 12 September 1973, the defendant filed its answer admitting that it took possession of the land in question as a part of its right-of-way.

On 18 December 1974, Judge Crissman entered an order which appeared to be an order denying summary judgment under Rule 56 of the Rules of Civil Procedure. The defendant objected and excepted to the entry of this order on the grounds that the matter was before Judge Crissman on its merits on an agreed statement of facts with a jury trial waived. On 25 March 1977, Judge Walker allowed defendant's 12(b)(6) motion to dismiss the complaint on the grounds the complaint did not state a claim upon which relief can be granted, holding that plaintiffs' sole remedy was an action for permanent damages which is now barred by the applicable statute of limitations. The plaintiffs appeal.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff appellants.

Deputy City Attorney James W. Miles, Jr., for defendant appellee.

ERWIN, Judge.

The record reveals that on 28 June 1974, the plaintiffs and defendant filed a stipulation of facts:

"I. That this is a civil action begun in the Superior Court Division of the General Court of Justice by the issuance of summons and filing of a complaint on 14 August 1973; that the action seeks to have the Court declare:

(a) That the plaintiffs are the owners of the property described in paragraph V of the complaint, the same being the property which is the subject matter of this action; and ask the Court to determine the title to the property;

(b) That the defendant is in wrongful possession of the same;

(c) That the plaintiffs are entitled to have the defendant surrender possession of the same to them and have the defendant restore the same to its former condition.

II. That on 19 May 1953, the plaintiffs acquired by deed certain property; that the property which is the subject matter of this action was encompassed in the description of said property; that the plaintiffs entered into possession of all of the said property and have claimed the same and exercised dominion over all of said property since said date; that the plaintiffs have paid taxes on the same at all times pertinent hereto.

III. That it is agreed that since the defendant took possession of the said property, the plaintiffs have at all times claimed the same and have paid taxes upon the same.

IV. That the plaintiffs caused to be constructed on said property a dwelling house and since that time have lived therein; that no part of the dwelling house or any other structure is located on the portion of property which is the subject matter of this action.

V. That on or about 7 November 1969, the defendant took possession of that portion of property which is the subject matter of this action; that defendant claimed ownership to said property by virtue of an alleged preexisting right of way; that the defendant has never negotiated with the plaintiffs for purchase of the same either before or after possession of the same.

VI. That the defendant used the property which is the subject matter of this action to widen an existing public roadway; that said widening consisted of increasing the width of the existing roadway and the installation of curb and gutter adjacent thereto; that the defendant is now in possession of the same.

VII. That the existing roadway and the roadway as improved is a principal arterial or major thoroughfare in the City of Greensboro; that the project has been completed and the roadway is in use as a public way.

VIII. That the defendant City of Greensboro is a municipal corporation and may acquire property by the exercise of the power of eminent domain when the same is required in the public interest; that the defendant has never instituted any condemnation proceedings with respect to the property which is the subject matter of this action; that the defendant has never negotiated with the plaintiffs for purchase of the same; that the defendant has never asked nor obtained permission from the plaintiffs to go upon the same.

IX. That on 10 November 1969, the plaintiffs instituted an action against the defendant City of Greensboro (designated as 69 CvS 9411) for the purpose of enjoining and restraining the City of Greensboro from entering upon the property which was the subject matter of that action and which is the subject matter of this current action (complaint attached as Exhibit A); that, based upon said complaint being treated as an affidavit, a temporary restraining order was issued against the City of Greensboro (attached hereto as Exhibit B); that subsequently an amended complaint was filed which sought recovery of defendant for alleged trespass in addition to the injunctive relief stated above (amended complaint attached as Exhibit C); that, based on a hearing on affidavits and argument of counsel, an Order was entered vacating and dissolving the temporary restraining order (attached as Exhibit D); thereafter defendant filed Answer (attached as Exhibit E).

X. That, upon motion for summary judgment, supported by affidavit, filed by the defendant, the [first] action was dismissed on 21 February 1973 on the ground that the plaintiffs had failed to present their claim to the City Council of the City of Greensboro in writing as required by Sections 7.01 and 7.02 of the City Charter (Motion, Affidavit, Order, and pertinent portion of City Charter attached hereto as Exhibits F, G, H, and J, respectively).

XI. That the property which is the subject matter of this action is the same as that which was the subject matter of action 69 CvS 9411 above-mentioned.

XII. [T]hat the matter came on to be heard before the Honorable Harvey Lupton, Judge Presiding at the one-week

special civil session of the Superior Court of Guilford County beginning on 18 March 1974; that, by consent of counsel for the respective parties, it was agreed that said Judge shall enter a decision herein, or any other regular Superior Court Judge shall enter a decision based on the facts herein stipulated and those appearing of record in this action, and that said decision may be rendered out of term, out of session and out of district."

On 18 December 1974, Judge Crissman entered an order which appears to be an order denying a motion for summary judgment which held in part:

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the defendant's motion for a summary judgment be, and the same is hereby denied; and

2. That this cause remain upon the trial calendar for trial before a jury in its regular course and order."

To the entry of Judge Crissman's order, defendant appellee excepted and made the following cross-assignment of error: "The Court committed prejudicial error in purporting to deny a motion for summary judgment which defendant never made instead of deciding this case upon the Stipulation of Facts."

We hold that it was error for Judge Crissman to treat the Stipulation of Facts as a motion for summary judgment, and we further hold that Judge Crissman should have entered judgment for the defendant.

In a prior civil action between the same parties to this action, the plaintiffs then sought damages in the amount of $1,500.00 from the defendant for destroying a large, ornamental tree, by grading, entering and tramping upon the herbage on said property and $5,000.00 in punitive damages relating to the same real property described in this action. The defendant answered that the amended complaint does not allege that prior to the institution of the action, the plaintiffs presented their claim in writing to the City Council of the defendant city as required by Sections 7.01 and 7.02 of the Charter of the City of Greensboro.

On 21 February 1973, the trial judge made the following findings of fact and entered order thereon:

"Based upon the foregoing undisputed facts, the Court makes the following conclusions of law:

(1) The plaintiffs failed to give written notice to the City Council of the City of Greensboro prior to the institution of this action for damages as is required by defendant's Charter.

(2) Compliance with the defendant's Charter provisions with respect to giving written notice is a condition precedent to the institution of any action against the defendant for the recovery of damages.

* * *

ORDERED, ADJUDGED AND DECREED that the plaintiffs' action is hereby dismissed with prejudice and that the cost of the action shall be taxed against the plaintiffs."

Plaintiffs contend that they have now stated a cause of action pursuant to N.C. G.S. 41-10.1, "Trying title to land where State claims interest."

We conclude that plaintiffs seek to eject the city from the property in question, not merely to try title. "The nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E. 2d 540, 545, 546 (1956). "But where, as here, defendants are in actual possession, and plaintiffs seek to recover possession, the action in essence is in ejectment." *Baldwin v. Hinton*, 243 N.C. 113, 117, 90 S.E. 2d 316, 319 (1955). *See also Poultry Co. v. Oil Co.*, 272 N.C. 16, 157 S.E. 2d 693 (1967); *Hayes v. Ricard, supra.*

In the first civil action, the plaintiffs were barred from seeking damages for failure to give notice as required by the Charter of the City of Greensboro. The judgment entered 21 February 1973 against the plaintiffs with prejudice stands as a permanent bar to any recovery of damages growing out of the city's acts of going upon and constructing a street on the property in question. The judgment was not appealed from.

The question now is: May the plaintiffs who are legally barred from suing for damages, maintain an action to eject the de-

fendant city, with power of eminent domain, from the land which plaintiffs allege they own, after the city has erected a permanent street across the property as a major thoroughfare for traffic? We answer no.

Our Supreme Court held in *Beasley v. Aberdeen and Rockfish Railroad Company*, 147 N.C. 362, 364-5 (1908):

> "[W]here a railroad corporation has entered on the land of another and constructed its road and is operating same, and, having the power of eminent domain, has not exceeded the ultimate rights of appropriation contained in the power nor violated the restrictions imposed upon it by its charter or the general law, such company cannot be ousted from the land by action of ejectment instituted by the owner nor subjected to successive and repeated actions of trespass by reason of the user and occupation of the property. . . ."

Beasley, supra, was followed by *Rhodes v. City of Durham*, 165 N.C. 679, 680, 81 S.E. 938, 939 (1914), holding:

> "[W]here the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that the right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement."

The city did not exceed its authority and has a right to be protected from ejectment by the plaintiffs in order to execute a public function, to maintain an orderly flow of traffic within its bounds. The right of eminent domain may not be distorted by the plaintiffs, who failed in their first civil action to recover damages from the city. In this case, the plaintiffs have reached their second and final bar, in that, the city, with a right of eminent domain, has gone upon the land in question and constructed a permanent street thereon and is protected against an action in ejectment pursuant to its power of eminent domain.

In view of the above, the order of Judge Crissman dated 18 December 1974 is reversed; the case is remanded with instruc-

tions to enter judgment for the defendant in accordance with this opinion.

The results are: (1) the order entered by Judge Walker, coming after the order of Judge Crissman, is vacated; (2) the order of Judge Crissman is reversed, and the case is remanded with instructions to enter judgment for defendant; (3) the plaintiffs are taxed with the costs.

Judges BRITT and CLARK concur.

REBECCA GOODMAN WOOD v. VERNON L. WOOD

No. 7721DC844

(Filed 15 August 1978)

1. **Rules of Civil Procedure § 60.1— striking divorce judgment—notice required**

Even though an order striking a divorce judgment on plaintiff's motion was entered during the same term as the divorce judgment itself, before the judgment of divorce could be stricken notice should have been given to defendant and a hearing should have been held at which plaintiff should have been required to offer evidence that justice required the striking of the judgment.

2. **Rules of Civil Procedure § 41.1— voluntary dismissal—time for taking**

A voluntary dismissal under G.S. 1A-1, Rule 41 will lie only prior to entry of final judgment, and, after final judgment, any correction, modification, amendment, or setting aside can only be done by the court.

APPEAL by defendant from *Alexander (Abner), Judge*. Judgment entered 31 May 1977, District Court, FORSYTH County. Heard in the Court of Appeals 30 June 1978.

On 4 December 1975, the parties, by way of consent judgment entered in an action brought in Mecklenburg County by plaintiff against defendant for child custody, child support, and alimony, resolved their differences. On 17 March 1977, plaintiff brought an action for absolute divorce based on separation for one year and asked that the consent judgment be incorporated in the judgment "as a part of the absolute divorce". The complaint was signed by Harold R. Wilson, attorney for plaintiff, and verified by the plaintiff on 15 March 1977. On 15 March 1977,

Harold Wilson and John Morrow were partners but Morrow had notified Wilson that he was withdrawing from the partnership as of the last day of March. This notice was given on 10 March. On 15 April 1977, defendant went to see Morrow to obtain representation in his attempt to obtain a decrease in the alimony and child support payments he was making. He exhibited the copy of the divorce complaint served on him. Morrow advised him not to answer the complaint, but to move, after the decree was entered, for termination of alimony.

On Monday, 16 May 1977, judgment of absolute divorce was entered. Morrow notified defendant by letter that the divorce had been granted and that the motion could be made. On 20 May, he mentioned to an associate that he was going to file the motion and was told that plaintiff's counsel, Harold Wilson, had been overheard talking with Judge Alexander about setting aside the judgment. Morrow then filed the motion to terminate alimony at 10:43 a.m. on Thursday, 20 May 1977. At 11:19 an order was entered striking the divorce judgment. No notice was filed or given. All the evidence tends to show that Mr. Wilson made an oral motion that morning prior to the filing of defendant's motion to terminate. After the order striking the divorce judgment was filed, and also on 20 May 1977, defendant filed a motion that that order be stricken.

Thereafter and also on 20 May 1977, Judge Alexander caused an order to be entered setting a hearing *on that motion only.* Plaintiff was served with notice of the hearing at 8:00 p.m. on 20 May 1977.

On 23 May 1977, plaintiff, "pursuant to NCGS 1A-1, Rule 41 of the Rules of Civil Procedure" filed a notice of voluntary dismissal, which was served on defendant's counsel.

On 26 May 1977, a motion dated 25 May 1977, was filed by Morrow, requesting that he be permitted to withdraw as counsel for defendant because of a possible conflict of interest, and that Fred G. Crumpler, Jr., be substituted as counsel for defendant. By order dated 26 May 1977, this motion was granted, and stipulation of Morrow and defendant agreeing to the substitution was filed.

On 31 May 1977, counsel for plaintiff moved the court to strike all pleadings, motions, and orders filed by Morrow. No notice was given of this motion.

The court conducted a hearing, the date of which does not appear in the record. The record is devoid of any indication by court or counsel as to what matters were for hearing. However, counsel for plaintiff argued his motion to strike the motions and other documents filed by Morrow, and counsel for defendant argued his motion to strike the order striking the divorce judgment and his motion to terminate alimony. Evidence was presented by both parties. Both plaintiff and defendant testified. There was no request to continue and no objection interposed to the taking of evidence. The order entered by Judge Alexander on 6 June 1977, denied defendant's motion for termination of alimony and his motion to strike the order striking the divorce judgment and plaintiff's motion to strike all pleadings and motions filed by Morrow.

To the signing and entry of this order, defendant excepted and appealed to this Court.

Harold R. Wilson for plaintiff appellee.

White and Crumpler, by Fred G. Crumpler, Jr., and Michael J. Lewis, for defendant appellant.

MORRIS, Judge.

In attempting to untangle the backlash resulting in this comedy of errors, we start with the order of 20 May 1977 striking the judgment of absolute divorce. The pertinent portion of that order is as follows:

> "This cause coming on to be heard and being heard before the undersigned, Judge of the District Court Division of the General Court of Justice of Forsyth County, North Carolina, *upon motion of counsel for the plaintiff showing that errors have been committed in the complaint filed in this action* in behalf of the plaintiff, and the Court, in its discretion, finds that the judgment heretofore entered in this action should be stricken." (Emphasis supplied.)

The divorce judgment was entered on Monday and the order striking it, on Thursday of the same week. Defendant contends

that whether the order striking the judgment was made under the provisions of G.S. 1A-1, Rule 60(b)(6), or otherwise, he was entitled to notice and an opportunity to be heard. In *Norton v. Sawyer*, 30 N.C. App. 420, 426, 227 S.E. 2d 148, 153, *cert. denied* 291 N.C. 176, 229 S.E. 2d 689 (1976), we said:

> "[w]hile Rule 60(b)(6) vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice, nevertheless, we hold that a judge cannot do so without a showing based on competent evidence that justice requires it."

Plaintiff contends this rule has no application, because it is applicable only to situations where the motion to strike the judgment is made after term—and that the court may modify, amend, or vacate any judgment during the term. Whether G.S. 1A-1, Rule 60(b)(6) is applicable we do not discuss. The order was entered during term. In *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1969), the Court reiterated two well-established rules of practice and procedure:

> "(1) During a term of court all judgments and orders are *in fieri*, and, except for those entered by consent, may be opened, modified, or vacated by the court upon its own motion. *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791; *Hoke v. Greyhound Corporation*, 227 N.C. 374, 42 S.E. 2d 407; 5 N.C. Index 2d, Judgments § 6 (1968). (2) Unless actual notice of a particular motion is required by the constitution or statute, parties to an action are fixed with notice of all motions or orders made during the term of court at which the cause is regularly calendared for trial. *Insurance Co. v. Sheek*, 272 N.C. 484, 158 S.E. 2d 635; *Speas v. Ford*, 253 N.C. 770, 117 S.E. 2d 784; *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709; *Harris v. Board of Education*, 217 N.C. 281, 7 S.E. 2d 538. *This rule with reference to constructive notice, however, bends to embrace common sense and fundamental fairness. . . .*" (Emphasis supplied.) 275 N.C. at 98, 165 S.E. 2d at 495.

[1] We think common sense and fundamental fairness required that before the judgment could be stricken notice be given defendant and hearing be had at which plaintiff be required to offer evidence that justice required the striking of the judgment. This

is particularly true when the judgment sought to be stricken is a divorce judgment. To envision the confusion which could be wrought by the striking of a judgment of absolute divorce without notice does not require a particularly vivid imagination. Frequently one of the parties, if not both, enter into another marriage immediately upon the entering of the divorce decree. Rights in property, of intestate succession, and others are changed with the granting of an absolute divorce. Here, the decree, because the divorce was obtained by plaintiff on the ground of separation for one year, had the effect of terminating her right to alimony. True, a hearing was subsequently had. However, the order setting the hearing, a copy of which was served on plaintiff, provided that the hearing would be on defendant's motion filed 20 May to set aside the order striking the judgment. It is also true that plaintiff testified at the hearing that she had instructed her counsel to base the divorce action on the grounds of defendant's adultery and did not realize that that was not a ground until after the final judgment was entered. Nevertheless, we have no way of knowing the basis of the court's action in striking the judgment. At that time, he had heard no evidence. We cannot say that the evidence presented at a hearing on plaintiff's motion to set aside the judgment would have been identical to the evidence presented at the hearing on defendant's motion to strike the order setting the judgment aside. Both plaintiff and the court stated that they did not know that defendant's counsel was in the case at the time the judgment was stricken. This begs the question. The complaint and summons issued in the divorce action were served on defendant. Notice of hearing on the motion to strike the judgment could have been similarly served. The order striking the divorce judgment must be vacated.

Apparently, no one questions the fact that a motion was made by plaintiff, albeit orally. Perhaps on remand plaintiff would be well advised to file a written motion. In any event, defendant must be given prior notice.

[2] Although defendant excepted to the "notice of voluntary dismissal" entered on 23 May 1977, purportedly pursuant to N.C. G.S. 1A-1, Rule 41, and assigned it as error, he did not bring this assignment of error forward and argue it in his brief. Nevertheless, we feel it is necessary, in order to obviate further confusion that we speak to this question. Obviously, a voluntary

dismissal under Rule 41 will lie only prior to entry of final judgment. After final judgment, any correction, modification, amendment, or setting aside can only be done by the court. The purported voluntary dismissal of 23 May 1977 is of no legal efficacy.

Defendant's motion to strike the order setting aside the divorce judgment should have been granted, a hearing set on the motion to set aside the judgment, and defendant's motion to terminate alimony held in abeyance pending the ruling on plaintiff's motion after hearing.

Plaintiff has not excepted to the order denying her motion to strike all motions, pleadings, and orders filed by Morrow, and correctly so, because the court's ruling was entered entirely properly.

Reversed and remanded.

Judges HEDRICK and WEBB concur.

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST EXECUTED BY JUAN C. COOKE, DATED APRIL 12, 1967, RECORDED IN BOOK OF MORTGAGES 806, PAGE 334, DURHAM COUNTY REGISTRY; A. A. MCDONALD, JR., SUBSTITUTE TRUSTEE

No. 7714SC767

(Filed 15 August 1978)

1. **Evidence § 11.7— dead man's statute—deceased's execution of note and deed of trust**

Testimony by the payee of a note concerning deceased's execution and delivery of the note and a deed of trust securing it and deceased's failure to pay the note when due should have been excluded under the dead man's statute, G.S. 8-51; however, the admission of such testimony was harmless error where there was other competent evidence of the same facts to which the payee testified sufficient to support the trial court's findings of fact.

2. **Mortgages and Deeds of Trust § 25; Seals § 1— foreclosure under power of sale—valid debt—seal—consideration**

Introduction of a promissory note along with evidence of execution and delivery supported the finding of a valid debt in a proceeding to foreclose under a power of sale contained in a deed of trust securing the note; further-

more, if consideration was necessary to a "valid" debt, the word "seal" beside the maker's signature created a presumption of consideration where there was no proof that the maker did not adopt it as her seal.

3. **Mortgages and Deeds of Trust § 25— foreclosure under power of sale— "holders" of notes**

In a proceeding to foreclose a deed of trust, there was sufficient competent evidence that the beneficiaries of the deed of trust were "holders" of the notes secured thereby where each note was payable to a beneficiary or order, neither note was endorsed, and each note was in the possession of the original payee-beneficiary. G.S. 25-1-201(20); G.S. 45-21.16.

4. **Mortgages and Deeds of Trust § 25— foreclosure under power of sale—default**

There was sufficient evidence of default in a foreclosure proceeding where petitioner introduced evidence of past due notes secured by the deed of trust and possession of the notes by the payee-beneficiaries.

5. **Mortgages and Deeds of Trust § 25— foreclosure under power of sale—holders of valid debt—sufficiency of order**

Trial court's order in a foreclosure proceeding sufficiently found that the beneficiaries of the deed of trust being foreclosed were the holders of a valid debt.

APPEAL by respondents from *McKinnon, Judge.* Judgment entered 9 June 1977, Superior Court, DURHAM County. Heard in the Court of Appeals 20 June 1978.

Petitioner is a trustee under a certain deed of trust from Juan C. Cooke (now deceased) for the benefit of Robert Carpenter and Edith Carpenter covering real property in Durham County. He commenced this special proceeding 8 April 1977 before the Clerk of Court of Durham County seeking an order, pursuant to G.S. 45-21.16, allowing him to proceed to sell the property under the power of sale contained in the deed of trust. The Clerk found the following "facts":

"A. That there is a valid debt existing due the holder as alleged in the Petition.

B. That there has been a default in the terms of the obligation.

C. That there is the right to foreclose under the instrument set forth above.

D. That notice has been given to those so entitled as by law provided.

E. That the Petitioner and holder of the secured Note can proceed with foreclosure pursuant to the terms of the instrument and as by law provided."

George Henry Cooke, both individually and as Administrator of the estate of Juan Carpenter Cooke, gave notice of appeal. A stay was granted. A hearing was held in Superior Court. Sylvia Clayton, a witness to the promissory notes and the notary public who notarized the deed of trust, and Robert Turner Carpenter and Edith Ann Carpenter, the beneficiaries of the deed of trust, testified on behalf of the petitioner. The deed of trust and the two promissory notes which it secured were before the court. The promissory notes dated 12 April 1967 were identical in form, except that Edith Ann Carpenter was the payee of one and Robert Turner Carpenter was payee of the other, and each was in the amount of $7,000 bearing interest at 6% per annum, interest and principal being due and payable one year from date. The notes were signed as follows:

her
/s/ Juan C. X Cooke [Seal]
mark

The notes were witnessed by Sylvia D. Roycroft (now Sylvia Clayton) and B. Ray Olive. The deed of trust was similarly executed, notarized by Sylvia D. Roycroft (now Sylvia Clayton), and recorded. The deed of trust was of even date with the notes, secured the payment of said notes, and contained a power of sale. Sylvia Clayton testified that the notes and deed of trust were executed by the free and voluntary act of Juan C. Cooke.

The trial court concluded that "with sufficient evidence of default found, the holders of the Notes and the Deed of Trust are entitled to proceed with the foreclosure of the same . . ." and ordered that petitioner could proceed with foreclosure.

From that order respondents appeal.

Joe C. Weatherspoon for petitioner appellee.

Roger S. Upchurch for respondent appellant.

MORRIS, Judge.

[1] Respondent objected to the testimony of the payees/beneficiaries concerning the notes and transactions as being violative of the Dead Man's Statute, G.S. 8-51. The maker of the notes and grantor of the deed of trust is now deceased. G.S. 8-51 provides that

> "Upon . . . the hearing upon the merits of a special proceeding, a party or person interested in the event, . . . shall not be examined as a witness in his own behalf or interest, . . . against the executor, administrator or survivor of a deceased person, . . . concerning a personal transaction or communication between the witness and the deceased person. . . ."

The testimony of Robert Carpenter, to which respondent objected, concerning the note to him and the failure of the deceased to pay the same when due should have been excluded. The Dead Man's Statute is clearly applicable to the testimony of a payee of a promissory note. *McGowan v. Beach*, 242 N.C. 73, 86 S.E. 2d 763 (1955); *see also Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946). The trial court's error in admitting this testimony does not, however, warrant reversal.

There was sufficient evidence of execution and delivery in the testimony of the witness Sylvia Clayton. The notes and deed of trust were before the court. The introduction of the past due notes along with evidence of their execution and delivery would make out, in an action upon the notes, a prima facie case for the entire amount of the notes. *Royster v. Hancock*, 235 N.C. 110, 69 S.E. 2d 29 (1952); *see also Whitley v. Redden*, 276 N.C. 263, 171 S.E. 2d 894 (1970).

The same evidence, absent any evidence to the contrary, is sufficient to support a finding that the payee/possessor is the holder of a valid debt and that the debtor has defaulted. Similarly, the deed of trust was before the court and there was independent evidence, through Sylvia Clayton, of its execution and delivery. That deed of trust provides that, upon default, the trustee "shall . . . sell any or all of said land at public auction. . . ." Thus, even disregarding Robert Carpenter's testimony, there was other evidence of the same facts to which he testified

sufficient to support the trial court's findings of fact. Where both competent and incompetent evidence is before the trial court, we assume that the trial court, when functioning as the finder of facts, relied solely upon the competent evidence and disregarded the incompetent evidence. *Anderson v. Insurance Co.*, 266 N.C. 309, 145 S.E. 2d 845 (1966). Therefore, respondent's assignment of error No. 1 does not warrant reversal.

Respondents tendered to the court a "proposed order", moved the court to sign that order, excepted to the denial of that motion, and assigned as error the court's failure to make the findings of fact it contained. Respondents also excepted to the signing of the order proposed by petitioner. This exception is the basis for their assignment of error to the findings of fact contained in the order.

[2] Respondents argue that there is not sufficient evidence to support the required finding that Robert Carpenter and Edith Carpenter are holders of a valid debt. First, is there sufficient competent evidence of a valid debt? As we have previously noted, introduction of a promissory note along with evidence of execution and delivery makes out a prima facie case for the entire amount of the note in an action on a promissory note. *Royster v. Hancock*, supra. That same quantum of evidence, in the absence of probative evidence to the contrary, will support the finding of a valid debt in a proceeding to foreclose under a power of sale. Respondents, also, contend that there cannot be a "valid" debt absent consideration. We take no position as to this general proposition, but we note that the word "seal" beside the maker's signature is legally sufficient to function as a seal, and, in the absence of proof by respondents that the maker did not adopt it as her seal, by law it is her seal. *McGowan v. Beach*, supra. A seal creates a presumption of consideration, *Trust Co. v. Smith Crossroads, Inc.*, 258 N.C. 696, 129 S.E. 2d 116 (1963). Therefore, even if consideration were necessary, there is evidence to support a finding thereof.

[3] Next, is there sufficient competent evidence that Robert and Edith Carpenter are the holders of the notes? G.S. 25-1-201(20) defines a "holder" as "a person who is in possession of . . . an instrument . . . drawn, issued or endorsed to him or to his order or to bearer or in blank." We believe that this definition is applicable

to G.S. 45-21.16. We are undoubtedly dealing with "instruments". One instrument was payable "to Robert Turner Carpenter or order"; the other, "to Edith Ann Carpenter or order". Neither note was endorsed, and each was in the possession of the original payee. Ownership is not indispensable to holdership. *See* G.S. 25-3-301. Respondents do not dispute any of the crucial facts. These facts constitute ample evidence that Robert Carpenter and Edith Carpenter were holders of a valid debt.

[4] Respondents argue that there is not sufficient evidence of default to support a finding of default. We disagree. As we have previously noted, possession and introduction of a past due note makes out a prima facie case as to the entire amount of the note in an action on the note. *Whitley v. Redden, supra.* If the respondent in a proceeding to foreclose under a power of sale fails to offer any evidence to contradict the same type of evidence when it is introduced in a foreclosure proceeding, the trial court's finding of default will not be disturbed on appeal.

[5] Respondents' final argument is that the order of the trial court "does not comply with the requirements of the foreclosure statute." Respondents argue that there was not a proper finding that Robert Carpenter and Edith Carpenter were holders of a valid debt. In his order, the judge referred to Robert Carpenter and Edith Carpenter as holders when he stated that "the holders of the Note" presented evidence of ownership. The order also reveals that he considered the question of whether they were "holders" when he found that "the holders of the Notes and the Deed of Trust are entitled to proceed with the foreclosure of the same. . . ." Similarly, the order incorporated a finding of a valid debt. The findings reflected "evidence of the debt" and clearly included a finding of default. Even if the finding as to "debt" were insufficient, the finding of "default" must necessarily incorporate the concept of a binding obligation which, in this case, was the debt. In any event, the intent of the trial court is plain, and we will not reverse the trial court for harmless error. Rule 61, North Carolina Rules of Civil Procedure.

The judgment of the trial court in ordering that petitioner be allowed to proceed with foreclosure is

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. BRYAN BOARD

No. 7819SC239

(Filed 15 August 1978)

1. **Narcotics § 4.2— entrapment—sufficiency of evidence**

   In a prosecution for possession and sale of MDA, evidence with respect to entrapment was properly submitted to the jury where the State's evidence tended to show that an undercover drug agent asked defendant if he knew where the agent could buy drugs but defendant's evidence tended to show that the agent persisted in asking defendant to get drugs for him.

2. **Criminal Law § 124.5— verdict—consistency not required**

   It is not required that the jury's 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.

3. **Criminal Law § 102— jury argument—reading statute permitted—arguing facts of other cases not permitted**

   The trial court did not err in allowing counsel for the State to read to the jury portions of G.S. 90-89 relating to Schedule I drugs and in refusing to allow defense counsel to read the evidence recited in certain court decisions to the jury, since counsel may read or state to the jury a statute or other rule of law relevant to the case, but counsel may not argue the facts of other cases to the jury.

4. **Criminal Law § 138.11— more severe punishment upon retrial—punishment justified**

   The court upon retrial did not err in imposing a more severe sentence upon defendant than was imposed at his first trial since the judge upon retrial found that defendant had an intervening conviction of possession of marijuana, and such finding fully justified the more severe sentence imposed upon retrial.

APPEAL by defendant from *Collier, Judge.* Judgment entered 20 October 1977 in Superior Court, ROWAN County. Heard in the Court of Appeals 28 June 1978.

Defendant was charged with (1) sale of 3, 4 methylenedioxy amphetamine (MDA) on 8 February 1975, (2) possession of MDA with intent to sell on 8 February 1975, (3) sale of MDA on 14 February 1975, and (4) possession of MDA with intent to sell on 14 February 1975.

Defendant was found guilty of simple possession of MDA and not guilty of sale of MDA on 8 February 1975, and guilty of

possession of MDA and guilty of sale of MDA on 14 February 1975.

Defendant appeals from a consolidated judgment imposing imprisonment as a committed youthful offender for a maximum term of 18 months.

SUMMARY OF STATE'S EVIDENCE

Earnest F. Casey, Jr., age 20, in December 1974, began coaching a church basketball team. Defendant, age 17, was a member of the team. They had known each other for many years. In late January 1975, Casey met S.B.I. Agent Adcox and agreed to work undercover as a drug agent, without pay except expenses. He wanted to become a law enforcement officer. He twice asked defendant if he knew where he could get some drugs. On 7 February he telephoned defendant and asked about getting drugs from him. Defendant agreed to do so. Casey and S.B.I. Agent Adcox met defendant. They had a conversation about MDA. Defendant said he had no MDA but could get some. Casey and Agent Adcox went to defendant's home the following day, where defendant sold MDA to the Agent for $35.00.

On 14 February, Casey called defendant who agreed to meet Casey and S.B.I. Agent Adcox at a parking lot. There defendant sold MDA to the Agent for $45.00.

On cross-examination, Casey testified that he did not try to get the defendant to buy drugs for him; that he asked defendant only twice if he knew where he (Casey) could buy drugs; that he did not offer defendant any money; that he did not buy drugs from defendant but merely set up the transaction for S.B.I. Agent Adcox by a telephone call to defendant on 7 February.

SUMMARY OF DEFENDANT'S EVIDENCE

Defendant testified that Casey asked him and other members of the church on many occasions to get drugs for him. Defendant often called him at his home and visited him there. Defendant told Casey he had no drugs at first, but after Casey persisted he agreed to buy drugs for them because Casey was his friend and basketball coach. Agent Adcox gave him the money and he bought the MDA for him.

Defendant's father and mother testified that Casey made many telephone calls to their son and often came to the house to visit him. They encouraged their son to associate with Casey but later their son refused to be involved with Casey and would not return his calls.

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

Robert M. Davis for defendant appellant.

CLARK, Judge.

[1] Defendant assigns as error the denial of his motion for nonsuit, contending that the evidence established entrapment as a matter of law and relying on *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975).

This Court in *State v. Braun*, 31 N.C. App. 101, 228 S.E. 2d 466, *app. dismissed*, 291 N.C. 449, 230 S.E. 2d 766 (1976), held that the burden of proving entrapment to the satisfaction of the jury was on the defendant and does not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), or of *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 429 U.S. 815, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1977).

In *Stanley, supra*, the ruling was based on the State's uncontradicted evidence, corroborated by the defendant's evidence. In the case *sub judice*, the entrapment evidence is conflicting. The entrapment issue was raised when the case was before this court in *State v. Board*, 29 N.C. App. 440, 224 S.E. 2d 650 (1976), where the evidence relating to the issue was substantially the same as that on retrial. This Court ordered a new trial for error in jury instructions. At the original trial and retrial the entrapment issue was a question of fact for the jury to determine, and at both trials the determination was against the defendant. We find no error. The court can find entrapment as a matter of law only where the undisputed evidence and inferences compel a finding that the defendant was lured by the officer, or agent of the officer, into an action he was not predisposed to take. *State v. Stanley, supra.*

[2] Defendant argues that the jury verdict, guilty of possession of MDA on 8 February 1975, was repugnant and should have been

set aside. It is noted that defendant testified on that occasion that he was merely acting as agent for S.B.I. Agent Adcox, who gave him money and asked defendant to buy the drugs for him. The jury could have based its verdict on this testimony. 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. 4 Strong's N.C. Index 3d, Criminal Law, § 124.5.

[3] Defendant makes the double-barrelled argument that the court erred in allowing counsel for the State during argument to read to the jury portions of G.S. 90-89 relating to Schedule I drugs, and in refusing to allow defense counsel to read portions of the decisions in *Sherman v. United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958), and in *State v. Stanley, supra.* Defense counsel wanted to read some of the evidence recited in the decisions. Wide latitude is allowed in argument, and counsel may argue to the jury the law and the facts and all reasonable inferences to be drawn therefrom, but counsel may not argue the facts of other cases to the jury. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967); 12 Strong's N.C. Index 3d, Trial, § 11. Counsel may in argument to the jury read or state to the jury a statute or other rule of law relevant to the case. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974).

[4] In the first trial of this case the court's judgment in one case provided for four weekend jail sentences, and the others were consolidated and sentence suspended and defendant placed on probation. On retrial the judgment imposed a maximum term of 18 months as a committed youthful offender. Defendant argues that the trial court did not have authority to impose a more severe sentence upon retrial. We do not agree. In the case *sub judice* the trial judge found defendant had an intervening conviction of possession of marijuana, and this finding appears in the record on appeal and in the Judgment and Commitment. *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 2d 656 (1969), held that when a judge imposes a more severe sentence upon retrial the reasons for doing so must appear affirmatively in the record to support the severer sentence. The fact that defendant after his original conviction and before retrial was convicted

of another drug offense fully justified the more severe sentence imposed in the case before us.

We have carefully considered defendant's other assignments of error and find them to be without merit. The defendant had a fair trial free from prejudicial error.

No error.

Judges PARKER and ERWIN concur.

HARRIS & GURGANUS, INC. v. JESSE NOAH WILLIAMS, JR.

No. 772DC821

(Filed 15 August 1978)

1. Deeds § 21— covenant to build or reconvey—validity

It would appear competent for a grantee in a deed of real property to agree either to build upon the property within a specified time or to reconvey the property to the grantor at the end of such time.

2. Deeds § 18— conditions and covenants in deed—binding effect on grantee

A grantee, by acceptance of a deed, becomes bound by conditions and covenants therein even though he did not sign the deed.

3. Equity § 2— laches—burden of proof

Laches is an affirmative defense; the party pleading it bears the burden of proof.

4. Deeds § 21; Equity § 2.2— specific performance of covenant to reconvey—no laches

Plaintiff's action for specific performance of a covenant in a deed to reconvey the land conveyed therein to plaintiff if defendant failed to build on it within a certain time was not barred by laches where plaintiff delayed instituting the action for three years and three months; there was no showing that plaintiff's delay had resulted in a change in condition of the land or in the relations of the parties which would make it unjust to permit prosecution of the suit; defendant had been notified on two occasions of plaintiff's intention to enforce the covenant; the covenant did not specify a time within which the reconveyance was to be accomplished; and there was no showing that the length of the delay was unreasonable.

5. Equity § 2.2— laches—defendant out of State

Plaintiff's delay in instituting suit on a covenant in a deed to build or reconvey cannot be excused on the ground that defendant was absent from the State, since grounds for jurisdiction *in rem* existed pursuant to G.S. 1-75.8.

APPEAL by plaintiff from *Manning, Judge.* Judgment entered 1 September 1977 in District Court, BEAUFORT County. Heard in the Court of Appeals 27 June 1978.

Action by plaintiff seeking specific performance of a "restrictive covenant." By answer and amended answer, defendant pled laches, statutes of limitations, and the statute of frauds. The facts as found by the trial court are undisputed, and a summary follows:

By deed dated 17 March 1971 and recorded 22 March 1971, plaintiff conveyed to defendant, then a resident of Washington, D.C., two adjoining waterfront lots in Bath at a total price of $5,000.00. The deed recited that the conveyance was subject to certain restrictive covenants of record. The "restrictive covenant" which is the subject of this action reads as follows:

> "VIII. TIME OF CONSTRUCTION
>
> Any person purchasing any lots in Section 1 or Section 2 of Springdale Village takes said lot or lots whether it be business or residential property upon the expressed condition that they will initiate construction of the dwelling or business for which lot is purchased within two years from the date of delivery of the Deed thereto and any purchaser further agrees that he will pursue said construction to completion within two years and eight months from the date of delivery of the Deed from the Owner to the Purchaser. In the event the purchaser shall fail to comply with this Restriction, then and in that event he agrees to reconvey the lot or lots to the Owner and the Owner does hereby agree to pay the same price to the Purchaser that the purchaser paid to the Owner provided, however, that the Owner reserves the right unto itself exclusively to enforce the provisions of this restriction and the provisions of this restriction do not run with the land as will hereinafter be provided for all other restrictions or covenants herein."

Defendant was advised of the above covenant during his negotiations with plaintiff for the purchase of the subject property. Defendant signed no instrument referring to the covenant in question or containing any obligation to reconvey to plaintiff the lots in question.

Approximately two years later plaintiff notified defendant by mail at his Washington, D. C. address to comply with the cove-

nant in question. Defendant subsequently moved to Tahiti where plaintiff again mailed correspondence regarding the covenant. Defendant responded to neither communication.

In July 1976, plaintiff learned of defendant's presence in Greenville, N. C. and served upon him the summons and complaint commencing this action.

Based upon its findings of fact, the trial court concluded that plaintiff was guilty of laches in seeking enforcement of the covenant, and thus not entitled to the relief sought.

Plaintiff appealed.

Wilkinson & Vosburgh, by James R. Vosburgh, for the plaintiff.

Frank M. Wooten, Jr. for the defendant.

BROCK, Chief Judge.

[1, 2] The covenant in question is, in effect, a contract between the parties calling for defendant to reconvey to plaintiff and for plaintiff to repurchase from defendant the lots in question for a specified price upon the failure of the stated conditions. Although there is scant authority dealing with covenants to build or reconvey, it would appear competent for a grantee, in a deed of real property, to agree to reconvey and for the grantor to agree to repurchase. *See* 7 Thompson on Real Property, § 3150, p. 64 (J. Grimes repl. 1962); *Felton v. Grier*, 109 Ga. 320, 35 S.E. 175 (1900). Furthermore, we are not confronted with any questions as to the statute of frauds. A grantee, by acceptance of a deed, becomes bound by conditions, etc., contained therein, even though he has not signed the deed. *Story v. Walcott*, 240 N.C. 622, 83 S.E. 2d 498 (1954); *Williams v. Joines*, 228 N.C. 141, 44 S.E. 2d 738 (1947). The delivery and acceptance of a deed takes covenants contained therein out of the operation of the statute of frauds. 7 Thompson on Real Property, *supra*, § 3150, p. 60.

We agree with the trial court's findings that the covenant in question is governed by the ten-year statute of limitations applicable to contracts under seal, and that the statute of limitations had not, therefore, elapsed prior to the institution of this lawsuit. The question presented by the decision of the district court is whether plaintiff's prayer for specific performance is barred by laches, *i.e.*, plaintiff's delay in bringing this action to enforce the covenant. In our opinion, neither the trial court's find-

ings of fact, nor the evidence presented at trial support the conclusion that plaintiff was guilty of laches or unreasonable delay.

[3] Laches is an affirmative defense; the party pleading it bears the burden of proof. *Taylor v. City of Raleigh,* 290 N.C. 608, 227 S.E. 2d 576 (1976). Laches is fully applicable to parties seeking specific performance of contracts. 71 Am. Jur. 2d, Specific Performance, § 93, pp. 126-127. The concept of laches is variously defined in the cases. *See, e.g., Taylor v. City of Raleigh, supra; McRorie v. Query,* 32 N.C. App. 311, 232 S.E. 2d 312, *cert. denied* 292 N.C. 641 (1977). Further principles applicable to the instant case are as follows:

> "The doctrine of laches may be defined generally as a rule of equity by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief. 'Laches' has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar in equity." 27 Am. Jur. 2d, Equity, § 152, p. 687.
>
> "Any unreasonable delay or inexcusable negligence on the part of the plaintiff may be sufficient to prevent his procuring a decree in equity for specific performance." 71 Am. Jur. 2d, Specific Performance, § 93, p. 127. However, "delay alone is not enough." *Id.* at § 94, p. 128.

In *McRorie v. Query, supra,* the relative significance of delay was discussed:

> "Lapse of time is not, as in the case when a claim is barred by a statute of limitation, the controlling or most important element to be considered in determining whether laches is available as a defense. The question is primarily whether the delay in acting results in an inequity to the one against whom the claim is asserted based upon '. . . some change in the condition or relations of the property of the parties.' 27 Am. Jur. 2d, Equity, § 163, p. 703. Also to be considered is whether the one against whom the claim is made had knowledge of the claimant's claim and whether the one asserting the claim had knowledge or notice of the defendant's claim and had been afforded the opportunity of instituting an action. *Id.* at § 162, p. 701." 32 N.C. App. at 323, 232 S.E. 2d at 320.

[4] In the case *sub judice* defendant made no showing sufficient to satisfy the burden of proof on the question of laches. There is neither evidence of nor findings of fact as to any inequity affecting defendant which resulted from plaintiff's delay of three years and three months in instituting suit, with the possible exception of the payment of ad valorem taxes by defendant. There is no finding that plaintiff's delay was without reasonable excuse, nor is there any showing that "lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim. . . . " *Teachey v. Gurley,* 214 N.C. 288, 294, 199 S.E. 83, 88 (1938). Furthermore, returning to the considerations noted in *McRorie v. Query, supra,* there is no showing of lack of knowledge on the part of defendant that plaintiff would assert the right to repurchase the property upon which this lawsuit is based. Instead, as found by the trial court, defendant was notified by mail at his Washington, D. C. address, and later at his Tahiti address, of plaintiff's desire to enforce the covenant in question.

The only findings of fact conceivably supporting the judgment of the trial court relate merely to the three-year, three month lapse of time between accrual of plaintiff's right to seek enforcement of the convenant and the filing of this lawsuit. Neither this finding nor the evidence which was presented at trial support the trial court's conclusion of law "[t]hat the Plaintiff was guilty of LACHES in that it negligently omitted for an unreasonable length of time to take action to force the reconveyance of the lots in question. . . ."

The covenant in question did not specify a time within which the reconveyance was to have been accomplished. In such a case when time of performance is not made of the essence of the contract, the law implies a reasonable time standard within which performance may be required. 71 Am. Jur. 2d, Specific Performance, § 35, p. 56; *see Yancey v. Watkins,* 17 N.C. App. 515, 195 S.E. 2d 89, *cert. denied* 283 N.C. 394 (1973). Considerations as to delay on plaintiff's part in tendering performance of the contract as affecting his right to seek specific performance merge with those surrounding the question of laches. *See* 81 C.J.S., Specific Performance, §§ 117, *et seq.* Again, defendant made no showing that plaintiff's delay was unreasonable.

[5] Although the decision of the district court must be reversed, we decline to order entry of judgment in favor of the plaintiff. "Even when the record discloses error which would have justified the entry of a final judgment by the appellate court, that court may have discretionary power to remand for further proceedings if necessary in order to prevent a failure of justice." 5 Am. Jur. 2d, Appeal and Error, § 962, p. 389. We are not convinced that plaintiff is entitled to specific performance. Admittedly, defendant did not present any evidence. However, there was indication in the record that plaintiff was not enforcing the particular covenant against other lots covered by it. It is possible that defendant might be able to show prejudicial change in condition during the delay which would make specific performance of the covenant to reconvey inequitable. Conversely, plaintiff's delay in instituting suit cannot be excused on the grounds that defendant was absent from the State. As noted by defendant, grounds for jurisdiction *in rem* existed pursuant to G.S. 1-75.8.

The judgment of the district court denying to plaintiff the relief sought and declaring defendant the lawful owner of the property in question free from the claims of plaintiff is reversed. The case is remanded to the district court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges BRITT and ARNOLD concur.

IN THE MATTER OF THE REVOCATION OF THE LICENSE OF MARVIN JESSE HARRIS, LICENSE NO. 2842781

No. 772SC785

(Filed 15 August 1978)

1. Automobiles § 1.1— revocation of driver's license for violation of liquor laws—liquor laws not vague or overbroad term

The phrase "liquor laws" as contained in G.S. 20-19(e), the statute providing for permanent revocation of a driver's license, is not unconstitutionally vague since men of common intelligence can understand it and is not overbroad since no conduct within the purview of the phrase is a constitutionally protected activity.

2. **Automobiles § 1.1; Disorderly Conduct and Public Drunkenness § 1— public drunkenness as violation of liquor laws**

The crime of public drunkenness is a violation of the liquor laws of N. C. as that term is used in G.S. 20-19(e).

APPEAL by respondent from *Small, Judge.* Judgment entered 9 May 1977, Superior Court, BEAUFORT County. Heard in the Court of Appeals 22 June 1978.

Petitioner commenced this action on 22 July 1976 pursuant to G.S. 20-25, seeking a review of the ruling of the Division of Motor Vehicles that petitioner was ineligible for the issuance of a new license pursuant to G.S. 20-19. The essential facts are these: Petitioner was convicted of driving under the influence on 3 December 1969, and his license was revoked for one year—from January 1970 to January 1971. On 10 April 1972, petitioner was convicted of aiding and abetting while driving under the influence, and his license was revoked for four years—from May 1972 to May 1976. On 22 May 1972 petitioner was convicted of driving under the influence, and his license was permanently revoked on 22 May 1972. Petitioner requested and received hearings at which he sought reinstatement of his license in May 1975 and November 1975. On 17 March 1976, petitioner was convicted of public drunkenness.

Petitioner sought and received another hearing on 12 June 1976 seeking reinstatement of his license. The Division ruled that he was ineligible for reinstatement and would remain ineligible until 17 March 1979, three years after the date of his conviction of public drunkenness. Petitioner appealed to the Superior Court.

The trial court concluded that "the phrase . . . 'liquor laws' . . . as contained in G.S. 20-19(e) is unconstitutionally vague, indefinite and overbroad . . ." and that "petitioner's conviction of public drunkenness is not a violation of the 'liquor laws'. . . ." The court ordered the Division to grant petitioner a hearing and ruled that it could not "deny reinstatement of petitioner's driving privilege for three years because of petitioner's conviction of public drunkenness. . . ."

From that judgment, respondent appeals.

Attorney General Edmisten, by Associate Attorney Mary I. Murrill and Assistant Attorney General William B. Ray, for respondent appellant.

James, Hite, Cavendish & Blount, by Dallas Clark, Jr., for petitioner appellee.

MORRIS, Judge.

G.S. 20-19(e) provides that

> "When a license is revoked because of a third or subsequent conviction for driving or operating a vehicle while under the influence of intoxicating liquor or while under the influence of an impairing drug, occurring within five years after a prior conviction, the period of revocation shall be permanent; provided, that the Division may, after the expiration of three years, issue a new license upon satisfactory proof that the former licensee has not been convicted within the past three years with a violaton of any provision of motor vehicle laws, liquor laws or drug laws of North Carolina or any other state and is not an excessive user of alcohol or drugs. . . ."

The trial court ruled that the statute, especially the phrase "liquor laws" was "unconstitutionally vague, indefinite and overbroad" and that a "conviction of public drunkenness is not a violation of the 'liquor laws'. . . ."

[1] First, we determine whether the phrase "liquor laws" is "unconstitutionally vague". Our Supreme Court has set out a detailed definition of "vagueness".

> " 'That the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalities, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'
>
> ' . . . the terms of a criminal statute must be sufficiently explicit to inform those subject to it what acts it is their duty to avoid or what conduct on their part will render them liable

to its penalities, and no one may be required, at the peril of life, liberty, or property to guess at, or speculate as to, the meaning of a penal statute.'" *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E. 2d 764, 768 (1962).

In our opinion, the phrase "liquor laws" is not a term "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Surplus Store, Inc. v. Hunter*, 257 N.C. at 211, 125 S.E. 2d at 768. Quite to the contrary, we believe that the term is so clear and understandable to men of common intelligence that no further discussion is necessary.

Next, is the statute constitutionally invalid because it is overbroad? A statute is unconstitutionally overbroad where "the possible harm to society in permitting some unprotected speech [or conduct] to go unpunished is outweighed by the possibility that protected speech [or conduct] of others will be muted [or inhibited]. . . ." *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed. 2d 830, 840 (1973). A statute is not overbroad when it punishes, prohibits, or inhibits only conduct which is not constitutionally protected. Overbreadth is an issue *only where* some constitutionally protected conduct is punished, prohibited, or inhibited by the very same statutory provision which punishes, prohibits, or inhibits the unprotected behavior.

Overbreadth has generally been an issue in cases which dealt with statutes allegedly interfering with first amendment rights. A good example of this pattern is *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed. 2d 125 (1975). There an ordinance was adopted which prohibited drive-in movie theaters from showing films containing nudity when the screen was visible from any public street or public place. Because the ordinance's prohibition encompassed some constitutionally protected conduct; for example, showing nudity which was not pornographic, along with constitutionally unprotected conduct, such as showing nudity which was pornographic, the ordinance was overbroad and was constitutionally invalid on its face.

The present case is completely different. The only conduct inhibited by the challenged statute, insofar as this case is concerned, is "violation . . . of liquor laws . . . of North Carolina. . . ." Petitioner has argued that the statute is overbroad because the

crime of public drunkenness is included in the phrase "violation of liquor laws" and because, under the statute, conviction of the crime of public drunkenness precludes reinstatement of driving privileges for three additional years. This argument is totally without merit. Public drunkenness is not a constitutionally protected activity; nor is any other conduct within the purview of the phrase "violation of liquor laws of North Carolina". Thus, the statute is not and cannot be deemed constitutionally overbroad.

[2] Finally, we must determine whether the crime of public drunkenness is a violation of the "liquor laws" of North Carolina as the term is used in G.S. 20-19(e). The trial court concluded that public drunkenness was not a violation of the liquor laws of North Carolina. G.S. 14-335(a) provides that "[i]f any person shall be found drunk or intoxicated in any public place, he shall be guilty of a misdemeanor. . . ."

> "In the construction of the Act our chief concern is to ascertain the legislative intent. . . .
>
> * * *
>
> 'It is an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning. . . . [Citations omitted.]
>
> 'It is also an accepted rule of construction that in ascertaining the intent of the Legislature in cases of ambiguity, regard must be had to the subject matter of the statute, as well as its language, *i.e.*, the language of the statute must be read not textually, but contextually, and with reference to the matters dealt with, the objects and purposes sought to be accomplished, and in a sense which harmonizes with the subject matter. [Citations omitted.]' " *Greensboro v. Smith*, 241 N.C. 363, 366, 85 S.E. 2d 292, 294 and 295 (1955).

We note first that the legislature intended to deny reissuance of a driver's license where the petitioner has violated either of three broad categories of laws: "motor vehicle laws", "liquor laws", or "drug laws". Furthermore, the expansive nature of the statute can be seen in that the prohibition extends to "laws of North Carolina *or any other state*". (Emphasis added.) It, therefore, appears that the legislature was demanding complete compliance with *all* laws governing the use of drugs, alcohol, and motor vehicles. This demand for compliance with the law is joined

with the requirement that the petitioner not be "an excessive user of alcohol". We are compelled to the conclusion that the legislature fully intended to include the crime of public drunkenness in the phrase "violation of liquor laws of North Carolina". Additionally, this interpretation is in more complete harmony with the statute as a whole. We also believe that this interpretation conforms to the natural meaning of the phrases. Finally, this construction has been adopted by the Division of Motor Vehicles, and the construction adopted by the State officials who administer a statute is always strongly persuasive. *Shealy v. Associated Transport,* 252 N.C. 738, 114 S.E. 2d 702 (1960).

We, therefore, hold that the crime of public drunkenness is a violation of the liquor laws of North Carolina as that term is used in G.S. 20-19(e). The trial court erred as a matter of law in holding to the contrary. The decision of the trial court is reversed and the ruling of the Division of Motor Vehicles is reinstated.

Reversed.

Judges VAUGHN and MARTIN concur.

WILLIAM DIXON v. MID-SOUTH INSURANCE COMPANY

No. 778DC840

(Filed 15 August 1978)

Insurance § 45— air embolism as cause of death—death from accidental injury—insurer obligated

A contract of insurance which provided coverage for "loss resulting solely from accidental bodily injuries" did not require a finding of "injury by accidental means" for defendant to be obligated; rather, defendant was obligated under its contract upon a finding that insured died from accidental injury, and an air embolism which occurred after surgery removing insured's left arm and shoulder and which caused her death was an accidental bodily injury under the terms of the contract of insurance.

APPEAL by defendant from *Exum, Judge.* Judgment entered 14 June 1977 in District Court, LENOIR County. Heard in the Court of Appeals 29 June 1978.

Plaintiff is the beneficiary under Policy No. 150304 issued by defendant to Ella Mae Dixon, plaintiff's wife, which obligates defendant to pay for "loss resulting solely from accidental bodily injuries sustained while this policy is in force, hereinafter referred to as 'Injuries'." Thereafter the policy contains an "Accidental Death Benefit" of $2,000 in the following terms:

> "If the Insured sustains 'Injuries' which shall result in the death of the Insured within ninety (90) days from the date of the accident, the Company will pay the Accidental Death Benefit. In addition, the Company will pay the amount of ten (10%) per cent of such Accidental Death Benefit to the beneficiary each month for twelve (12) consecutive months following the date of death of the Insured. Benefits under this Part 1 shall be in lieu of all other benefits provided by this policy."

Ella Mae Dixon died 28 August 1975 at North Carolina Memorial Hospital, Chapel Hill, following the surgical amputation of her entire left arm and shoulder to remove a cancerous tumor underneath her arm. The cause of death was determined to be an air embolism in the right ventricle of the heart.

Plaintiff filed proof of loss with defendant but defendant denied liability. The date of death, the relationship of the insured and beneficiary, and the existence of the policy in full force and effect on the date of insured's death were stipulated. It was also stipulated that, if the loss was covered under the policy, the beneficiary was entitled to recover $4,400.

The trial judge made findings of fact and concluded, *inter alia,* the following:

> "That the policy in question is an 'accidental death' policy as distinguished from an 'accidental means' policy and does not require, as a prerequisite to coverage, for the insured to die of 'accidental means', but merely requires death resulting from accidental bodily injuries.
>
> That the insured, Ella Mae Sutton Dixon, died as a result of accidental bodily injuries."

Judgment was entered in favor of plaintiff for $4,400 plus interest from 28 August 1975 until paid, and for the costs. Defendant appealed.

Gerrans and Spence, by William D. Spence, for the plaintiff appellee.

McLeod and Senter, by William L. Senter, for the defendant appellant.

MORRIS, Judge.

There are two basic questions raised by this appeal, the answers to which are determinative of the entire controversy:

1. Does the language of the policy of insurance in question obligate defendant only if the insured's injury was caused by accidental means, or is defendant obligated upon a finding of accidental injury?

2. Was the air embolism which caused insured's death an accidental bodily injury under the terms of the policy in question?

The rule is clear in this State that policies of insurance, having been prepared by the insurer, will be liberally construed in favor of the insured, and strictly against the insurer. Since the words used in an insurance policy have been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company. See cases cited in 7 Strong's, N.C. Index 3rd, Insurance, § 6.2. We do not feel that terms of the insurance policy in question in this case are ambiguous, but if they were, the above rule would apply.

The Courts of this State have clearly adopted the view that there is a distinct difference between a policy which provides coverage for "accidental injury" and a policy which provides coverage for "injury by accidental means". A sufficient discussion of the difference between "accidental injury" and "injury by accidental means", and their equivalents, can be found in the citations and annotations collected in 7 Strong's, N.C. Index 3rd, Insurance, § 45, *et seq.*, and we need not belabor that question here.

The insurance policy involved in this lawsuit clearly falls within the "accidental injury" class of coverage. It provides for coverage for "loss resulting solely from accidental bodily

injuries". "The words 'accident' and 'accidental' have never acquired any technical signification in law, and when used in an insurance contract are to be construed and considered according to the ordinary understanding and common usage and speech of people generally." 44 Am. Jur. 2d, Insurance, § 1219 p. 64. If the defendant had desired to draft its insurance contract to cover only "injury by accidental means", it could have done so. Such a distinction has long been recognized in this State. *See Fletcher v. Trust Co.*, 220 N.C. 148, 16 S.E. 2d 687 (1941).

Our answer to the first question posed above is that a finding of "injury by accidental means" is not required, and that defendant is obligated under its contract upon a finding that Ella Mae Dixon died from "accidental injury".

Even so, defendant argues that the evidence does not support the trial court's finding and conclusion that Ella Mae Dixon died as a result of accidental bodily injuries. We disagree. The following findings of fact were made by the trial judge from competent evidence offered at trial:

> "That shortly prior to August 28, 1975, the insured, Ella Mae Sutton Dixon, a 45 year old black female, was referred by her family physician to North Carolina Memorial Hospital at Chapel Hill, North Carolina, for treatment of a malignant cancerous tumor under her left arm. That on August 19, 1975, the insured, Ella Mae Sutton Dixon met with Dr. Herbert J. Proctor, a general surgeon, at North Carolina Memorial Hospital who examined her and told her that an operation was needed to remove her left shoulder and arm and that if this operation was not undertaken the cancer would kill her. That after some deliberation the insured consented to the operation.
>
> That on August 28, 1975, the insured underwent the operation for the removal of her left arm and shoulder at North Carolina Memorial Hospital in Chapel Hill. The chief surgeon during said operation was Dr. Herbert J. Proctor. Dr. Frantz and Dr. Kimbro also assisted in the operation. There were also medical personnel in charge of anesthesia and nurses present at various times during the operation.
>
> The operation began at about 2:30 p.m., August 28, 1975, and was completed at approximately 5:30 p.m. That Dr. Proctor

and all medical personnel exercised extreme caution and care for the safety of the insured. That nothing unusual occurred during the operation and the operation was considered to be a successful surgical operation. That Dr. Proctor left the operating room at about 5:30 p.m. as the incision was being closed. That at this time Dr. Proctor felt the operation had been successful and that the operation had gone as planned in all respects. That the insured was alive at 5:30 p.m., August 28, 1975. That at about 6:15 p.m. on August 28, 1975, Dr. Proctor was informed by Dr. Frantz that the insured had died.

That on August 29, 1975, an autopsy was performed upon the insured, Ella Mae Sutton Dixon. That the autopsy took approximately three hours and was performed to determine the cause of death of Ella Mae Sutton Dixon.

That Ella Mae Sutton Dixon died on August 28, 1975 as a result of an air embolism. That her death was not intended, not foreseen and not expected. That her death was unusual and did not happen in the ordinary course of things.

That although death by air embolism is always a remote possibility in operations such as this one, it is a possibility in many surgical operations and procedures and it is considered a very slight risk or probability. That all precautions were taken during the operation to guard against air embolism. That the death of Ella Mae Sutton Dixon by air embolism was not foreseen, not expected and not intended by anyone.

That the insurance policy in question provides coverage for loss of life 'resulting solely from accidental bodily injuries'. That the policy in question is not an 'accidental means' policy.

That the insured, Ella Mae Sutton Dixon, died on August 28, 1975, as a result of accidental bodily injuries."

Defendant makes a strong jury argument upon its view of the evidence. Defendant argues that decedent underwent a drastic and major operation involving the removal of her entire left arm and shoulder; that an air embolism is a known risk and danger of the forequarter amputation type surgery which decedent underwent; the nature of the operation itself was a contributing factor to her death, and she did not die "solely from

accidental bodily injuries"; and that her death, therefore, was not within the policy coverage. The argument is interesting but not convincing. Defendant would have us overlook the competent evidence from which the trial judge made his findings of fact.

Our answer to the second question posed above is that the air embolism which caused Ella Mae Dixon's death was an accidental bodily injury under the terms of the contract of insurance.

Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHNNY MACK OXNER

No. 7714SC996

(Filed 15 August 1978)

1. Robbery § 1.1— armed robbery—claim of right to property taken

There is no merit in defendant's contention that he could not be found guilty of armed robbery because he had a bona fide claim of right to the property taken where (1) defendant denied taking any property from the prosecuting witness at all; (2) defendant and others were "dealing" in marijuana, which is prohibited by statute; (3) defendant's claim was an unliquidated amount of money received by the victim in the sale of marijuana for defendant; and (4) defendant used a sawed-off shotgun to aid him in the collection of the money taken over the victim's objections.

2. Criminal Law § 124.1; Robbery § 6— guilty verdict as to defendant—jury's request for instructions as to codefendant—no showing of lack of understanding of charges against defendant

The trial court in an armed robbery case did not err in refusing to set aside a jury verdict finding defendant guilty of attempted armed robbery and to resubmit the case to the jury when the jury, which had been unable to agree on a verdict as to a codefendant and was still deliberating on the question of the codefendant's guilt or innocence, asked the court for another explanation of the elements of attempted armed robbery and attempted common law robbery, since the evidence against each defendant was not identical, and the jury's request did not show that it did not understand the elements of the charges against defendant.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 5 August 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 3 April 1978.

Defendant was indicted for armed robbery of one Louis White Keith of $50.00, found guilty by a jury of attempted armed robbery, sentenced to eight to ten years in the custody of the Department of Correction, and he appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Richard N. Weintraub, for defendant appellant.

ERWIN, Judge.

The defendant contends in light of the circumstances disclosed by the evidence that the jury could possibly find him guilty of the offense of assault with a deadly weapon or the offense of larceny from the person or both. In failing to instruct the jury on these two offenses, the defendant asserts that the trial court committed prejudicial error, entitling him to a new trial.

[1] The defendant further contends, relying on *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965), that a person cannot be guilty of robbery and forcibly taking property from the actual possession of another where he has a bona fide claim of right or title to the property, since such belief negates the requisite *animus furandi* or intent to steal.

In the trial below, the State's evidence tended to show that sometime prior to 15 April 1977, defendant's girl friend, one Iris Harris, gave Keith some marijuana. On 15 April 1977, defendant approached Keith and stated, "You have got my money." Keith testified, "I thought it (the marijuana) was a present." Defendant contends that Keith owed him some money which resulted from the sale of the marijuana. Keith testified.

> "[I] tried to sell it but couldn't, and that is why I didn't owe Oxner any money. I received nothing from Oxner, so I did not think that he was entitled to receive anything from me.
>
> Later that afternoon Oxner returned, this time with co-defendant Connie Hickson. The two of them approached me

with guns. Oxner 'asked me did I have his money and I said no.' He asked for the money several times. I knew what he was talking about. At one point they pointed the guns at me. I told Hickson that he had nothing to do with the matter. They went through my pockets, and I scuffled with them. Each of them struck me, and I was bruised. They left me, and then a passing police car was flagged down."

A scuffle ensued between defendant, co-defendant, and the prosecuting witness, Keith, after which Keith was missing $50.00. Defendant and co-defendant were apprehended shortly thereafter, and two loaded guns were found nearby.

Iris Harris testified for co-defendant, Hickson, that she was with the defendant both times on 15 April 1977 when he went to see the prosecuting witness:

"[I] had earlier given Keith some marijuana, and Keith was supposed to sell it. I had promised the proceeds of the sale to Johnny Oxner, and Keith knew of that promise. Keith had told Oxner that he (Keith) would pay Oxner.

On the afternoon of April 15, Oxner got out of his car with a gun, but he never pointed it at Keith. As Keith went toward his car, Hickson raced Keith to it and Hickson took a gun from Keith's car. Neither Hickson nor Oxner searched Keith's pockets."

Larry Baines testified that Keith had earlier said he had sold the marijuana in question for about $100.00.

Defendant's evidence tended to show that he spoke to Keith several times on 15 April 1977; that Keith knew that he was to sell the marijuana and give him the money from the sale, but refused to do so; that neither defendant nor co-defendant pointed guns at Keith or took money from him.

From the evidence, the Court charged the jury in part:

"Therefore, I charge you that if you find from the evidence and beyond a reasonable doubt that on or about the 15th day of April, 1977, Johnny Mack Oxner or Connie Ray Hickson had in their possession, either of them, a firearm and took and carried away a $50.00 bill from the person or the presence of Louis Keith without Mr. Keith's voluntary con-

sent, and accomplished this by endangering or threatening Mr. Keith's life with the use or threatened use of a sawed-off shotgun, the defendant knowing that he was not entitled to take the property, and intending at the time to deprive Mr. Keith of its use permanently, if you find those seven things from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty of robbery with a firearm. However, if you do not so find or have a reasonable doubt as to one or more of these things you should not find him guilty of robbery with a firearm.

* * *

[I]n order for you to find the defendant or either of them guilty of attempted robbery with a firearm the State must prove four things beyond a reasonable doubt:

First, that the defendant or either of them, if they were acting in concert, intended to take the property of Louis Keith, to rob him, that is to say to forcibly take and carry away the personal property of Mr. Keith, and intended to take it from his person or from his presence without his consenting, knowing that they were not entitled to take it, intending to deprive him of its use permanently."

The evidence at the trial was in conflict. Defendant's testimony put at issue whether the money was taken from the prosecuting witness at all, not the intent with which it was taken. On the other hand, there was evidence which defendant asserts put at issue the intent with which the money was taken.

Our Supreme Court held in *State v. Lee*, 282 N.C. 566, 193 S.E. 2d 705 (1973), that in an armed robbery prosecution, the trial judge was not required to charge the jury that in order to convict the defendant, the jury must find that he took the victim's rings with the specific intent to convert them to his own use where the issue was not the intent with which the rings were taken but whether they were taken at all. In *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410 (1948), and *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964), our Supreme Court held that the evidence for the defendants tended to negate any intent to steal. In *Lunsford*, *supra*, the defendants contended they took a pistol from the prosecuting witness, who was intoxicated, to keep him from

shooting one of them; that the pistol was surrendered to the arresting officer; and that they had no intent to deprive him permanently of the pistol. In *Lawrence, supra*, the defendant had taken from the prosecuting witness' wallet the exact amount which the witness owed him and which he (witness) had said he would be glad to pay. A new trial was awarded in both cases, because the Court failed to explain in certain terms, understandable to a layman, the essential felonious intent implicit in the expression "felonious taking." In the case before us, the instructions of the trial judge were adequate.

In view of the record before us, we reject the defendant's contention that he cannot be found guilty of robbery and forcibly taking of property from the actual possession of another where he has a bona fide claim of right or title to the property since such belief negates the requisite *animus furandi* or intent to steal.

The record shows: (1) the defendant denied taking any property from the prosecuting witness at all; (2) the defendant and others were "dealing" in marijuana, which is prohibited by Chapter 90 of our General Statutes; (3) the alleged claim or debt was an unliquidated amount of money; and (4) the defendant used a "sawed-off" shotgun to aid him in collection of the debt or claim to the property taken over the objections of the prosecuting witness.

We renounce the notions that force be substituted for voluntary consent and violence be substituted for due process of law.

[2] In his final assignment of error, defendant contends the Court erred in denying his motion "to resubmit the case to the jury after the jurors showed their failure to understand the elements of the crimes" with which he was charged. This assignment has no merit.

The record discloses that after the jury had deliberated for some period of time, they returned to the courtroom and stated that they had reached a verdict as to the defendant Oxner, but had not reached a verdict as to the co-defendant. The Court proceeded to take the verdict as to defendant, and upon being polled, each juror confirmed his verdict of guilty of attempted armed robbery. The jury was dismissed for the night.

When court reconvened the next morning, the foreman asked for a re-explanation of the "six parts" constituting attempted armed robbery and attempted common law robbery. The Court gave additional instructions on the points requested, and the jury resumed its deliberations as to the co-defendant. Defendant's counsel then stated to the Court, "In view of the jury's questions about armed robbery, I move to set aside the verdict on the grounds that the jury didn't seem to understand." The trial judge denied the motion.

We conclude the motion was properly overruled. The jury had returned a complete verdict as to the defendant. Since the evidence against each defendant was not identical, it is understandable that the jury might have difficulty in applying the law to the case against one defendant that they would not have in the case against the other defendant. The assignment of error is overruled.

In the trial of the defendant below, we find no prejudicial error.

No error.

Judges BRITT and CLARK concur.

ALVIN D. DOVE AND MAURICE MARSHALL, A PARTNERSHIP, T/A SAINT'S LOUNGE v. NORTH CAROLINA BOARD OF ALCOHOLIC CONTROL

No. 7710SC744

(Filed 15 August 1978)

Intoxicating Liquor § 2.5— beer license—violation without knowledge of permittee

The State ABC Board properly suspended petitioners' on-premises beer permit on the ground that petitioners "knowingly allowed" the use of their premises for an unlawful purpose where petitioners' employee sold heroin while on the premises, notwithstanding there was no evidence that petitioners had actual knowledge that the employee sold the heroin, since all acts of an employee are imputed to the permittees for the purposes of revoking or suspending a permit under G.S. 18A-43(a).

APPEAL by respondent from *Graham, Judge.* Judgment entered 3 June 1977, Superior Court, WAKE County. Heard in the Court of Appeals 2 June 1978.

Evidence before the Board of Alcoholic Control revealed the following essential facts: Special Agent John Price of the Drug Enforcement Administration entered petitioners' premises, Saint's Lounge, on 5 August 1975 and purchased a "spoon" of heroin from Gerald Brown for $250. At that time petitioners held an "on-premises" beer permit, and Gerald Brown was working behind the bar with petitioner Freddie Marshall serving beer to customers. Brown, in fact, sold a beer to Agent Price. There was no evidence, other than the physical proximity of co-permittee Marshall, that either of the petitioners had actual knowledge of the transaction.

By notice, the petitioners were informed of the incident and informed that they had violated G.S. 18A-43(a) by "[k]nowingly allowing your licensed premises to be used for unlawful purposes on or about August 5, 1975, 10:45 p.m. by knowingly allowing your employee, Gerald Edward Brown, to sell a controlled substance (Heroin) to Special Agent Johnnie L. Price. . . ." The hearing officer found a violation and recommended a 120 day suspension of petitioners' permit. The Board approved the findings of fact and imposed a 45 day suspension with an additional 75 day suspension being suspended for one year. The co-permittees petitioned the Superior Court for review, prayed for a stay order which was granted, and prayed that the "action for the Board be rescinded *toto*". After hearing, the Superior Court found that the sale of heroin occurred and that co-permittee Marshall was present but co-permittee Dove was not. The trial court concluded that there was insufficient evidence that petitioners knew of the actions of Brown, that they did not knowingly allow the said use of their premises, and that Brown's actions could not be imputed to petitioners. The trial court ordered that the suspension of the permit be rescinded. From that order, respondent Board of Alcoholic Control appeals seeking a reversal of the trial court's order and re-instatement of the suspension.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the respondent appellant.

Beech and Pollock, by D. D. Pollock, for the petitioner appellees.

BROCK, Chief Judge.

Respondent Board of Alcoholic Control contends that the actions of Gerald Brown in selling heroin to Agent Price are imputed to petitioners for the purposes of this proceeding. Respondent contends, and petitioners concede, that on the night of 5 August 1975 Gerald Brown was an employee of petitioners under the Malt Beverage Regulations of the Board of Alcoholic Control. The Board argues that because Brown is an employee, his actions are legally imputed to petitioners and that, therefore, the trial court erred in concluding that petitioners did not "knowingly allow" the use of their premises for an unlawful purpose. We agree.

G.S. 18A-43(a) provides in pertinent part that,

> "If any permittee . . . allows the premises with respect to which the permit was issued to be used for any unlawful, disorderly, or immoral purposes, . . . his permit may be revoked or suspended by the State Board of Alcoholic Control."

G.S. 90-95 makes the sale of heroin a punishable offense. The sale of heroin is an unlawful purpose within the meaning of the term in G.S. 18A-43(a). The only genuine question raised by the facts before us is whether petitioners "knowingly allowed" the use of the premises for unlawful purposes. Petitioners contend, and the trial court concluded, that petitioners could not be said to have knowingly allowed that use absent, at a minimum, a showing of circumstances putting them on notice that Brown was selling heroin on the premises. Respondent contends that by law the very acts of an employee are imputed to a permittee for the purposes of suspending his license under G.S. 18A-43.

Although petitioners' position has some appeal, the case law is otherwise. Our Supreme Court has faced this same issue previously and has clearly set out the law in this regard.

> "The petitioners, the licensees, elected to operate their retail beer business at least in part with employees, and they must be responsible to the licensing authority for their employees' conduct in the exercise of their license, whether they know about it or not, else we would have the absurd result that beer could be sold at forbidden hours on the

premises by their employees and whiskey sold on the premises by their employees, and the licensees would be immune to disciplinary action by the State Board of Alcoholic Control, if they had no knowledge of it. Such a result would cause a complete breakdown of beverage control by the State, and cannot have been contemplated by the Legislature.

In a number of cases the courts have upheld revocation, cancellation or suspension of liquor licenses because of improper, or wrongful or unlawful acts of the licensees' employees or agents, although such acts are committed against the instructions of the licensee or without his knowledge or consent. This is sound law, which we adopt. (Citations omitted.) . . . 'In our opinion there is no room for debate on the question whether, for the purpose of suspension or cancellation of licenses, the holder of a retail liquor license should be held responsible for the acts and conduct of his employee in the operation of the business. Sound public policy requires that he is responsible. To hold otherwise would lead to a complete breakdown of the whole system and theory of supervision contemplated by the Act, and would permit a licensee to escape liability for suspension or revocation of his license merely on the ground he had no knowledge of and had not authorized or approved a violation by the employee. In an effort to get at this very thing the Legislature has seen fit to classify those persons to whom licenses may be granted and who may be employed by licensees. In the nature of things it must be held that the licensee is responsible at all times for the acts and conduct of his employee in the operation of the business. The rule under consideration is not unreasonable, arbitrary, capricious or in contravention of the Act, and is not unconstitutional.' " *Boyd v. Allen*, 246 N.C. 150, 155-156, 97 S.E. 2d 864, 868 (1957). *See also Fay v. Board of Alcoholic Control*, 30 N.C. App. 492, 227 S.E. 2d 298, *cert. denied* 291 N.C. 175 (1976).

The case cited by petitioners deals with the acts of customers. In *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971), the question was whether the permittee knowingly permitted an affray. In that case, the fight involved *customers* not *employees*, and the employees were doing

everything possible to eject those involved in the fight. The case is clearly not applicable.

It is clear that the law of this State is that all acts of employees are imputed to the permittee for the purposes of G.S. 18A-43. Thus, upon the facts before the Board and, subsequently, the trial court, we conclude that petitioners did, as a matter of law, knowingly allow the use of their premises for an unlawful purpose. The judgment of the trial court is reversed and the order of the Board suspending petitioners' license is affirmed and reinstated.

Reversed.

Judges VAUGHN and MARTIN concur.

CLIFTON T. WHYBURN PLAINTIFF-APPELLANT v. H. ROSS NORWOOD AND WIFE, STELLA G. NORWOOD; RONALD BENOIT; NANCY R. ROBINSON; JUDY R. HARRIS; JOSEPH C. PHILLIPS AND WIFE, TERESA A. PHILLIPS; ROBERT E. TIBBS, SR., AND WIFE, CAROLE R. TIBBS; TIMIR BANERJEE AND WIFE, RITA MARIE BANERJEE; KENNETH W. WATERS AND WIFE, LILA C. WATERS; REGINE NAUMAN HAYES AND HUSBAND, TED W. HAYES; REX E. BROOKS AND WIFE, CAROLYN L. BROOKS; MARY C. WIENTJES; DANIEL O'NEAL AND WIFE, JACKIE W. O'NEAL; DYAL JEAN WEAVER; DAVID W. HOLMES AND WIFE, KATHLEEN M. HOLMES; PIERRE MORELL AND WIFE, BONNIE B. MORELL; THE GUARANTY STATE BANK, A NORTH CAROLINA CORPORATION; THE CENTRAL CAROLINA BANK AND TRUST COMPANY, A NORTH CAROLINA CORPORATION; LILLIAN B. ROYAL DEFENDANT-APPELLEES

NELLIE BYNUM STROWD v. H. ROSS NORWOOD AND WIFE, STELLA G. NORWOOD; RONALD BENOIT; NANCY R. ROBINSON; JUDY R. HARRIS; JOSEPH C. PHILLIPS AND WIFE, TERESA A. PHILLIPS; ROBERT E. TIBBS, SR., AND WIFE, CAROLE R. TIBBS; TIMIR BANERJEE AND WIFE, RITA MARIE BANERJEE; KENNETH W. WATERS AND WIFE, LILA C. WATERS; REGINE NAUMAN HAYES AND HUSBAND, TED W. HAYES; REX E. BROOKS AND WIFE, CAROLYN L. BROOKS; MARY C. WIENTJES; DANIEL A. O'NEAL AND WIFE, JACKIE W. O'NEAL; DYAL JEAN WEAVER; DAVID W. HOLMES AND WIFE, KATHLEEN M. HOLMES; PIERRE MORELL AND WIFE, BONNIE B. MORELL; THE GUARANTY STATE BANK, A NORTH CAROLINA CORPORATION; THE CENTRAL CAROLINA BANK AND TRUST COMPANY, A NORTH CAROLINA CORPORATION

No. 7715SC741

No. 7715SC799

(Filed 15 August 1978)

Appeal and Error § 6.11— order limiting lis pendens—no immediate appeal

In an action to quiet title to property which defendants have incorporated into a residential subdivision, an order limiting the scope of *lis pendens* filed by plaintiffs only to the area of the subdivision which they claim was interlocutory and not immediately appealable.

APPEALS by plaintiffs from *Hobgood, Judge.* Orders entered 1 July 1977 in Superior Court, CHATHAM County. Heard in the Court of Appeals 1 June 1978. (Appeals consolidated for purpose of hearing and determination.)

In March of 1977 each plaintiff filed a complaint to quiet title to certain real property which he or she allegedly owns but which

defendants Norwood have incorporated into a residential development named "River Forest". Plaintiffs do not claim title to all of the property in the 318-acre River Forest subdivision but only to approximately 16.7 acres thereof for which the deeds of plaintiffs and the Norwoods overlap.

Plaintiffs also joined as defendants 25 other persons and corporations who had purchased or financed lots in the River Forest development on the ground that the restrictive covenants in their deeds and recorded in a declaration of "Restrictive and Protective Covenants" give said defendants an interest in the disputed property through a purported right to restrict the use thereof.

Contemporaneously with the filing of their complaints, plaintiffs filed notices of lis pendens describing as the property affected by the pending litigation the entire River Forest subdivision. Defendant Ross Norwood filed motions to limit the scope of the notices of lis pendens only to the area to which plaintiffs claim title.

Following a hearing, based primarily on the complaints, the court allowed the motions and ordered cancelled so much of the notices of lis pendens which purport to apply to property other than the 16.7 acres claimed by plaintiffs.

Plaintiffs appealed.

Epting, Hackney & Long, by Joe Hackney, and Barber, Holmes & McLaurin, by Edward S. Holmes, for plaintiff appellants Clifton T. Whyburn and Nellie Bynum Strowd.

Gunn & Messick, by Paul S. Messick, Jr., for defendant appellee H. Ross Norwood.

BRITT, Judge.

Defendant appellee contends that the orders from which plaintiffs purport to appeal are interlocutory ones, not affecting substantial rights, and that they are, therefore, not immediately appealable. We think this contention has merit.

In *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975), Judge Clark, speaking for this court, said:

"G.S. 1-277 and G.S. 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Raleigh v. Edwards*, 234 N.C. 528, 67 S.E. 2d 669 (1951)."

We do not think the orders of Judge Hobgood deprive plaintiffs of substantial rights which they would lose if the orders are not reviewed before final judgment. Consequently, the appeals from said orders are dismissed.

Appeals dismissed.

Judges ARNOLD and ERWIN concur.

STATE OF NORTH CAROLINA v. NORMAN BARNHILL

No. 783SC148

(Filed 15 August 1978)

Assault and Battery § 16— assault on a female—instruction on simple assault unnecessary

In a prosecution for assault with a deadly weapon where the evidence tended to show that defendant was a male over 18 years of age and the victim was a female and the trial court instructed the jury on the offense of assault on a female, an instruction on the offense of simple assault was not necessary.

APPEAL by defendant from *Small, Judge.* Judgment entered 12 September 1977 in Superior Court, PITT County. Heard in the Court of Appeals 2 June 1978.

In warrants issued 23 October 1976, defendant was charged with: (1) unlawfully, willfully and feloniously stealing, taking and carrying away certain personal property of Super Dollar Store; and (2) unlawfully and willfully assaulting Brenda Saunders with a deadly weapon, a beer bottle, by threatening to strike her with said bottle. The charges were consolidated for trial and defendant entered a plea of not guilty to both charges.

At trial, the State presented evidence tending to show the following: On 22 October 1976, two black males entered the Super Dollar Store in Greenville. One of these men, later identified as defendant, stuffed a pair of blue jeans in his shirt and put on a vinyl jacket. Brenda Saunders, the manager, asked defendant to step into her office. He refused to do so, but initially agreed to remain in the store until the police arrived. Shortly thereafter, he walked out of the store and Ms. Saunders and her husband followed. At this point, defendant picked up an empty beer bottle and threatened to hit Ms. Saunders if she did not stop following him. Defendant then continued on his way.

Defendant testified on his own behalf and his testimony tended to show that he had previously patronized the Super Dollar Store, but had never tried on clothes there. He denied taking any clothes from the Super Dollar Store on 22 October 1976, and further testified that he has never threatened Ms. Saunders with a beer bottle. On cross-examination, defendant stated that another man, J. C. Daniels, told him that the police had questioned him about the theft thinking his name was Norman Barnhill.

Upon a verdict of guilty of larceny and assault on a female, defendant was sentenced to two (2) consecutive two (2) year terms. Defendant appealed.

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

J. David Duffus, for the defendant.

MARTIN, Judge.

Defendant assigns as error the failure of the trial court to charge the jury on the lesser included offense of simple assault. We find no merit in this contention.

In the instant case, the trial court included in its charge to the jury an instruction declaring and explaining the law arising on the evidence as it related to the offense of *assault on a female.* Among other things, the jury was instructed that the State must prove the assault, that the victim was a female and that defend-

ant was a male over the age of 18 years. The jury, obviously failing to find that the beer bottle was used as a deadly weapon, acquitted defendant of that charge, and returned a verdict of guilty of assault on a female. We are of the opinion that, on the facts of this case, an instruction on the offense of simple assault was not necessary.

In the case at bar, the evidence presented established that defendant, a male over 18 years old, assaulted a *female.* "An assault on a female, committed by a man or boy over eighteen years of age, is not a simple assault; it is a misdemeanor punishable in the discretion of the court." *State v. Hill,* 6 N.C. App. 365, 369, 170 S.E. 2d 99, 102 (1969). In a prosecution for assault with a deadly weapon where the evidence discloses that, if an assault were made, it was made by a male over 18 on a female, it is not error to fail to submit the question of guilt of simple assault. *State v. Church,* 231 N.C. 39, 55 S.E. 2d 792 (1949). In *State v. Jackson,* 226 N.C. 66, 36 S.E. 2d 706 (1946), a defendant pled guilty to "a simple assault" on "Mrs. Walker." The Court held that defendant could be punished for a general misdemeanor. The Court said:

> "G.S. 14-33, creates no new offense. It relates only to punishment. Under its provisions all assaults, and assaults and batteries, not made felonies by other statutes are general misdemeanors punishable in the discretion of the court, except where no deadly weapon has been used and no serious damage done the punishment may not exceed a fine of $50 or imprisonment for 30 days, unless the assault is committed upon a female by a man or boy over 18 years of age. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the proviso or exception. Thus they remain general misdemeanors." 226 N.C. at 67-68, 36 S.E. 2d at 707.

State v. Courtney, 248 N.C. 447, 103 S.E. 2d 861 (1958); *State v. Lefler,* 202 N.C. 700, 163 S.E. 873 (1932); *State v. Jones,* 181 N.C. 546, 106 S.E. 817 (1921); *State v. Smith,* 157 N.C. 578, 72 S.E. 853 (1911).

Accordingly, we find no error in the trial court's failure to submit a charge on the offense of simple assault. We have carefully reviewed defendant's remaining assignment of error as they relate to both his assault and larceny convictions and find no prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 AUGUST 1978

ISENHOUR v. ISENHOUR No. 7720DC820	Stanly (76CVD307)	Affirmed
KEYE v. VANHOY No. 7721DC757	Forsyth (74CVD8145)	No Error
STATE v. HALL No. 784SC254	Sampson (77CRS7341) (77CRS7260)	No Error
STATE v. KEARNEY No. 787SC234	Wilson (77CR6535) (77CR6507)	No Error
STATE v. LEWIS No. 7813SC176	Bladen (75CR0511)	No Error
STATE v. LUNSFORD No. 7812SC271	Hoke (76CRS3960)	No Error
STATE v. ROBINSON No. 7814SC223	Durham (77CRS15631)	No Error
STATE v. TURBYFILL No. 7824SC202	Avery (74CR2370)	No Error
STATE v. WASHINGTON No. 789SC147	Warren (75CR1238) (75CR1245)	No Error

RUTH P. BLAKE (WIDOW); HESTER ANN BLAKE; WILLIAM F. BLAKE AND WIFE, SARAH P. BLAKE; CLIFTON A. BLAKE AND WIFE, ELSIE R. BLAKE; STEPHEN G. BLAKE AND WIFE, EXIE LEE L. BLAKE; MARY BLAKE WITMER (WIDOW); LYDA BLAKE MORRISON AND HUSBAND, HOWARD A. MORRISON, JR.; AND BETTY BLAKE TUCK AND HUSBAND, FRANK S. TUCK v. EDNA BISHOP NORMAN AND HUSBAND, PAUL NORMAN; L. W. BISHOP AND WIFE, MRS. L. W. BISHOP; O. H. BISHOP, JR. AND WIFE, MRS. O. H. BISHOP, JR.; KATHLEEN GUTHRIE HORRELL AND HUSBAND, _______ HORRELL; MARIE GUTHRIE KISTLER AND HUSBAND, _______ KISTLER; ANN ELIZABETH GUTHRIE AND JOHN HAYWOOD GUTHRIE, HEIRS OF LEOLA BISHOP GUTHRIE, DECEASED; L. W. EVERETT (WIDOWER); NORMAN BATTS; THELMA BATTS: MARTHA B. CASEY AND HUSBAND, S. W. CASEY; AND MARGARET BLAKE POLLOCK AND HUSBAND, JAMES POLLOCK; LEON GILBERT THOMAS, JR. AND WIFE, PRISCILLA CROOM THOMAS; A. A. CANOUTAS, TRUSTEE; EDWARD E. WORRELL AND WIFE, CATHERINE M. WORRELL, MORTGAGEES

No. 775SC795

(Filed 29 August 1978)

Judgments § 37.3— action to quiet title—prior cases involving same division of land—no res judicata or collateral estoppel

Plaintiffs' action to quiet title to a lot in a 1956 division of land was not barred by *res judicata* or collateral estoppel because of two prior cases involving lots in the 1956 division where each of the three cases involved different lots in the 1956 division and lappage between a division of land conveyed by plaintiffs' predecessor in title in 1879 and the lot in that particular case, since there was no identity of subject matter or of issues in the three cases.

APPEAL by defendants Edna Bishop Norman, Paul Norman, Martha B. Casey, S. W. Casey, Leon Gilbert Thomas, Jr., Priscilla Croom Thomas, Delphia Everett, Hazel E. Hines, Earl Hines, Wayne H. Everett, Lucille E. Parker, Carlton A. Parker, Luela E. Davis, Major T. Davis, Doris Schindewolf, Billy Gene Schindewolf, Billie E. Coston and husband, Willie Coston, Evelyn Yopp, L. W. Bishop, Mrs. L. W. Bishop and O. H. Bishop, Jr., from *Rouse, Judge.* Order entered 21 July 1977, in Superior Court, PENDER County. Heard in the Court of Appeals 26 June 1978.

Plaintiffs in this action to quiet title allege that they, and the defendants Pollock who refused to act as parties plaintiff, are tenants in common and the owners of Lot No. 1, containing 11.7 acres, assigned to S. G. Blake in the Jesse W. Batson Division as shown on the map thereof made by Raymond Price, surveyor, and recorded in Map Book No. 5, at page 78, Registry of Pender County.

Plaintiffs and defendants Pollock, all of whom will hereafter be referred to as plaintiffs for convenience and clarity, are devisees and heirs of S. G. Blake or his deceased son, Wyatt E. Blake.

Defendants pled, among other things, *res judicata*, more specifically "issue preclusion", also referred to as "collateral estoppel", as a bar to plaintiffs' claim, and at hearing introduced into evidence the Batson Division proceedings, the proceedings and opinions in the *Batson* and *Cutts* cases, and the deeds hereafter referred to in this opinion.

After hearing on the plea in bar the trial court in its order denying the plea in bar included the following findings of fact and conclusions of law:

> "3. The basis of the defendant's plea in bar is that the issues in this action have been decided by the cases of *Batson v. Bell*, 249 N.C. 718 (1959), and *Cutts v. Casey*, 271 N.C. 165 (1967); 275 N.C. 599 (1969); 278 N.C. 390 (1971).
>
> 4. The plaintiffs in this action were not parties in either *Batson v. Bell, supra*, or *Cutts v. Casey, supra*.
>
> 5. Wyatt E. Blake, predecessor in title to Ruth P. Blake, one of the plaintiffs herein, was one of the attorneys for the plaintiffs in *Batson v. Bell, supra*, and *Cutts v. Casey, supra*.
>
> 6. S. G. Blake was a party to the Jessie W. Batson Division.
>
> 7. S. G. Blake, predecessor in title to all of the plaintiffs in this action, was a surety on the plaintiffs' bond in the case of *Batson v. Bell, supra*, and he agreed with some of the heirs of Jessie W. Batson that he would pay all expenses of the division of the Jessie W. Batson lands on Topsail Island.
>
> 8. Wyatt E. Blake, son and heir of S. G. Blake, was one of the attorneys for plaintiffs in *Batson v. Bell, supra*, and *Cutts v. Casey, supra*.
>
> 9. All of the plaintiffs, except Ruth Blake, and defendants Pollock derive their title through the will of S. G. Blake. Plaintiff Ruth Blake derives her title through the will of W.

E. Blake, son and heir of S. G. Blake, who was deeded his interest by S. G. Blake.

10. The present plaintiffs (and the defendants Pollock), are heirs of S. G. Blake and Wyatt E. Blake.

11. The land in controversy in this action, being Lot No. 1 of the Jesse W. Batson Division, was not in question in either *Batson v. Bell, supra,* or *Cutts v. Casey, supra.* The plaintiffs in this action and in *Batson v. Bell, supra,* and *Cutts v. Casey, supra,* derive their title from the Jessie W. Batson Division. The defendants in the instant action and in *Cutts v. Casey, supra,* derive title from the Millie Bishop Division, which in turn derives from Jessie W. Batson.

12. This action involves a completely different portion of the Jessie W. Batson Division than either *Batson v. Bell, supra,* . . . and except for the Defendant Casey, this action involves completely different parties.

13. The case of *Batson v. Bell, supra,* was after trial in Superior Court in Pender County, appealed to the North Carolina Supreme Court and reported in 249 N.C. 718, and the case of *Cutts v. Casey, supra,* after three trials in the Superior Court of Pender County was appealed each time to the North Carolina Supreme Court and reported in: 271 N.C. 165 (1967), 275 N.C. 599 (1969) and 278 N.C. 390 (1971).

14. Defendant's Motion to Dismiss based upon the alleged failure of the plaintiffs to pay the costs of the previous action which was voluntarily dismissed pursuant to Rule 41 of the North Carolina Rules of Civil Procedure was not properly before the Court by either written Motion or by proper service.

15. Neither *Batson v. Bell, supra,* nor *Cutts v. Casey, supra,* purported to be and they were not class actions so as to bind the plaintiffs in this action.

CONCLUSIONS OF LAW

1. That the present action is in no way controlled or determined by either the cases of *Batson v. Bell, supra,* or *Cutts v. Casey, supra.*

2. That none of the plaintiffs in this action nor their predecessor in title had such a relation to any of the parties of interest in either *Batson v. Bell, supra,* or *Cutts v. Casey, supra,* as to make them responsible for the final result of said cases.

3. That plaintiffs in this action not being parties to the previous actions of *Batson v. Bell, supra,* or *Cutts v. Casey, supra,* nor their predecessors in title being parties to *Batson v. Bell, supra,* or *Cutts v. Casey, supra,* are not bound by the holdings, issues, or factual determinations of said cases.

4. That neither Wyatt E. Blake nor S. G. Blake had such direct, pecuniary or real interest in *Batson v. Bell, supra,* or *Cutts v. Casey, supra,* as to be considered a party and bound by the result of either action."

Rountree & Newton by Kenneth A. Shanklin; and Gary E. Trawick for plaintiff appellees.

Corbett & Fisler by Leon H. Corbett, Robert Hugh Corbett and Leon H. Corbett, Jr.; Marshall, Williams, Gorham & Brawley by Lonnie B. Williams for defendant appellants.

CLARK, Judge.

Defendants' plea that the *Batson* and *Cutts* cases are *res judicata* and a bar to plaintiffs' claim requires an examination of these cases, which were introduced in evidence at the hearing on defendants' plea. See *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562 (1959), and *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967); 275 N.C. 599, 170 S.E. 2d 598 (1969); and 278 N.C. 390, 180 S.E. 2d 297 (1971).

In both the *Batson* and *Cutts* cases plaintiffs traced title to land grant No. 1696, dated 20 April 1859, from the State of North Carolina to Jesse W. Batson, conveying 51 acres of land described as follows:

> "BEGINNING at a stake, William B. Sidbury's corner on the Sound, running thence with Sidbury's line across the Banks South 25 East 66 poles to a stake at the edge of the ocean; thence with the edge of the ocean North 53 East 107 poles [1765.5 feet] to Fredrick Ruhe's line; thence with Ruhe's line

North 25 West 88 poles to Crooked Creek; thence with the meander of said creek to the beginning. . . ."

This tract fronted 1765.5 feet on the Atlantic Ocean.

On 1 August 1879 Jesse W. Batson and his wife conveyed to Millie Bishop a part of the above tract, described as follows:

"BEGINNING at a stake, Vashti Atkinson's . . . corner on the Sound, running thence with said Vashti Atkinson line across the banks S. 25 E. 66 poles to a stake at the edge of the ocean; thence with the edge of the ocean N. 53 E. 53 poles to a stake; thence N. 25 W. 88 poles to the sound; thence with the meanders of the sound back to the beginning. . . ."

This tract fronted 874.5 feet on the Atlantic Ocean and was the southern half of the original Jesse W. Batson tract. Batson retained about one-half of the original tract, and the retained tract fronted 891 feet on the Atlantic Ocean, assuming that the distance calls in the Batson grant are accurate.

In 1956 the retained Batson tract was owned by the heirs of Jesse W. Batson and S. G. Blake who had acquired an undivided interest in the tract. It appears that the Rhue line on the North was known and established on the ground. The retained tract was divided into twelve lots, beginning with Lot No. 1 (allotted to S. G. Blake), which adjoined the Rhue line on the North, and ending with Lot No. 12 at the South purportedly adjoining the Bishop line. A map of this Division appears in *Cutts v. Casey*, 278 N.C. 390, at page 409, 180 S.E. 2d 297, at page 318 (1971).

In this Division the twelve lots fronted on the Atlantic Ocean for a distance of 2574 feet, although under the distance calls in the original Batson grant (1765.5 feet) and the part conveyed to Millie Bishop (874.5 feet) *there remained in the retained tract only* 891 feet fronting on the Atlantic Ocean. The original Batson grant called for Ocean frontage of 1765.5 feet; the Division increased the total ocean frontage to 3448.5 feet, placing the Millie Bishop Tract, with 874.5 feet ocean frontage, between Lot No. 12 of the Division and the Sidbury tract on the South. But it appears that the owner of the Sidbury tract did not accept the location of their northern boundary as shown on the Division Map, and the owners of the Millie Bishop tract did not accept the location of their line

as shown on the Division Map. The owners of the Bishop tract effected a subdivision with their lots overlapping many, if not all, of the Batson Division lots. A map of this Division appears in *Cutts v. Casey,* 278 N.C. at 408, 180 S.E. 2d at 317.

It is noted that if the distance calls in the original Batson grant and the deed from Batson to Millie Bishop are accurate, the Batson retained tract (with ocean frontage of 891 feet), would cover only Lots 1, 2, and a part of Lot No. 3 of the Division, and that the remainder of Lot No. 4 and all of Lots Nos. 5 through 12 would be within the boundaries of the Millie Bishop tract or the Sidbury tract on the South. Apparently, the claim of the Batson heirs and S. G. Blake, as shown in the Division (which almost tripled the size of the retained Batson tract), and the disputed location of the Sidbury land triggered the land disputes and land actions.

In *Batson v. Bell, supra,* plaintiffs claimed ownership of Lot No. 7 of the Batson Division, and defendants were the owners of a lot which was a part of the Millie Bishop tract. The Millie Bishop tract had been subdivided into six lots, each fronting 159.3 feet on the ocean, for a total ocean frontage of 955.8 feet, as shown on the map reproduced in *Cutts v. Casey,* 278 N.C. at 408, 180 S.E. 2d at 317. The ocean frontage of 955.8 feet exceeded by 81.3 feet the distance designated in the Batson deed to Millie Bishop. But the Sidbury line called for in the Batson grant was located much further North than shown in the Batson Division, resulting in extensive overlapping and conflicting claims. This action was determined by judgment against plaintiffs because plaintiffs failed to carry the burden of proving that they were the owners of Lot No. 7 as shown and located on the map of the Batson Division. It appears that plaintiffs failed to prove the location of the Sidbury line, which bounded the original Batson grant on the South and the location of the lands conveyed in 1879 from Batson to Millie Bishop.

In *Cutts v. Casey, supra,* the plaintiff claimed ownership of Lot No. 3 of the Batson Division. The jury answered the issues against the plaintiff finding that plaintiff failed to prove the location of the Sidbury line on the South and the Millie Bishop tract. The trial judge granted plaintiff's motion for judgment notwithstanding the verdict in favor of defendants. The Supreme

Court of North Carolina reversed and remanded with directions to the trial court to enter the judgment tendered by defendants, on the grounds that the trial court did not have the power to direct a verdict in favor of the party having the burden of proof. This judgment decreed that plaintiff was not the owner of Lot No. 3 in the Batson Division and incorporated the court's ruling "nonsuiting" defendants' cross action. Again, it appears that plaintiff failed to prove to the satisfaction of the jury the location of the Sidbury line on the South and the location of the lands conveyed in 1879 from Batson to Millie Bishop. However, in *Cutts v. Casey*, 271 N.C. 165, 155 S.E. 2d 519 (1967), when the case first came to the Supreme Court, it was held that plaintiff's evidence would justify a finding that the land he claims lies within the Batson grant and outside the Millie Bishop tract, and reversed the nonsuit entered by the trial court. It may be reasonably concluded that defendants were victorious not because of the strength of their own title but because of what the jury found to be the weakness of plaintiff's title.

In *Cutts*, 278 N.C. at 411, 180 S.E. 2d at 307-308, Justice Sharp (now Chief Justice), stated:

> "A failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto*, entitle the adverse party to an adjudication that title to the disputed land is in him. He is not relieved of the burden of showing title in himself. *Moore v. Miller*, 179 N.C. 396, 102 S.E. 627. 'The plaintiff must recover on the strength of his own title, and upon failure of proof by him the jury may well find that he is not the owner of the land, although satisfied that the defendant has no title.' *Wicker v. Jones*, 159 N.C. 103, 116, 74 S.E. 801, 806. This statement is, of course, equally applicable to a defendant who has set up a cross action in which he claims title to the land in dispute. Thus, in this case, if defendants fail to locate the Millie Bishop tract according to their contentions, title cannot be adjudicated in plaintiff merely because of defendants' failure of proof. The burden remains upon plaintiff to prove his title. There are cases involving a disputed title to land in which neither party can carry the burden of proof."

It does not appear in either the *Batson* or *Cutts* cases that defendants by cross-action established title to lands they claimed.

The parties plaintiff who had the burden of proof failed to establish title. It is noted that plaintiffs claim title to Lot No. 1 of the Batson Division, the northernmost lot in the Division, which adjoins the established Rhue line on the North. The lots claimed by plaintiffs in the *Batson* and *Cutts* cases were located South of Lot No. 1.

S. G. Blake was a party to the partition proceeding which effected the Batson Division. The parties plaintiff in the *Batson* and *Cutts* cases, or their predecessors in title, were parties to this partition proceeding. Wyatt Blake, son of S. G. Blake, was the attorney for the parties in this partition proceeding and was an attorney for plaintiffs in both the *Batson* and *Cutts* cases, *supra*, and his clients failed to prove title in either case. In the case *sub judice* plaintiffs are the heirs of S. G. Blake and devisees of Wyatt Blake, who was deeded his interest by his father, S. G. Blake.

Defendants contend that the parties to the Batson partition proceeding, and the parties plaintiff in the *Batson* and *Cutts* cases had the same duty of locating the Sidbury line on the South and the part of the Batson grant conveyed to Millie Bishop, in order to prove that their lands were located within the retained Batson grant; that the parties plaintiff in the case *sub judice*, in order to prove title, must locate on the ground the Batson Division (retained Batson grant), and that issue having previously been determined against parties with whom they are in privity, the parties plaintiff are barred from doing so upon the principle of "issue preclusion", a part of the doctrine of *res judicata*, or upon the doctrine of collateral estoppel.

The doctrines of *res judicata* and collateral estoppel are based upon the same policy considerations, which are: (1) that each person have his day in court to completely adjudicate the merits of his claim for relief, and (2) that the courts must demand an end to litigation when a claimant has exercised his right and a court of competent jurisdiction has ruled on the merits of his right. *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655 (1958); *Gillispie v. Bottling Co.*, 17 N.C. App. 545, 195 S.E. 2d 45, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 275 (1973).

North Carolina recognizes both doctrines. In *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973), the court stated:

"Under a companion principle of *res judicata*, collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination. *Masters v. Dunstand* [256 N.C. 520, 124 S.E. 2d 574 (1962)]; *Deaton v. Elon College*, 226 N.C. 433, 38 S.E. 2d 561 (1946); 5 Strong, N.C. Index 2d, Judgments § 35 (1968); 46 Am. Jur. 2d, Judgments § 418 (1969). See also *Poindexter v. Bank*, 247 N.C. 606, 101 S.E. 2d 682 (1958); *Craver v. Spaugh*, 227 N.C. 129, 41 S.E. 2d 82 (1947). As stated by Mr. Justice Murphy in *Commissioner v. Sunnen*, 333 U.S. 591, 599, 92 L.Ed. 898, 907, 68 S.Ct. 715, 720 (1948): '[Collateral estoppel] is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally.'

The distinction between *res judicata* and collateral estoppel or estoppel by judgment was stated by Mr. Justice Field in *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L.Ed. 195, 198 (1877):

> '. . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> 'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'

This distinction was recognized and approved in *Clothing Co. v. Hay*, 163 N.C. 495, 79 S.E. 955 (1913); *Ferebee v. Sawyer*, 167 N.C. 199, 83 S.E. 17 (1914)."

The general principles applicable to both doctrines were stated by Justice Devin in *Light Co. v. Insurance Co.*, 238 N.C. 679, 79 S.E. 2d 167 (1953), as follows:

> " 'It is a principle of general elementary law that the estoppel of a judgment must be mutual.' *Bigelow v. Old Dominion C. Min. & S. Co.*, 225 U.S. 111. . . .
>
> Estoppel by judgment operates only on parties and their privies. It is a maxim of law that no person shall be affected by any judicial investigation to which he is not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. An adjudication affects only those who are parties to the judgment and their privies, and gives no rights to or against third parties. 1 Freeman on Judgments, sec. 407. Privies are 'persons connected together or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them.' Black's Law Dictionary. 'To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase of a party subsequent to the action, or he must hold the property subordinately.' Ballentine's Law Dictionary. 'Any of those persons having mutual or successive relationship to the same right of property.' Webster.
>
> '. . .When issues on the same subject-matter have once been settled by litigation between the same parties or their privies, before a court of competent jurisdiction, and the estoppel of the judgment is mutual, that is to say that the other party would be bound if the original decision had been to the contrary, then in the interest of reasonable finality of litigation that decision should be conclusive.'
>
> . . . .
>
> Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues. It is also a well established principle that estoppels must be mutual, and as a rule only parties and privies are bound by the judgment. These rules are subject to exception." 238 N.C. at 689-91, 79 S.E. 2d at 173-175.

North Carolina has recognized some exceptions to those general rules in cases cited and relied on by the defendants. We recognize the exceptions but do not find that those cases involve factual situations similar to, or that they are determinative of, the case *sub judice.* See Note, Civil Procedure—Offensive Assertion of a Prior Judgment as Collateral Estoppel—A Sword in the Hands of the Plaintiff?, 52 N.C.L. Rev. 836 (1974). See also Note, Civil Procedure—Collateral Estoppel: The Fourth Circuit Squeezes an Oversized Judgment Through a Narrow Issue, 55 N.C.L. Rev. 219 (1977); and Note, Civil Procedure—Broadening the Use of Collateral Estoppel—The Requirement of Mutuality of Parties, 47 N.C.L. Rev. 690 (1969).

The ultimate issue in the *Batson* case was whether plaintiffs were the owners of Lot No. 7 of the Batson Division, and in the *Cutts* case the issue was whether plaintiff was the owner of Lot No. 3 of the Batson Division. It appears that in both cases plaintiffs attempted to prove ownership (title) by locating the original Batson grant, the location of the tract conveyed from the grant by Jesse W. Batson to Millie Bishop, and that Lot No. 7 in the *Batson* case and Lot No. 3 in the *Cutts* case were located within that part of the grant retained by Jesse W. Batson. The plaintiffs in both cases failed to prove their title to their respective lots to the satisfaction of the jury. However, there was no adjudication that title to the disputed lands was vested in the defendants in either *Batson* or *Cutts.*

Both the *Batson* and *Cutts* cases involved a lappage and the extent to which the Millie Bishop Tract (since divided by her heirs into six lots) claimed by defendants in both cases covered the plaintiffs' lots within the Batson Division. It appears from the *Cutts* case that the heirs of Millie Bishop claim most, if not all, of the Batson grant (the lands lying between the Sidbury line on the South and the Rhue line on the North). But the deed from Batson to Millie Bishop did not call for the Rhue line; nor did the Bishop Division recognize the Rhue line. Counsel for defendants in their brief (page 2), in making their statement of the case after asserting the claim of the Millie Bishop heirs, added: "If, in fact, any lands were left, they were vested in the heirs of Jesse W. Batson." This statement recognizes the lappage question. Plaintiffs allege ownership of Lot No. 1 of the Batson Division, which adjoins the Rhue line on the North. Assuming that plaintiffs at-

tempt to prove this title to Lot No. 1 by going back to the State grant, as did plaintiffs in *Batson* and *Cutts*, they could prove that the lot, or some part of it, is within the original Batson grant which remained after Jesse W. Batson made the conveyance to Millie Bishop, even though plaintiffs in the *Batson* and *Cutts* cases were unable to prove title to and location of their respective lots.

Because plaintiffs claim ownership of lands which are not the same lands claimed by plaintiffs in the *Batson* and *Cutts* cases and because there is a question of lappage, there is neither identity of subject matter nor of issues.

Since we find no identity of subject matter or issues, we do not treat the question of mutuality of parties raised by the defendants.

The findings of fact by the trial court are supported by competent evidence and the facts found fully support the conclusions of law.

Affirmed.

Judges PARKER and ERWIN concur.

STATE OF NORTH CAROLINA v. HOWARD KEITH THOMPSON, JIMMIE DALE HARDEE

No. 775SC1064

(Filed 29 August 1978)

1. Searches and Seizures § 34— hashish in plain view in van—warrantless seizure proper

Tinfoil-wrapped packages of hashish seized without a search warrant from the recessed tray beneath the dashboard of the van in which defendants were sitting were properly admitted into evidence in a prosecution for felonious possession of hashish where the evidence tended to show that on the occasion in question an officer was riding in a law enforcement vehicle; there had been some break-ins in the area; in the course of an investigation the law enforcement vehicle was driven up to the van in question; the officer got out of his vehicle, identified himself as a law officer, approached the van and asked the persons therein to step out and identify themselves; the officer reached across

the front seat of the van towards the driver to see the driver's identification and, while doing so, saw three tinfoil packets in an open compartment under the dashboard of the van; these packets were in plain view; and the officer, who was an expert in the identification of narcotics, formed the opinion that the contents of the tinfoil parcels, one of which was open, was hashish.

2. **Searches and Seizures § 8— warrantless arrest based on warrantless seizure of hashish—subsequent search proper**

Since the initital warrantless seizure of hashish in plain view in a van was proper, all the occupants of the van could properly be arrested and subsequently searched, and seizure of hashish pursuant to such a search was proper.

3. **Criminal Law § 75.9— defendant's statement that hashish was his—volunteered statement**

A statement by one defendant made just after his arrest that all the "stuff," referring to hashish, in a van was his and that he did not want to get anyone else in trouble was voluntary and not made in response to interrogation, and such statement was admissible whether or not the court found that defendant had been apprised of his rights.

4. **Criminal Law § 66.1— identification of defendant by officer—opportunity for observation**

The trial court properly admitted evidence relating to an officer's identification of defendant after finding that the officer had ample time and opportunity to observe defendant, since the evidence tended to show that the officer observed defendant from a distance of 40 or 45 yards for approximately five minutes under light provided by a streetlight and the interior lights of the van in which defendant sat; he then drove to within twenty feet of the van and observed defendant by light from the high-beam bulbs of his automobile directed into the open doors of the van; and he subsequently walked up to the van and observed defendant at arm's length for several minutes while talking to him.

5. **Narcotics § 4.3— hashish in van—possession—sufficiency of evidence**

In a prosecution for possession of hashish found in a van, evidence was sufficient to be submitted to the jury where it tended to show that one defendant was seated in the passenger seat in the front of the van very close to the tray from which the hashish was taken and he voluntarily told the arresting officer that "the stuff was his and he didn't want anyone else in trouble"; moreover, evidence that a second defendant owned the van and was present therein when the controlled substance was found was sufficient to allow the jury to infer that he had the power and intent to control the contraband found there.

6. **Narcotics § 4.6— proximity to drugs—jury instructions on possession—no prejudicial error**

Though the trial court's instruction, "if hashish is in plain view of a person then you could infer from that he has both the power and intent to control it, and that would be constructive possession," may not be a correct statement of the law, standing alone, defendant was not prejudiced thereby in light of the

evidence tending to show that defendant was sitting in the front passenger seat of a van directly in front of the open recessed area where hashish was found and that he stated shortly thereafter that the "stuff" was his.

Judge ERWIN dissenting.

APPEAL by defendants from *Webb, Judge.* Judgments entered 24 August 1977 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 26 April 1978.

Upon pleas of not guilty defendants were tried on bills of indictment charging them with felonious possession of more than one-tenth of an ounce of hashish. Evidence presented by the State tended to show:

At approximately 12:30 a.m. on 17 April 1977, Officer William Wolak and W. A. Lee of the Narcotics Bureau of the New Hanover County Sheriff's Department, were on routine patrol in the Fort Fisher area of said county. At a public boat ramp in the area they observed a parked van and a motorcycle.

A *voir dire* was held during which Wolak testified that the passenger door on the right-hand side of the van was open and the interior light was on; that he and Lee approached the van in order to identify the occupants because it was late at night and break-ins had been reported in the vicinity; that they approached the van from its right side and the headlights of their car shined into the van; and that Defendant Thompson was sitting in the passenger seat of the vehicle. The trial court found facts in accord with Wolak's testimony and allowed him to identify defendant Thompson.

Wolak testified before the jury that he got identification from Thompson and asked him to step out of the van; that he then "leaned across the empty passenger seat" in order to get identification from the driver; that there was an open, recessed area in the dash in front of the passenger's seat; that while he was leaning into the van he noticed tinfoil packets in the recessed area; and that one of the packets was open and contained a brown substance which he identified as hashish. A *voir dire* was held at the conclusion of which the trial court refused to suppress evidence relating to the hashish.

The trial court further found, based on Wolak's testimony, that Thompson was arrested and advised of his rights after discovery of the hashish and that Thompson then volunteered the statement that all of the "stuff" was his and that he did not want to get anyone else in trouble. Wolak further testified that Thompson and the driver were sitting in the front seats; that there was a large, open area behind the seats some ten feet from where the hashish was found; that defendant Hardee was lying in the back; that Hardee's wife and two others were also in the back of the van; and that all occupants of the van were arrested.

Officer Lee testified that he searched Hardee after his arrest and found in his pocket a packet of green vegetable matter which a chemist testified contained "point six-tenths of a gram of hashish." The chemist also testified that a packet found in the dash contained 94.2 grams of hashish. Motions to suppress were denied.

Neither of the defendants testified but defendant Thompson presented three witnesses. One of them, his mother, testified that defendant Hardee was married to Thompson's sister; that Thompson lived in Florida and his sister lived in the Fayetteville (N.C.) area; and that Thompson left Florida by plane to visit his sister several days before the incident in question.

Another witness, James Gentry, testified that he and his wife went to the Wilmington area with defendant Hardee and his wife; that the four of them went on motorcycles; that the Hardees had two vans and defendant Thompson was going to Wilmington in a van that the witness had seen the Hardees use. On cross-examination by Hardee's attorney, Gentry testified that he and Hardee reached Carolina Beach on the motorcycles; that Hardee crashed his bike against the curb and hurt his leg; that thereafter they saw Thompson with the van; and that they loaded Hardee and his bike in the van and eventually arrived at the place where they were arrested. When asked if there was a tray or little recepticle area on the dashboard, Gentry answered that he was not familiar with "Jimmy's (Hardee's) van". The witness further stated: "I know that Jimmie Hardee did not have a sleeping bag on his bike, but I don't know if there was anything else. That was all in the van."

The jury found each defendant guilty of felonious possession of hashish and from judgments imposing prison sentences of 18 months, defendants appealed.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

Parker, Rice & Myles, by William G. Hussmann, Jr., for defendant appellant Thompson, and Burney, Burney, Barefoot & Bain, by Roy C. Bain, for defendant appellant Hardee.

BRITT, Judge.

[1] Both defendants contend the court erred in admitting into evidence the tinfoil-wrapped packages of hashish seized from the recessed tray beneath the dashboard of the van. They argue that the seizure was not made pursuant to a search warrant, nor was it justified by a probable cause-exigent circumstances exception to the warrant requirement or by the "plain-view" doctrine. We find no merit in this contention.

When defendants objected to evidence relating to the hashish found beneath the dash, the court conducted a *voir dire* hearing in the absence of the jury. Following the hearing, the court found as facts that on the occasion in question Officer Wolak was riding in a law enforcement vehicle; that there had been some break-ins in that area; that in the course of an investigation, the law enforcement vehicle was driven up to the van in question; that Wolak got out of his vehicle, identified himself as a law enforcement officer, approached the van and asked the persons therein to step out and identify themselves; that he "reached across the front seat of the van towards the driver to see the driver's identification, and while doing so, he saw three tinfoil packets in an open compartment under the dashboard of the van; that these three tinfoil parcels were in plain view; that Mr. Wolak is an expert in the identifcation of narcotics;" and that he formed the opinion that the contents of the tinfoil parcels, one of which was open, was hashish.

Findings of fact supported by competent evidence on *voir dire* are conclusive on appeal. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974); *State v. Pike*, 273 N.C. 102, 159 S.E. 2d 334 (1968). We have examined the record and conclude that there was ample evidence to support the court's findings. We now consider

whether the facts found will support the admission of evidence seized without a warrant.

We think the plain view doctrine applies in this case. Under circumstances requiring no search because the item is in plain view, no constitutional immunity from unreasonable search and seizure arises. *State v. Legette*, 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970). The plain view doctrine requires that the officer seizing the contraband be in a place where he has a right to be *and* that the seized item be plainly visible to him without further searching into an area where the party from whom the item is seized has a reasonable expectation of privacy. 11 Strong's N.C. Index 3d, Searches and Seizures §§ 5-6, and cases cited therein.

Chief Judge Mallard, writing for this court, quoted from *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), in which it is said that "[w]hat the plain view cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *State v. Fry*, 13 N.C. App. 39, 45, 185 S.E. 2d 256, 260 (1971), *cert. denied*, 280 N.C. 495, 186 S.E. 2d 514 (1972). In *Fry* the police officer was investigating a traffic violation and opened the door of a van to see the occupants therein. When he did this, he saw that one of them was holding a bag of marijuana. The marijuana was later admitted into evidence.

Defendants contend that the case *sub judice* is distinguishable from *Fry* in that Officer Wolak was not investigating a traffic violation and therefore had no prior justification for looking inside the van. Clearly, this argument is erroneous.

A police officer who observes a van or other vehicle in an isolated place late at night, knowing that break-ins have been reported in the area, is justified in stopping it to determine its ownership and the identity of the occupants. *State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93 (1974), *cert. denied*, 286 N.C. 416, 211 S.E. 2d 796 (1975). In *Bagnard* a highway patrolman investigating a hit-and-run incident in the area stopped an automobile similar to the one reportedly involved therein. When the driver of the vehicle was unable to produce a registration card, the officer opened

the car door to obtain the registration number from the tag attached there. When the door was opened, the officer discovered a bag of marijuana on the floor. The seizure of the marijuana and its subsequent admission into evidence was upheld as the officer was in a place where he had a legal right to be and had inadvertently discovered the contraband. Similarly, Officer Wolak was properly in a place where he had a legal right to be.

Defendants, relying on *State v. Blackwelder*, 34 N.C. App. 352, 238 S.E. 2d 190 (1977), argue that the contraband seized in this case was not in plain view and, therefore, not inadvertently discovered. Their reliance on *Blackwelder* is misplaced.

In *Blackwelder* the officers rummaged under the seat of a stopped automobile and discovered a controlled substance. Here, Officer Wolak simply observed hashish lying on tinfoil in an open tray in a recessed area of the van's dash. This was an inadvertent discovery rather than a search. " '[T]he term [search] implies some exploratory investigation or an invasion and quest, a looking for or seeking out. The quest may be secret, intrusive, or accomplished by force.' 79 C.J.S., Searches and Seizures § 1, p. 775." *State v. Reams*, 277 N.C. 391, 396, 178 S.E. 2d 65, 68 (1970). Officer Wolak conducted no forceful, intrusive or secretive investigation. Rather, he merely seized an illegal substance lying openly before him.

We hold that the two-pronged test of *Coolidge v. New Hampshire* referred to in *State v. Fry, supra*, has been met in this case. The police officer making the seizure here was in a place where he had a right to be and inadvertently discovered the contraband.

[2] Defendant Hardee asserts error in the admission of the hashish seized from his pocket. The gist of his argument is that the initial seizure of narcotics from the van was illegal, that absent such seizure there was not any probable cause to arrest him, and that the post-arrest search of his person in which the additional contraband was discovered was tainted by the prior illegality.

Our consideration of this assignment is governed by our resolution of the first issue in this case. Because the initial seizure was valid, Hardee and the other occupants of the van could properly be arrested. Discovery of the hashish gave Officer Wolak sufficient probable cause under N.C.G.S. 15A-401 to justify

this action. Once a person is placed under arrest, he may be searched thoroughly. *State v. White,* 18 N.C. App. 31, 195 S.E. 2d 576, *cert. denied,* 283 N.C. 587, 196 S.E. 2d 812 (1973). Evidence obtained in such a search is inadmissible only if the initial arrest is improper. Since Hardee was arrested in accordance with the law, this evidence was properly admitted against him.

[3] Defendant Thompson contends that the incriminating statement made by him at the time of the seizure of the contraband was improperly admitted into evidence as he had not been advised of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 84 S.Ct. 1758 (1966).

The evidence presented on *voir dire* supports the court's finding that Thompson's statement was voluntary and was not made in response to interrogation. Such a statement is admissible whether or not the court finds that the defendant has been apprised of his rights. *State v. Jackson,* 280 N.C. 563, 187 S.E. 2d 27 (1972). "[W]here there is evidence that admissions were freely and voluntarily made without inducement by promises, threats, or coercion, reception of the admission in evidence will not be error. . . ." 4 Strong's N.C. Index 3d, Criminal Law § 75.9, p. 320.

[4] Defendant Thompson contends that the court improperly admitted evidence relating to Officer Wolak's identification of him. He contends the officer had insufficient opportunity to observe and identify him. We find no merit in this contention.

After defendant's objection to the identification the trial judge conducted a *voir dire* at which he found that Officer Wolak had ample time and opportunity to observe defendant Thompson. Examination of the record of the *voir dire,* viewed in the light most favorable to the State, reveals that Officer Wolak observed Thompson from a distance of 40 or 45 yards for approximately five minutes under light provided by a streetlight and the interior lights of the van. He then drove to within twenty feet of the van and observed Thompson by light from the high-beam bulbs of his automobile directed into the open doors of the van. Subsequently, he walked up to the van and observed Thompson at arm's length for several minutes while talking to him. We hold that the court properly admitted the identification testimony as Officer Wolak had adequate opportunity to observe and identify Thompson.

[5] Both defendants contend the trial court erred in denying their motions for nonsuit. This contention has no merit.

Where there is more than a scintilla of evidence to support the allegations of the indictment, the motion for nonsuit is properly denied. Conflicts and contradictions within the testimony must be resolved by the jury. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). In a case such as the one presently considered, the State may overcome a motion for nonsuit by presenting evidence establishing the defendant's close proximity to the drug as well as incriminating circumstances or facts from which the jury might infer that the defendant has reduced the narcotic to his possession. *State v. Weems*, 31 N.C. App. 569, 230 S.E. 2d 193 (1976). The defendant's possession may be actual or constructive. *State v. Bagnard, supra.*

In Thompson's case the State's evidence was clearly sufficient to withstand a motion for nonsuit. The testimony offered, if believed by the jury, established that Thompson was seated in the passenger seat in the front of the van very close to the tray from which the hashish was taken. In addition, he voluntarily told the arresting officer that "the stuff was his and he didn't want anyone else in trouble." The illegal substance was in plain view. Defendant's location near the contraband and the additional facts introduced into evidence justified the denial of his motion for nonsuit.

In Hardee's case, evidence that he owned the van and was present therein when the controlled substance was found was sufficient to allow the jury to infer that he had the power and intent to control the contraband found there. Ownership of premises where drugs are found is sufficient to require submission of the issue of possession to the jury. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

[6] Defendant Thompson contends the court erred in giving the following instruction to the jury:

> "As I told you, if hashish is in plain view of a person then you could infer from that he has both the power and intent to control it, and that would be constructive possession. You are not required to infer that he had the power and intent to control it, however. You will consider that along with all the

other evidence in determining whether he had the power and intent to control it and there take constructive possession."

We concede that the first sentence in the quoted instruction, standing alone, may not be a correct statement of law. However, when the instruction is considered in context and in light of the evidence tending to show that defendant Thompson was sitting in the front passenger seat of the van directly in front of the open recessed area where the hashish was found, and that he stated shortly thereafter that the "stuff" was his, we perceive no error prejudicial to him.

In support of this contention, defendant Thompson relies on *State v. Washington*, 33 N.C. App. 614, 235 S.E. 2d 903 (1977), and *State v. Weems, supra.* We find it easy to distinguish those cases from the case at hand.

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

No error.

Judge CLARK concurs.

Judge ERWIN dissents.

Judge ERWIN dissenting.

I vote to grant the defendants a new trial. I feel the motion to suppress the evidence should have been allowed. The record clearly shows: the van in question was parked in a public area near Fort Fisher at the end of Highway 421 in the area of the Wildlife Boat Camp. The boat landing is an open area with several street lights and borders on the water.

The record before us does not show that the defendants were violating any laws of the State at the time they were being observed by the officers, Wolak and Lee. There is not any indication that the defendants were acting in any suspicious manner, nor were they wanted for the commission of any crimes. On voir dire, Officer Wolak testified that he and Lee approached the van in order to identify the occupants, because it was late at night and break-ins had been reported in the vicinity earlier that evening. But the record does not disclose the time of the break-ins, the description of the van allegedly connected with the break-ins,

or that the officers ever asked for or received either the registration card of the van in question or the driver's license.

The van had not been stopped pursuant to G.S. 20-183(a). In such cases as *State v. Smith,* 289 N.C. 143, 221 S.E. 2d 247 (1976), the defendant was driving his motor vehicle in a careless and reckless manner; in *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973), defendants were stopped to determine the validity and presence of the driver's license and registration card; and in *State v. Fry,* 13 N.C. App. 39, 185 S.E. 2d 256 (1971), *cert. denied* and *appeal dismissed,* 280 N.C. 495, 186 S.E. 2d 514 (1972), the police officer was investigating a traffic violation, opened the door of a van, and saw in plain view a person holding a bag of marijuana. In *State v. Legette,* 292 N.C. 44, 231 S.E. 2d 896 (1977), our Supreme Court held that a pistol found in a Plymouth was properly admitted into evidence on the "plain view" doctrine where the evidence showed that the butt end of the pistol was readily visible to Officer Jarrell as he stood outside the Plymouth.

In *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970), our Supreme Court held that the "plain view" doctrine applied when an officer removed a piece of chrome strip from the exterior of the car in question. No interior search of the car was necessary.

I would hold that the conduct of Officer Wolak in reaching across the seat and looking in the recessed area of the van a search. "A search, even of an automobile, is a substantial invasion of privacy." *United States v. Ortiz,* 422 U.S. 891, 896, 45 L.Ed. 2d 623, 629, 95 S.Ct. 2585, 2588 (1975). The motion to suppress should have been allowed.

THOMAS L. ROBINSON v. WHITLEY MOVING AND STORAGE, INC., WESTERN ELECTRIC COMPANY, AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 7710SC693

(Filed 29 August 1978)

1. Master and Servant § 3— mover of manufacturer's goods—relationship of independent contractor and employer

A contract between defendant moving company and defendant Western Electric established the relationship of employer and independent contractor

where the evidence tended to show that defendant moving company was in the business of moving personal property for the general public and possessed the necessary skills, knowledge, and expertise to execute that purpose; the materials, including the bay that fell on plaintiff thereby giving rise to this action, were under the sole control of defendant moving company; the work contracted to be performed was to be paid for by Western Electric according to the contract on the basis of pounds moved and equipment to be used; defendant mover was free to use the necessary personnel to complete the work contracted for; and Western Electric had no duties under the contract to supervise defendant mover.

2. **Negligence § 27— safety code—evidence inadmissible**

In general, safety codes not having the force and effect of law are not admissible; therefore, in an action by plaintiff to recover for injuries sustained when a switching bay fell on him while it was being moved, the trial court did not err in excluding from evidence a pamphlet of defendant Western Electric which detailed the procedures for handling switching bays such as the one that fell on plaintiff.

3. **Evidence § 36— statement by defendant's employee—hearsay—exclusion proper**

In an action to recover for injuries sustained by plaintiff when a switching bay fell on him while it was being moved, the trial court did not err in excluding an undated report by the job supervisor for defendant Western Electric in which the supervisor related what jobs he had assigned to whom at the time of the accident, since plaintiff did not carry his burden as to the date the report was written, and the statement was thus merely a narration of past events and therefore hearsay.

4. **Negligence § 57— owner of building in which the injury occurred—summary judgment proper**

In an action by plaintiff to recover for injuries sustained when a switching bay, owned by defendant Western Electric and moved by defendant moving and storage company into defendant Southern Bell's building, fell on plaintiff, the trial court properly granted summary judgment for Southern Bell, since the evidence tended to show that no employee of Southern Bell gave any instructions for the moving of the bay; there was nothing about the building itself or the room in which the bay was placed which caused it to fall; and there was no genuine issue as to any material facts in dispute between plaintiff and Southern Bell.

APPEAL by plaintiff from *McLelland* and *Godwin, Judges.* Judgments entered 9 December 1974 and 25 March 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 25 May 1978.

Plaintiff filed his complaint 18 April 1973 against defendants, Whitley Moving & Storage, Inc. (Whitley), Western Electric Company (Western Electric), and Southern Bell Telephone and

Telegraph Company (Southern Bell) alleging negligence as to each defendant and seeking damages for his injuries. All of the defendants answered denying liability, with Western Electric and Southern Bell crossclaiming for indemnity pursuant to contract against Whitley. Judge McLelland granted Southern Bell's motion for summary judgment. Plaintiff received certain compensation from Whitley on a covenant not to sue resulting in a voluntary dismissal.

Plaintiff testified that on the morning of 17 July 1972, he reported to Manpower, Inc., where he was directed to go to the Southern Bell Building in Raleigh; he arrived at the loading dock and after a break, he was directed by an employee of Whitley to go with another man who had been told to get some dollies; he was not told what he was supposed to do, but went to the storage floor with Jerry Brown, an employee of Whitley, to wait by a switching bay; and plaintiff was still standing there when Brown tipped a large switching bay (weighing 1,600 pounds) over on the plaintiff while trying to move it.

Manuel Betancourt, a job supervisor for Western Electric, testified, as a hostile witness, to the procedure involved in getting the bays to the Southern Bell Building and installing them. Certain of the bays were brought on the truck to the building pursuant to a written request and stored on a separate floor until the time for installation at Betancourt's convenience.

The following stipulations were read into evidence:

"(3) That the plaintiff was injured when a piece of automatic switching equipment called a 'line link frame' 'switching frame', 'double bay', or a 'double switching bay' (hereinafter called Double Bay), turned over on him.

(4) That the Double Bay which fell on the plaintiff was eleven feet five and one-half inches (11′ 5½″) high, five feet seven and one-half inches (5′ 7½″) wide, and ten and one-half inches (10½″) thick, and weighed one thousand six hundred pounds (1,600 lbs.).

(5) That Western Electric Company manufactured the equipment for integration with the existing operating equipment of Southern Bell Telephone and Telegraph Company; that the equipment was transported by common carriers

other than Whitley Moving and Storage, Inc. from Western Electric Company's manufacturing facility to Whitley Moving and Storage, Inc.'s warehouse located at 3006 Industrial Drive, Raleigh, North Carolina; that upon delivery of the equipment to Whitley Moving and Storage, Inc.'s warehouse, Whitley Moving and Storage, Inc., issued a warehouse receipt; that the equipment was thereafter stored by Whitley Moving and Storage, Inc. at its warehouse; and, that on July 12, 1972, Manuel Betancourt ordered the equipment moved into the telephone building.

(6) That Whitley Moving and Storage, Inc. had a standard transportation services contract with Western Electric Company from the 22nd day of May, 1972, through the 3rd day of June, 1974, to receive, pick up, load, transport, unload, and deliver material within a five (5) mile area of the city limits of Raleigh, North Carolina, said contract being Y6751-11.

(7) That Western Electric Company's Order No. 42244 was a job order number covering the equipment movement into the Southern Bell Telephone and Telegraph Building at 121 West Morgan Street, Raleigh, North Carolina, on July 17, 1972, when the accident occurred.

(8) That on July 17, 1972, the Double Bay piece of the equipment was transported by Whitley from its warehouse to the Southern Bell Telephone Building, and was at the time of the accident resting on a dolly belonging to Whitley in a large room belonging to Southern Bell Telephone and Telegraph Company.

(9) That during the transporting of said piece of equipment, no Western Electric Company employee was involved in the transporting of the equipment from Whitley's warehouse to the storage room in the telephone building; that Western Electric Company maintains an office and two storage rooms in the telephone building, but the incident did not occur in the portion of the building used by Western Electric Company.

(10) That the plaintiff was treated by Dr. Robert B. Nelson, Orthopaedic Surgeon, for a miltiple fracture of the pelvis."

At the close of plaintiff's evidence defendant Western Electric moved for a directed verdict pursuant to Rule 50 for the reasons:

> "[N]o. 1, it appears from the evidence offered by plaintiff and by the introduction of the contract into evidence, that the defendant Whitley Moving and Storage Company was an independent contractor, and any evidence of negligence on the part of the defendant Whitley, if any, would not be imputed to the defendant Western Electric. Secondly, defendant contends, and I believe the record will disclose, that the plaintiff has failed to show any negligence, active or passive, on the part of the defendant Western Electric Company in any of the respects alleged by plaintiff in the Complaint."

Judge Godwin granted the motion for a directed verdict. Plaintiff's motion for a new trial was denied. Plaintiff appealed.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr. and Richard G. Chaney, for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay, by I. Edward Johnson and Robert W. Kaylor, for defendant appellee Western Electric Company.

Robert L. Emanuel, for defendant appellee Southern Bell Telephone and Telegraph Company.

ERWIN, Judge.

The first question presented by the plaintiff for our determination is: Was it error for the trial court to grant the defendant's (Western Electric's) motion for a directed verdict, taking the evidence presented at the trial in the light most favorable to the plaintiff?

The plaintiff contends that under the terms of the contract as well as the actual course of performance, Whitley was a servant of Western Electric and not an independent contractor. We do not agree.

Where as here, the plaintiff presented his evidence and rested his case, defendant's motion for a directed verdict in its favor is the procedure prescribed by Rule 50(a) of the Rules of

Civil Procedure, G.S. 1A-1, for testing the sufficiency of the plaintiff's evidence for submission to the jury. This is substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit under G.S. 1-183. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973), and *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971).

Plaintiff offered into evidence the contract between Western Electric and Whitley. The contract provided in part:

> "2. RESPONSIBILITY. a. The Contractor shall have the sole and exclusive care, custody, and control of all goods, wares, merchandise and material from the time it is tendered to the Contractor, its agents or servants, until the same shall be delivered to and accepted by the Company or its associated companies in the Bell System as hereinafter defined or designated agents thereof.
>
> * * *
>
> 4. LIABILITY. All personnel furnished by the Contractor pursuant to this contract shall for all purposes be considered as employees of the Contractor. The Contractor shall indemnify and save the Company and its associated companies in the Bell System harmless from any and all damage, loss, interest, expense, court costs, and counsel fees arising out of any and all claims that may be made against the Company or its associated companies in the Bell System by the Contractor's employees or any other persons for injuries to persons or damage to property resulting from acts or omissions of the Contractor or of the Contractor's employees or agents and shall, if so directed by the Company, undertake the settlement and defense of any such claim. . . ."

The plaintiff's evidence tended to show that he had no contact with anyone employed by Western Electric and that he received his instructions from Jerry Lee Brown, employee of Whitley. Southern Bell was not involved in the transporting of the equipment from Whitley's warehouse to the storage area in Southern Bell's building.

Our Supreme Court held in the case of *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944), as follows:

"What, then, are the elements which ordinarily earmark a contract as one creating the relationship of employer and independent contractor? The cited cases and the authorities generally give weight and emphasis, amongst others, to the following:

The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time." (Citations omitted.)

[1] Here the terms of the agreement are in writing and are clearly set forth. What relationship between the parties was created by the contract? Whether it was that of master and servant or that of employer and independent contractor is a question of law. *Beach v. McLean*, 219 N.C. 521, 14 S.E. 2d 515 (1941).

Whitley was in the business of moving personal property for the general public, possessing the necessary skills, knowledge, and expertise to execute that purpose. The materials, including the bay that fell on the plaintiff, were under the sole control of Whitley. The work contracted to be performed was to be paid for by Western Electric according to the contract on the basis of pounds moved and equipment to be used. Whitley was free to use the necessary personnel to complete the work contracted for.

Western Electric had no duties under the contract to supervise Whitley nor did the plaintiff's other evidence reveal such duty.

From the record before us, we conclude that the contract between Whitley and Western Electric established the relationship of employer and independent contractor. *See Brown v. Texas Co.*, 237 N.C. 738, 76 S.E. 2d 45 (1953).

[2] The plaintiff assigned error to the trial court's ruling excluding certain evidence of the plaintiff relating to Western Elec-

tric's duties to the plaintiff under the circumstances of this case. Plaintiff alleged that defendant Western Electric "knew or, in the exercise of due care, should have known that the defendant, Whitley, was using improper, inadequate and inherently dangerous work procedures in moving heavy and cumbersome equipment in a limited space area." In support of this allegation, plaintiff attempted to offer into evidence Exhibit No. 12, "consisting of three pages; being the 'Installation Engineering Handbook 30 of the Western Electric Company, Inc., Service Division,'" detailing the procedures for handling switching bays such as the one that fell on the plaintiff. The plaintiff contends: (1) that it was some evidence on the proper standard of care to be used in moving the bays; and (2) that it constituted evidence that Western Electric knew what the standard of care was at the same time that it knew what procedures Whitley was in fact using.

In general, safety codes not having the force and effect of law are not admissible. *Hughes v. Vestal*, 264 N.C. 500, 142 S.E. 2d 361 (1965); *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601 (1963); and *Sloan v. Light Co.*, 248 N.C. 125, 102 S.E. 2d 822 (1958). We overrule this assignment of error.

[3] We do not agree that the trial court erred in excluding the undated report of Manuel Betancourt, employee of Western Electric. The report appears to be a statement in part as to what happened at the time of the accident given to witness Betancourt by one J.C. Kornegay, who was not called as a witness during the course of the trial by plaintiff. The part the plaintiff considers as an admission against Western Electric reads:

> "[I] had instructed the foreman of the crew, a Mr. Johnson, that at all times, he should have at least three men for moving frames. I had assigned N. S. Barbour to handle the first floor so as to instruct them where to place the frames, and the manner in which they should be handled. . . ."

In *Hubbard v. R. R.*, 203 N.C. 675, 678, 166 S.E. 802, 804 (1932), Chief Justice Stacy stated the rule of evidence relevant here as follows:

> "It is the rule with us that what an agent or employee says relative to an act presently being done by him within

the scope fo his agency or employment, is admissible as a part of the *res gestae*, and may be offered in evidence, either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer." (Citations omitted.)

The plaintiff had the burden to establish the report in the manner required by our rules of evidence and our case law. The plaintiff did not carry his burden as to the date the report was written. To us, the statement is merely a narration of past events and is hearsay.

[4] The plaintiff's last question relates to Judge McLelland's granting defendant Southern Bell's motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. The trial court found as required by Rule 56 that there was no genuine issue as to any material fact as between plaintiff and defendant Southern Bell and dismissed the action against Southern Bell. The record compels us to agree that the summary judgment entered by Judge McLelland was proper.

The standard for summary judgment is fixed by Rule 56(c):

"[T]he judgment sought shall be rendered forthwith 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."

Our Court held in *Pridgen v. Hughes*, 9 N.C. App. 635, 638, 177 S.E. 2d 425, 427 (1970):

"While neither the federal rules nor the North Carolina rule excludes the use of the procedure in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied. Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) Vol. 3, § 1232.1; Gordon, The New Summary Judgment Rule in North Carolina, *supra*. But summary judgment is proper where it

appears that even if the facts as claimed by the plaintiff are proved, there can be no recovery, Barron and Holtzoff, Federal Practice and Procedure, *supra*, thus providing a device for identifying the factually groundless claim or defense."

See also 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); and *Forte v. Paper Co.*, 35 N.C. App. 340, 241 S.E. 2d 394 (1978), *cert. denied*, 295 N.C. 89, 244 S.E. 2d 258 (1978).

The plaintiff alleged:

"XIII. That the defendant, Southern Bell, was negligent in the following particulars, among others, to wit:

1. failing to provide proper work and storage area for equipment installation;

2. failing to provide proper lifting equipment for bays which were being temporarily stored and realigned;

3. failing to provide those involved in the moving process with the moving, lifting and holding equipment available and

4. failing to provide on-site supervision of the unskilled personnel handling the moving."

Southern Bell answered denying all of the allegations. Southern Bell answered interrogatories of the plaintiff as follows:

"1) With respect to plaintiff's Interrogatory No. 5 of July 26, 1973 as limited by order of the Court, Southern Bell Telephone and Telegraph Company is aware of no other accidents occurring in connection with the delivery and installation of switching bay equipment to the Company premises on West Hargett Street, Raleigh, N. C., between June 8, 1972, and July 17, 1972, and has no reports on file with the exception of that relating to the injuries, accident experienced by plaintiff on July 17, 1972, a report of which is dated July 19, 1972, a copy of which report is hereto attached.

2) With respect to plaintiff's Interrogatory No. 8 of July 26, 1973, Southern Bell Telephone and Telegraph Company

neither owned nor provided any equipment for the delivery and installation of switching bay equipment to its premises on West Hargett Street, Raleigh, N. C., on July 16, 1972, and is not aware of the amount of such equipment owned or provided by Western Electric Company for such purposes."

The plaintiff, Southern Bell, and Western Electric stipulated as set out:

"7. That on July 17, 1972, one piece of equipment (sometimes called a frame, double bay or switching bay) was transported by Whitley from its warehouse to a large room used for storage in said Southern Bell building; that said piece of the equipment was to remain in the large storage room until removal to a different floor and location in the building for installation; and that in the course of transporting said piece of the equipment, an alleged incident occurred in which the plaintiff Robinson was allegedly injured.

8. That during the transporting of said piece of equipment Whitley's employees were engaged in moving of said equipment and that no Western Electric or Southern Bell employee was involved in the transporting of the equipment from Whitley's warehouse to the storage room in Southern Bell's building.

9. That the said piece of the equipment alleged to have fallen on the plaintiff Robinson, one of the movers for Whitley engaged to transport said piece of the equipment from Whitley's warehouse to the storage room in Southern Bell's building, weighed 1,630 pounds, was 11 feet 5½ inches high, was 5 feet 7½ inches wide and 10½ inches thick.

10. That for the purpose of this action Southern Bell at the time of the alleged incident was the owner of the piece of equipment which allegedly fell on and injured the plaintiff Robinson.

11. That Western Electric maintains an office and tool storage room in the said Southern Bell building, but the alleged incident did not occur in those portions of the Southern Bell building used by Western Electric."

The deposition of Jerry Lee Brown reveals:

"With regard to instruction or supervision from Southern Bell or Western Electric personnel on the premises, whenever we carried the machines up there a man named Manuel would take down the numbers on the machines and send them to Mr. Whitley. He would call Mr. Whitley and tell him which numbers to bring so he could set them up, and when we got there he would tell us which floor to put it on. He would come down to the truck and write down the number and we would carry them to the floor he told us. We received no instructions from him except as to where the bays should be placed. He did not advise or instruct as to how they should be handled or moved.

No person from Southern Bell undertook to instruct or advise us as to where to place the bays or how they should be handled.

* * *

This bay was taken from the loading dock and placed in a room on the second floor. One end of that room already had bays set up in it, but there wasn't anything in the end we were putting these in . . . It was just like a big open space with columns, and a couple of columns holding the roof up, and along where that one fell at there was a file cabinet. We had put some other stuff in there previously.

Mr. Robinson assisted me in moving it into this room on the second floor. Once we got it there I put the handtruck underneath it and lifted it up and when I did it went off balance and started falling. The accident occurred when I had just brought it into the room and was in the process of trying to remove it off of the dolly. The bay was laying on the side on top of the dolly, and the top of it was higher than me and Mr. Robinson, I had to look up to see the top of it. We were in the process of removing it from the dolly and placing it on the floor in this large open room. The wooden part of the crate was still around it, and it was my understanding that it was not to be installed in that place, but was to be installed on the third floor.

When we lifted it up, the man that was supposed to get the dolly would wait at the end until it was off the dolly, but instead Mr. Robinson was at the side waiting for it to get off

the dolly. I had not observed that prior to the time I started lifting up on the end. We weren't too far into the room at this point.

I didn't see anyone else in the room except a lady sitting at a desk about 20 feet away. I don't know who she was or who she worked for.

* * *

At no time were we instructed or supervised by either Southern Bell's people or Western Electric's people except we were told where the bays were to be put. No one instructed us on the part of our employer. . . ."

The plaintiff's deposition showed the following:

"[W]hen I arrived I saw this truck with these bays. There was one guy there and we waited for some others to come back from a snack bar. There were a total of four men. One of them said I would be working with this dude I went upstairs with. I didn't know either one of them. He didn't tell me what I was to do when I got upstairs. I went with this other man and he told me to wait there by that bay.

He came back with a device that looked like a forklift but you use your hands. It looked like a ladder with two arms extending out of the bottom, and I think there were wheels at the bottom. He brought it and put it under the front of the bay and when he put it under the front of the bay it started pulling up on it or something, and the thing fell on me. I think he put it under the bay and started pulling on it. The only time I touched this apparatus at all was when it started falling on me. I really didn't know what was going on, really."

The plaintiff contends that defendant Southern Bell was the owner of the building wherein the accident occurred, and further, that defendant Southern Bell would benefit from the installation being done was sufficient to show that Southern Bell retained dominion over the work area in question to place upon it the duty to take necessary precautions to prevent injury to plaintiff.

The plaintiff's deposition showed:

"Where these bays were looked like an empty building that they were putting things in. The floor was solid. It

didn't give. There was plenty of light. The bay that was right in front of me did not appear to be uneven or swaying back and forth or in any way unsecure, but coming into a place where so much was going on you wouldn't take a real hard look. There was nothing about the room itself or the building that caused the bay to fall."

From the record, we conclude that there were no genuine issues as to any material facts in dispute between the plaintiff and the defendant Southern Bell, and summary judgment was properly entered.

The results are: summary judgment entered by Judge MCLELLAND is affirmed; the directed verdict entered by Judge GODWIN is affirmed.

Judgments affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES THOMPSON

No. 7826SC166

(Filed 29 August 1978)

1. **Criminal Law § 66.15— in-court identifications—independent origin—no taint from pretrial procedures**

In-court identifications of defendant by two robbery victims and another witness were properly admitted where the evidence supported the court's determination that the in-court identifications were of independent origin and not tainted by pretrial lineup or photographic identifications.

2. **Criminal Law § 66.9— photographic identifications—six photographs—more than one photograph of defendant—time between crime and identification**

Pretrial photographic identifications of defendant were not impermissibly suggestive because only six or seven photographs were shown to the witnesses, because more than one photograph of defendant was included in those shown to the witnesses, or because there was a lapse of nearly four weeks between the crime and the photographic identification.

3. **Criminal Law § 66.6— lineup two days after photographic identification—no suggestiveness**

A lineup was not impermissibly suggestive because it was held only two days after photographic identifications of defendant by the witnesses.

4. Criminal Law § 66.4— lineup—non-testimonial identification order not required

A non-testimonial identification order was not required for defendant's appearance in a lineup where defendant was in custody on another charge at the time of the lineup.

5. Criminal Law § 66— identification of robber as "defendant"

It was not improper in an armed robbery case to permit witnesses on various occasions to identify one of the robbers as "defendant."

6. Criminal Law § 62— polygraph results—stipulation of admissibility

In this prosecution for armed robbery, the trial court did not err in the admission of a polygraph operator's opinion that defendant displayed deception during a polygraph test when he denied committing the robbery where defendant, his attorney and the assistant district attorney entered into a written stipulation that the results of the polygraph test would be admissible in evidence; the court conducted a voir dire and determined that defendant voluntarily requested the test and signed the stipulation; the trial court found the witness to be an expert in the field of polygraph examinations; defendant's attorney cross-examined the operator about the test; and the court instructed the jury that the operator's testimony should be considered only as it might bear on defendant's credibility.

7. Criminal Law § 89.10— impeachment of defendant—robberies on certain dates—reference to pending indictments

The trial court in a prosecution for armed robbery did not err in permitting the State to impeach defendant by asking him whether he robbed certain persons on certain dates, even if the prosecutor was looking at indictments pending against defendant as defendant was being cross-examined, where there was no indication of bad faith on the part of the State or that the jury knew the nature of the notes or documents the prosecutor was using.

8. Criminal Law § 89.2— competency of testimony for corroboration

In an armed robbery prosecution, a witness's testimony that the victim answered affirmatively when the witness asked her, "Was it the two black guys that just left in your car?" was competent to corroborate the victim's testimony.

9. Robbery § 3— permission to remove property—nonresponsive answer—absence of prejudice

Defendant in an armed robbery case was not prejudiced when the victim, upon being asked whether he gave defendant permission to remove the contents of his pockets, gave an unresponsive answer that he didn't even give his wife that permission, since the clear import was that permission had not been given, and the victim had already testified that defendant removed the contents of his pockets at gunpoint.

10. Robbery § 4.3— taking property from presence of victim—victim in another room

Property was taken from the presence of the victim and the crime constituted armed robbery where the victim was forced at gunpoint to leave an office and enter a bathroom and the property was then taken from the office.

11. Robbery § 4.3— armed robbery—nonsuit—real or toy pistol

Nonsuit was not required in armed robbery cases because one victim testified that she "couldn't tell if it was a toy pistol."

12. Robbery § 5.4— armed robbery—use of two guns—uncertainty as to whether one gun was real—failure to submit common law robbery

The trial court in an armed robbery case was not required to charge on the lesser included offense of common law robbery because of a victim's uncertainty as to whether a gun used in the robbery was real where the evidence showed that two guns were used in the robbery and the uncertainty involved only one of the guns.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 23 September 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 June 1978.

Defendant was charged in three bills of indictment proper in form with the offenses of armed robbery and was found guilty of the armed robbery of one Faye Jenkins and one William Hasty. (During the trial, the trial court ruled that two of the charges, #76CR65156 and 7, were merged.) The offenses were committed in Jenkins' office in Central Square Apartments in Charlotte. Defendant received 40-year sentences in the custody of the Department of Correction.

Prior to trial, defendant moved to suppress certain identification testimony. A voir dire was held, at which the State's evidence tended to show that: Jenkins was manager of Central Square Apartments; Jenkins and Hasty, another Central Square employee, were in the apartment office on 5 October 1976 when defendant came to the door and inquired about an apartment; defendant and another man then entered the office and pulled out guns; the robbers put both Jenkins and Hasty in a bathroom and took the latter's wallet and keys; the robbers searched the office and then returned to the bathroom to ask Jenkins where her money and car keys were; and one Linda Sutton who lived in the same building, saw defendant and the other man at close range as they left the office and drove away in Jenkins' car.

Officer Parker testified on voir dire that: he showed groups of photographs to the three witnesses which did not include defendant, and they could not identify anyone; Jenkins and Hasty thereafter viewed a lineup which did not include defendant, and they could not identify anyone; on 1 November 1976, the officer showed the three another group of photographs, and they each selected defendant's picture; he then showed the witnesses a more recent picture of defendant; and the three witnesses viewed separately another lineup on 3 November at which Jenkins and Hasty selected defendant, and Sutton did not pick anyone out. Each of the three witnesses testified that Officer Parker had never indicated to them which photograph or person he or she should select and that their selections were based upon their observations at the time of the robberies.

Defendant presented on voir dire the testimony of a local public defender who had observed the 3 November lineup. He stated that he did not represent defendant. At the close of the hearing, the trial court entered an order finding facts and admitting the identification testimony. Jenkins, Hasty, Sutton, and Parker then gave similar testimony before the jury.

As its final witness, the State presented Officer Holmberg to testify as to a polygraph test. Defendant's motion to suppress was denied. Holmberg testified that he administered a polygraph test to defendant on 7 July 1977 and that in his opinion, the results showed deception when defendant denied committing the robberies.

Defendant testified and presented several witnesses in corroboration. He denied having participated in the robberies, and he and other witnesses testified as to his whereabouts on 5 October 1976. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Tate K. Sterrett, for defendant appellant.

ERWIN, Judge.

[1] Defendant presents 14 arguments on this appeal, and we find no error for the reasons stated. He first contends, in three

assignments of error, that the trial court erred in denying his motion to suppress evidence of pretrial and in-court identifications of defendant by Jenkins, Hasty, and Sutton. He maintains that the pretrial procedures were improperly suggestive and that the in-court identifications were based on the improper procedures and were not of independent origin. We do not agree.

First, as to the in-court identifications of defendant, even if we were to assume that the pretrial identifications were improper, the trial court, in its comprehensive findings following voir dire, found that the in-court identifications were "of independent origin, based solely upon what the prosecution witnesses saw and observed at the time of the armed robbery." The witnesses had ample opportunity to see defendant at the time of the robberies from short distances in a well-lighted area. There was ample evidence to support the trial court's finding as to the independent origin of the in-court identifications, and it is binding upon us. *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978), and *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

As to pretrial identification, our Supreme Court has stated the test as follows in *State v. Henderson*, 285 N.C. 1, 9, 203 S.E. 2d 10, 16 (1974), *modified on other grounds*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976):

> "[T]he test . . . is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." (Citations omitted.)

See also State v. Long, 293 N.C. 286, 237 S.E. 2d 728 (1977). In essence, defendant argues that the photographic identifications were impermissibly suggestive, that the subsequent lineup identification was tainted thereby, as was the identification of defendant at the probable cause hearing.

As stated above, the record supports the trial court's finding that the witnesses had ample opportunity to observe defendant at the time of the robberies under conditions conducive to accurate identification. All of the witnesses testified that the officer did not tell them which photograph to select, nor did he tell them that a suspect's picture was in the group.

[2] Defendant maintains that the small number, apparently six or seven, of photographs shown to the witnesses on 1 November 1976, testimony tending to show that more than one photograph of defendant was among them, alleged discrepancies between descriptions given the police and defendant's actual height and weight, and the lapse of time between the offenses and the photographic identifications show that the procedures were conducive to misidentification. We note that relatively small numbers of pictures were shown to witnesses in several cases in which sufficient suggestiveness as to violate a defendant's rights was not found. *State v. Bundridge, supra; State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977); *State v. Long, supra;* and *State v. Shore*, 285 N.C. 328, 204 S.E. 2d 682 (1974). Nor do we think that the apparent inclusion of more than one photograph of defendant renders the photographic identifications impermissibly suggestive. We further note that in *State v. McKeithan, supra*, there was a longer lapse of time between the crime and the photographic identification than the delay herein.

Viewing the "totality of the circumstances," we conclude that the pretrial photographic identifications were not "so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." The testimony reveals that the witnesses were unprompted and viewed the photographs separately. All the witnesses were quite sure of their identification of Thompson:

Jenkins: "As to why I have identified James Thompson as the person who robbed me on October 5, because he was the man that robbed me. There is no question in my mind. I am absolutely positive."

Hasty: "This is the man that stepped into the apartment, asked for an apartment, held a gun on us, marched me into a bathroom and removed items of my personal effects from my pockets."

Sutton: "Yes, today I can point out the defendant as being the person I saw coming out of Mrs. Jenkins' office, getting into her car, coming back, going into her office, and getting back into her car on October 5, 1976. There is no doubt in my mind about that."

[3] Turning to the lineup identifications, defendant states in his brief that he "does not question per se the composition of the lineup or the manner in which the identification procedure was conducted." Defendant does contend, however, that no lineup should have been conducted, that it took place only two days after the photographic identifications, and that "[t]he police obviously were trying to fortify and solidify the witnesses' image of Defendant so that they could make in-court identifications of him." Jenkins had indicated to the police her desire to see "at long range" the man whose photograph she had selected. Again, the testimony indicates that there was no prompting and that the witnesses viewed the lineup separately. On the one hand, defendant argues that too much time elapsed between the crime and the photographic identifications, and on the other hand, he maintains that too little time elapsed between the photographic and lineup identifications. Defendant's contention that the police were merely seeking to securely implant defendant's image in the witnesses' minds is speculative and unsupported by the record. In substance, defendant seeks a rule of law requiring that photographic identifications may not be quickly followed by lineup identifications. We decline to adopt such a rule. The test remains that stated in *State v. Henderson, supra,* and we conclude that the lineup identifications herein do not violate due process.

[4] Defendant next contends that the lineup was conducted without the issuance of a non-testimonial identification order required by G.S. 15A-271 *et seq.* and, therefore, it was error to allow testimony of both the out-of-court and in-court identifications.

Defendant, however, concedes that he was in custody on another charge at the time of the lineup. Our Supreme Court in *State v. Irick,* 291 N.C. 480, 490, 231 S.E. 2d 833, 840 (1977), held as follows:

> "[A]rticle 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. *The statute does not apply to an in custody accused* . . . ." (Emphasis added.)

Thus, this assignment of error is overruled.

[5] Defendant argues that it was improper to permit the witnesses on various occasions to identify one of the robbers as "defendant," contending that this created "a false sense of familiarity." Defendant cites no authority for this proposition, and we have found none. This assignment of error is without merit.

Citing numerous exceptions, defendant contends that the trial court abused its discretion in permitting the district attorney to ask leading questions and should have declared a mistrial on its own motion. Clearly it is within the trial court's discretion in permitting leading questions on direct examination, and its discretion will not be reviewed on appeal absent an abuse thereof. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). We see no such abuse on this record. In fact, many of defendant's objections to leading questions were sustained.

We likewise see no abuse of discretion in the trial court's permitting the State to recall Jenkins as a witness. Permitting a witness to be recalled rests in the sound discretion of the trial court. *State v. Stewart*, 16 N.C. App. 419, 192 S.E. 2d 60 (1972); 1 Stansbury's N.C. Evidence § 24 (Brandis rev. 1973). Further, defendant contends that the trial court should have excluded Jenkins' testimony on recall, as it was "so vague, uncertain, and remote that it was irrelevant." Suffice it to say that this testimony was clearly relevant as an effort by the State to establish what property was taken and when it was taken.

[6] In three assignments of error, defendant attacks the admission of certain testimony pertaining to the polygraph test. In *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975), this Court carefully and thoroughly detailed the conditions under which polygraph results would be admitted on stipulation. The record reveals that: (1) defendant, his attorney, and the assistant district attorney all signed a stipulation to the effect that defendant voluntarily requested a polygraph examination, that the results would be admissible irrespective of their nature, unless such results were inconclusive, and that W. O. Holmberg (the same examiner involved in *State v. Steele, supra,*) is a qualified examiner, and he would conduct the test and interpret the results; (2) defendant signed a voluntary request and authorization for the test; (3) the trial court conducted an extensive voir dire as to voluntariness of defendant's request and stipulation and his understanding thereof; (4) there was considerable foundation

laid as to the skill and experience of Officer Holmberg, the questioning procedures, and the instrumentation; (5) Officer Holmberg was accepted by the trial court as an expert in the field of polygraph examinations; (6) the witness testified that in his opinion, defendant displayed deception; (7) defendant cross-examined the officer; and (8) the trial court instructed the jury in pertinent part, that:

> "[S]uch testimony does not tend to prove or disprove any elements of the crime the defendant is accused of having committed, nor did such testimony tend to establish the defendant's guilt of such crime. . . . [A]t most, such testimony tended only to indicate that at the time of the examination of the defendant, the defendant, in the opinion of the witness was not telling the truth. . . . [T]he jury . . . should only consider the witness's testimony only as it might bear on the defendant's credibility. . . . The court further instructed the jury that whatever weight the testimony should receive was for the jury to determine."

We conclude that the safeguards, as stated in *State v. Steele, supra,* governing the admission of polygraph evidence upon stipulation were satisfied herein. We have carefully considered defendant's assignments of error pertaining to the polygraph examination and the testimony of Officer Holmberg, and we find none to be sustainable.

[7] Next, relying on *Watkins v. Foster,* 570 F. 2d 501 (4th Cir. 1978), defendant contends that the trial court erred in permitting the State to impeach defendant by asking him whether he robbed certain persons on certain dates.

It is well established in this jurisdiction that a witness, including a criminal defendant, may be asked on cross-examination whether he has committed certain criminal acts. *State v. Waddell,* 289 N.C. 19, 220 S.E. 2d 293 (1975), *modified on other grounds,* 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976). Such questions must be asked in good faith, and the scope of the questions is subject to the discretion of the trial court. *State v. Williams,* 292 N.C. 391, 233 S.E. 2d 507 (1977). We do not perceive any indication of bad faith on the part of the State, nor do we see an abuse of trial court discretion. Defendant contends that the assistant district attorney was looking at indictments pending against him

as he was being cross-examined. Even if we were to assume the truth of that contention, there is no indication that the jury knew the nature of the notes or documents the prosecution was using. An argument analogous to defendant's was rejected by our Supreme Court in *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977).

Further, we think that *Watkins v. Foster*, *supra*, decided by a divided panel of the U. S. Fourth Circuit Court of Appeals, is readily distinguishable from defendant's case. In that case, the Court held that the cross-examination of petitioner at his trial was prejudicial and deprived him of a fair trial. First, we note that the State's case against Foster consisted solely of fingerprint evidence; the evidence against defendant Thompson is not nearly so sparse. Further, there was reason to question the State's good faith in propounding the questions it put to Foster on cross-examination; as stated above, we see no basis to question the prosecution's good faith herein. Accordingly, this assignment of error is overruled.

[8] Defendant's next assignment of error pertains to testimony of State's witness Sutton as to what Jenkins had told her in response to Sutton's question, "Was it the two black guys that just left in your car? And she said, Yes." This testimony was admitted solely for the purpose of corroborating Jenkins' testimony, should the jury find that it did so, and the trial court so instructed the jury. We think that clearly the above portion of Sutton's testimony, to which defendant excepts, was corroborative of Jenkins' testimony, or so the jury could find, and was competent for that purpose.

[9] Defendant next excepts to the following testimony of State's witness Hasty:

> "Q. Did you give Thompson permission to do that (remove the contents of Hasty's pockets)?
>
> A. I don't even give my wife that permission."

Defendant contends that Hasty's answer was unresponsive. There was no prejudicial error. While the answer was flippant, its clear import was that such permission had not been given. Hasty had already testified that two men, one of whom was defendant, entered the apartment with guns, and took Hasty and Jenkins to

a bathroom, and that defendant frisked him and removed the contents of his pockets, including about $150.

[10] Defendant assigns error to the failure of the trial court to grant his motions for judgment as of nonsuit. He first contends that as to the merged cases, the alleged offenses did not occur in the presence of the victims, as they were not in the same room as the one from which the property was taken. We decline to adopt such a narrow view. To do so would seemingly invite would-be perpetrators to waylay their victims in one location and then as part of the same transaction, to take their property from another nearby location, thereby avoiding guilt of robbery, even if the other elements of the offense were present. Here the evidence tends to show one continuing transaction and that force or intimidation was used to accomplish the taking.

> " 'Presence,' within the rule that a taking of property from the presence of another may constitute robbery, means a possession or control so immediate that violence or intimidation is essential to sunder it. A thing is in the presence of a person, with respect to robbery, which is so within his reach, inspection, observation, or control that he could, if not overcome by violence or prevented by fear, retain his possession of it." 77 C.J.S. Robbery, § 9, p. 455.

See also State v. Dunn, 26 N.C. App. 475, 216 S.E. 2d 412 (1975).

[11] Defendant's further contention that nonsuit should have been granted in all of the cases because Jenkins testified on cross-examination that "I couldn't tell you if it was a toy pistol" is also without merit. The evidence tends to show that defendant had a gun. This assignment of error is overruled.

[12] In his final assignment of error, defendant argues that the trial court erred in failing to instruct the jury on the lesser-included offense of common law robbery and in failing to submit same to the jury, in the absence of a request to do so. Again, defendant asserts that Jenkins' "uncertainty" as to whether or not the gun was real supports his argument. He relies on *State v. Keller,* 214 N.C. 447, 199 S.E. 620 (1938), *State v. Jackson,* 27 N.C. App. 675, 219 S.E. 2d 816 (1975), and *State v. Faulkner,* 5 N.C. App. 113, 168 S.E. 2d 9 (1969). We find *Keller* and *Jackson* readily distinguishable from the instant case in that in those cases, there

was doubt as to whether the perpetrators had any weapon at all. Concededly, *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), and *Faulkner* support defendant's contention. However, in the latter two cases, the evidence indicated that only one "gun" was involved. Here the evidence tends to show that *two* "guns" were involved, and Jenkins' uncertainty was as to whether *one* gun might have been a toy and not both of them. We feel, therefore, that the evidence did not require an instruction on common law robbery. *See State v. Evans*, 25 N.C. App. 459, 213 S.E. 2d 389 (1975).

Having considered defendant's contentions, we conclude that he had a fair trial, free of prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WALTER DOUGLAS LONG

No. 788SC206

(Filed 29 August 1978)

1. Searches and Seizures § 43— violations of Criminal Procedure Act not substantial—seized evidence not suppressed

Even if a search of defendant violated various provisions of G.S. Chapter 15A, such violations did not constitute grounds for exclusion of the evidence seized since the violations were not substantial, as exclusion of evidence seized by the investigators of the U. S. Air Force on Seymour Johnson Air Force Base would not in any way deter similar searches and seizures in the future.

2. Searches and Seizures § 20; Army and Navy § 1— search warrant issued by commanding officer of military base—oath or affirmation not required

Commanding officers of military bases qualify as neutral and detached magistrates for the purpose of determining probable cause to issue search warrants, and searches and seizures made pursuant to authority issued by the commanding officer of a military installation upon probable cause, even though not supported by oath or affirmation, are valid and constitutional when the search is made of property in the possession or under the control of a person under the command of the issuing officer.

3. Searches and Seizures § 32— search warrant for contraband in residence—weapons frisk of those present proper

A limited "frisk" or search for weapons is reasonable and may be constitutionally made of all individuals present in a private residence when the residence is searched pursuant to a valid search warrant based upon probable cause to believe that the residence is a place in which heroin and other controlled substances are bought and sold and that such contraband is then present; an officer's reaching into defendant's boot, which was perhaps the most obvious place a weapon would have been concealed, in no way transformed the "frisk" of defendant for weapons into a complete search for contraband.

APPEAL by the State from *Fountain, Judge.* Order entered 6 December 1977 in Superior Court, WAYNE County. Heard in the Court of Appeals 22 June 1978.

The defendant was indicted for the felony of possession of the controlled substance heroin with the intent to sell. The defendant filed a written motion to suppress certain physical evidence obtained as the result of a search and seizure. After a hearing on the motion, the trial court ordered the evidence in question suppressed. From this order, the State appealed.

The State's evidence at the hearing on the motion to suppress tended to show that Kenneth Walker, a member of and criminal investigator for the United States Air Force Office of Special Investigations at Seymour Johnson Air Force Base in Wayne County, North Carolina, received information from a confidential informant on the morning of 19 May 1977. The informant stated that he had seen large amounts of marijuana at the home of Air Force Sergeant Samuel Britt. Britt's home was in government housing on the base. The informant also related that he had seen Britt and his wife use and sell both heroin and marijuana in the home. The informant also gave specific details as to the amounts of heroin and marijuana he had seen in the home as well as detailed descriptions of their wrappings and location within the home.

At approximately 5:00 p.m. on 19 May 1977, Investigator Walker sent the informant to the home in an attempt to have him purchase narcotics. As a result of this visit, the informer told Walker he had observed a packet of cocaine on the living room table in the home. The informant attempted to purchase the cocaine, but Britt told him it was for his own personal use. Britt

then told the informant to come back later that night, and he would sell the informant drugs.

After the informant related this information to Walker and other Air Force investigators, the Britt home was placed under surveillance. Numerous openings and closings of the doors to the home were observed, and three unknown males were seen going into the home.

Between 10:00 p.m. and 10:20 p.m. on 19 May 1977, Air Force investigators related all information in their possession to Colonel James S. Brimm, the commanding officer of Seymour Johnson Air Force Base. The information related to Colonel Brimm by the investigators included all the information previously set forth herein. The investigators related the information to Colonel Brimm verbally and without being placed under oath. Acting pursuant to his authority as commanding officer of Seymour Johnson Air Force Base, Colonel Brimm then signed an "Authority to Search and Seize" directing the officers to search the home, Britt and his wife, and all other military personnel present.

At approximately 10:20 p.m. Investigator Walker sent the informant back to the home, which was then under surveillance by Walker and others. Walker observed the informant go to the home and leave in about one minute without going inside. Other Air Force investigators, together with county officers, then arrived and a search of the home was conducted. Investigator Walker went to the front door and attempted to enter, but found the door had been nailed shut. He then went to the rear of the home and entered. Upon entering the investigators found Sergeant Britt in the bathroom and the defendant, Walter Douglas Long, came out of a back bedroom. They were both directed to go into the living room of the home. One of the individuals present appeared to be under the influence of drugs. The investigators observed that Mrs. Britt "appeared hysterical and was jumping around."

The investigators testified that they then conducted a "pat down" of the defendant and others to determine whether they were armed. They further testified that such a pat down was normal procedure conducted for their own safety. Investigator Walker testified that the informant had told him that Sergeant Britt had previously inquired about obtaining a weapon.

Investigator Walker conducted the "pat down" of the defendant by running his hands down the defendant's body and in his boots. He testified that he ran his hands around the inside of the defendant's left boot "all the way to his foot." Upon placing his hand in the defendant's left boot, he felt a sharp pointed object which he thought was a knife. He then pulled the object out and determined it was a spoon wrapped in plastic with eight small packets of a powder type substance, three white Q-tips and one needle. He did not remove anything else from the defendant at this time. He then asked the defendant for his identification, and the defendant produced a driver's license and stated that he was a civilian. Investigator Walker then turned the defendant over to the county law enforcement officers present. The home was then searched pursuant to the "Authority to Search and Seize" issued by Colonel Brimm. Various controlled substances were found in the bedroom and other areas.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Barnes, Braswell & Haithcock, P.A., by Michael A. Ellis and R. Gene Braswell, for defendant appellee.

MITCHELL, Judge.

The State assigns as error the order of the trial court excluding the evidence seized from the defendant as being the fruit of a "frisk" in violation of G.S. 15A-255. The defendant, however, contends that the Air Force investigator exceeded the authority to search embodied in that statute, as the "frisk" went beyond "an external patting of the clothing of those present" when the investigator reached inside the defendant's boot. The defendant additionally contends that the search of the defendant was not authorized by G.S. 15A-256 as the "Authority to Search and Seize" issued by Colonel Brimm was issued upon an oral application in violation of G.S. 15A-244 and was not issued by an official authorized under G.S. 15A-243. The defendant additionally contends that the investigators violated G.S. 15A-256 by searching him prior to an unsuccessful search of the premises.

[1] Assuming arguendo that the defendant is correct as to each of his contentions regarding violations of G.S. Chapter 15A, we do

not find such violations would constitute grounds for exclusion of the evidence seized. Our statutes only require that evidence obtained in violation of G.S. Chapter 15A be suppressed if it is obtained as a result of a "substantial" violation of the provisions of the Chapter. G.S. 15A-974(2). One of the critical circumstances to be considered in determining whether the violation is "substantial" is the extent to which exclusion will deter similar violations in the future. Here, we find that exclusion of the evidence seized by the investigators of the United States Air Force on Seymour Johnson Air Force Base would not in any way deter similar searches and seizures in the future. Air Force and other military authorities would and should continue to exercise the powers granted them by the Congress and President of the United States to search for and seize evidence of criminal violations on military bases. Our holding here would have no tendency to deter such conduct in the future, and any violation of G.S. Chapter 15A occasioned by such searches on military bases pursuant to proper military authority will not be deemed "substantial" within the meaning of G.S. 15A-974.

Additionally, we think that "Our Federalism" requires a sensitivity to the legitimate interests of the governments of both the State and the United States and dictates that neither carry out its functions so as to unduly interefere with the legitimate activities of the other. *See Younger v. Harris*, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (1971). *But see* McMillan, James B., *Abstention—The Judiciary's Self-Inflicted Wound*, 56 N.C.L. Rev. 527 (1978). Our construction of G.S. 15A-974 in such manner as to hold the actions of members of the United States Air Force not to constitute "substantial" violations of our statutes, if they constitute violations of any type, has the added benefit of avoiding such undue conflicts among the components of "Our Federalism."

[2] The defendant also contends that the "Authority to Search and Seize" issued by the commanding officer of Seymour Johnson Air Force Base was unconsitutionally issued in violation of his rights under the Fourth Amendment to the Constitution of the United States as it was not issued upon probable cause as found by a neutral and detached magistrate. In support of this contention the defendant refers us to the cases of *Shadwick v. City of Tampa*, 407 U.S. 345, 32 L.Ed. 2d 783, 92 S.Ct. 2119 (1972), and *Johnson v. United States*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367

(1948). We do not agree. Commanding officers of military bases qualify as neutral and detached magistrates for the purpose of determining probable cause. *United States v. Banks*, 539 F. 2d 14 (9th Cir.), *cert. denied*, 429 U.S. 1024, 50 L.Ed. 2d 626, 97 S.Ct. 644 (1976). Searches and seizures made purusant to authority issued by the commanding officer of a military installation upon probable cause, even though not supported by oath or affirmation, are valid and constitutional, when the search is made of property in the possession or under the control of a person under the command of the issuing officer. *Wallis v. O'Kier*, 491 F. 2d 1323 (10th Cir.), *cert. denied*, 419 U.S. 901, 42 L.Ed. 2d 147, 95 S.Ct. 185 (1974); *United States v. Grisby*, 335 F. 2d 652 (4th Cir. 1964). Here, the search of Sergeant Britt's home on Seymour Johnson Air Force Base pursuant to the authority of the commanding officer was a constitutionally valid search. We find that, in the constitutional sense, the search by military authorities, pursuant to their commanding officer's "Authority to Search and Seize," resulting in the search of the Britt home and of the defendant must be treated as though conducted pursuant to a valid and lawful search warrant.

[3] Finally, we are called upon to determine whether the search of the defendant during the course of the lawful search of the Britt home otherwise violated the Fourth Amendment to the Constitution of the United States. We find it did not. Only those searches and seizures which are unreasonable are constitutionally prohibited. The limits of reasonableness placed upon searches are equally applicable to seizures, and whether a search and the resulting seizure are reasonable must be determined from the facts of the individual case. 11 Strong, N.C. Index 3d, Searches and Seizures, § 1, p. 485. Here, we find the search of the defendant in the Britt home on 19 May 1977 and the resulting seizure of contraband were reasonable and lawful.

Several courts have indicated that when, as here, a search is conducted pursuant to lawful authority based upon probable cause indicating the presence on the premises to be searched of a type of contraband easily hidden on the person, complete searches for contraband materials may be conducted upon all individuals present. *Samuel v. State*, 222 So. 2d 3 (Fla. 1969); *Willis v. State*, 122 Ga. App. 455, 177 S.E. 2d 487 (1970); *People v. Pugh*, 69 Ill. App. 2d 312, 217 N.E. 2d 557 (1966); *State v. Loudermilk*, 208 Kan.

893, 494 P. 2d 1174 (1972); *State v. De Simone*, 60 N.J. 319, 288 A. 2d 849 (1972); *Johnson v. State*, 440 S.W. 2d 308 (Tex. Crim. App. 1969). *See United States v. Johnson*, 475 F. 2d 977 (D.C. Cir. 1973); *Walker v. United States*, 327 F. 2d 597 (D.C. Cir. 1963); *State v. Saiz*, 106 Ariz. 352, 476 P. 2d 515 (1970). *But see State v. Carufel*, 263 A. 2d 686 (R.I. 1970), and cases referred to therein. We have previously held that complete searches of such individuals for contraband are reasonable and consitutional if conducted, pursuant to G.S. 15A-256, after a search of the premises and persons designated in the warrant fails to produce the items sought and specified in the warrant. *State v. Watlington*, 30 N.C. App. 101, 226 S.E. 2d 186, *appeal dismissed*, 290 N.C. 666, 228 S.E. 2d 457 (1976).

The facts presented by the present case, however, do not require that we determine whether complete searches of all individuals present in the Britt home for contraband materials would have been constitutional. Here, the investigators limited their search of the defendant to a "frisk" for weapons and did not conduct a complete search of the defendant's person. We do not feel that the act of reaching into the defendant's boot, which was perhaps the most obvious place a weapon would have been concealed, in any way transformed the "frisk" for weapons into a complete search for contraband. Rather, we find that a limited "frisk" or search for weapons is reasonable and may be constitutionally made of all individuals present in a private residence, when the residence is searched pursuant to a valid search warrant based upon probable cause to believe that the residence is a place in which heroin and other controlled substances are bought and sold and that such contraband is then present.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the Supreme Court of the United States held that, in order to authorize a search for weapons without a warrant, the officer conducting the search must be able to point to specific and articulable facts which, taken together with rational inferences therefrom, reasonably warrant the intrusion. In such instances, it is necessary to balance the need to search or seize against the invasion which the search or seizure entails. As the investigators in the present case searched the residence pursuant to authority issued upon a showing of probable cause to believe the residence contained contraband and was regularly used in the sale of such

contraband, the intrusion occasioned by the "frisk" of the defendant to determine whether he was armed and dangerous was reasonable and constitutional. Although such "frisks" do not technically constitute a so-called "stop and frisk" procedure, we find this to be one of those "carefully defined classes of cases" referred to in *Terry*, which make up an exception to the warrant requirement and that such searches are reasonable. Certainly, if an officer may, without the benefit of either a search warrant or arrest warrant stop individuals he has observed engaging in unusual conduct on a public street after concluding that they contemplate a crime and are armed, as in *Terry*, searches such as those presented by the present case are reasonable and, therefore, constitutional.

The defendant contends, however, that *Sibron v. New York*, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889 (1968), is a limitation upon the holding of *Terry* and requires our holding the search in the present case unconstitutional. We do not agree. In *Sibron* the police officer searched the defendant in a public place for contraband. His search of the defendant was based solely upon having observed the defendant in the presence of various known narcotics addicts throughout the day. The arresting officer in that case did not suggest that he was in fear of bodily harm or that he searched Sibron in self-protection to find weapons. The holding and opinion in *Sibron* are, therefore, of no assistance in deciding the issues presented here.

Additionally, we do not find the opinion of the Supreme Court of the United States in *United States v. Di Re*, 332 U.S. 581, 92 L.Ed. 210, 68 S.Ct. 222 (1948), to be helpful in our analysis of the present case. There, on information that an informer was to buy counterfeit gasoline ration coupons from a certain individual at a named place, officers arrived and found a parked automobile occupied by its owner, from whom the informer had just purchased coupons, and a third person. Without the benefit of either a search warrant or an arrest warrant, the officers arrested the third person and took him to a police station, where a search of his clothing revealed an envelope containing coupons counterfeited in violation of federal law. The Court held that the mere presence of the third person in the parked automobile with its owner and the informer was not such as to indicate that he had committed the felony of knowingly possessing counterfeit

coupons. Therefore the arrest without an arrest warrant was unlawful. The search of the third person having been justified as a search incident to a lawful arrest without a warrant, the Court held that it must stand or fall upon the validity of the arrest and was also unlawful. We do not think the holding in *Di Re*, however, requires our holding the search in the present case unconstitutional. Although the Court in that case did, in *obiter dictum*, cast doubts upon the validity of a search for contraband conducted upon all persons found in a residence searched pursuant to a warrant, it in no way implied that a limited "frisk" for weapons, such as reaching into the top of an individual's boot, would be unreasonable and unconstitutional. Thus, we do not believe that the holding in *Di Re* is in any way controlling in the present case. *See Pennsylvania v. Mims*, 434 U.S. 106, 54 L.Ed. 2d 331, 98 S.Ct. 330 (1977).

Here the "frisk" of the defendant for weapons was strictly limited to the purpose of determining whether the defendant was armed. The Air Force investigators indicated that such "frisks" for weapons were their standard procedure in such situations. The testimony of these agents of the United States, which indicated they limited their search to a weapons "frisk," was further supported by the fact the limited "frisk" did not result in seizure from the defendant of any form of identification, or other item not subject to being mistaken for a weapon when felt during the "frisk." Rather, the defendant himself produced his identification to the investigators upon request after they had completed their search for weapons, which resulted in the discovery of a spoon and contraband easily mistaken for a weapon until pulled from the defendant's boot. We cannot say that a standard procedure, such as that employed here by the Air Force, calling for a limited search or "frisk" for weapons is unreasonable. Instead, we believe it to be authorized by the holding in *Terry*. In this regard, we cannot improve upon the statement of the Supreme Court of the United States that:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the of-

> ficer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Terry v. Ohio, 392 U.S. 1, 24, 20 L.Ed. 2d 889, 907-908, 88 S.Ct. 1868, 1881 (1968).

To hold the limited search for weapons conducted by the investigators in this case unreasonable or not justified by exigent circumstances would deny them just such powers to take necessary measures to determine whether those they are investigating at close range are carrying weapons and to neutralize threats of physical harm. We do not believe this result is required and must reverse the order of the trial court granting the defendant's motion to suppress and remand the case for further proceedings according to law.

Reversed and remanded.

Judges PARKER and HEDRICK concur.

IN THE MATTER OF THE RIGHT TO PRACTICE LAW OF: HAROLD ROBINSON, ESQ.

No. 7725SC732

(Filed 29 August 1978)

1. Attorneys at Law § 10— disciplining attorneys—inherent power of superior court

A superior court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice law in this State, and disbarment.

2. Attorneys at Law § 11— attorney's failure to perfect appeals—jurisdiction to discipline attorney

The Superior Court of Burke County was not without jurisdiction to discipline an attorney for failure to perfect appeals in four criminal cases

because notices of appeal had been given in the four cases since (1) the mere giving of notices of appeal did not carry to the appellate division any question concerning the conduct of counsel; (2) our courts have inherent authority to discipline attorneys practicing therein even in relation to matters not pending in the particular court exercising that authority; and (3) the records in the four cases were on file in the Superior Court of Burke County, respondent attorney was a resident of Burke County, and that court was the most convenient and appropriate forum for an inquiry into the attorney's conduct.

3. **Attorneys at Law § 11— disciplinary proceeding—no necessity for written notice**

A superior court judge was not without authority to make inquiry into an attorney's conduct because no written complaint had been filed where the judge was making inquiry into conduct disclosed by the records of his court.

4. **Attorneys at Law § 11— disciplinary proceeding—presentation of evidence by district attorney**

It was not improper for a superior court judge to request the district attorney to present evidence against an attorney in a disciplinary proceeding.

5. **Attorneys at Law § 11— disciplinary proceeding—criminal session of court**

Although disciplinary proceedings against an attorney are civil in nature, disciplinary action was properly taken against an attorney during a session of court for the trial of criminal cases instead of a session for the trial of civil matters since the judge was exercising an inherent power of the court which was not dependent upon the type of session of court over which he was then presiding.

6. **Attorneys at Law § 11— disciplinary proceeding—notice of charges—appearance of bias by issuing judge—failure of judge to disqualify himself—determination of discipline by Court of Appeals**

Where the notice of charges issued by a superior court judge in a disciplinary proceeding against an attorney stated that respondent, in each of four criminal cases in which he was appointed to represent the defendant on appeal, "negligently and willfully failed to perfect the appeal or to seek appellate review through other permissible means" in violation of DR 1-102(1), (5) and DR 6-101(3) of the Code of Professional Responsibility, it appears on the face of the notice of charges that the judge may have prejudged respondent's conduct before hearing any evidence; therefore, the judge should have disqualified himself and referred the inquiry to another judge, and his order suspending respondent from the practice of law must be vacated. However, the Court of Appeals, in the exercise of its inherent power to discipline attorneys, will rehear this matter and will determine what discipline, if any, should be imposed on respondent for his conduct as disclosed by the record.

APPEAL by respondent from *Snepp, Judge.* Judgment entered 20 June 1977 in Superior Court, BURKE County. Heard in the Court of Appeals 1 June 1978.

Respondent is licensed to practice law in North Carolina and in all the Courts of this State. He graduated from Wake Forest Law School in 1965 and passed the North Carolina Bar Examination in 1965. He thereafter practiced law in Mooresville, N. C. for approximately three months, after which he served two years as a legal clerk in the office of the Judge Advocate General, Seventh Division of the Eighth Army. After release from active military duty in December 1967 respondent served for one year as a prosecutor in the Domestic Relations Court in Greensboro, N. C. About February 1969 respondent moved to Jacksonville, N. C. where he engaged in the general practice of law until January 1975. In June 1975 respondent moved to Morganton, Burke County, where he set up practice as a sole practitioner and has engaged in the practice of law since that time. During his ten or more years in the practice of law in North Carolina, respondent has never perfected an appeal to either court of the appellate division of this State.

In Burke County Case No. 74CR9136, *State v. Harvey Berry,* the defendant was found guilty of involuntary manslaughter on November 20, 1975 and sentenced to a term of 7-10 years in the State's prison. He gave notice of appeal. On March 2, 1976 the defendant's trial attorney petitioned the court to be permitted to withdraw as counsel and the court appointed respondent, Harold Robinson, as defendant's attorney to perfect the appeal. From March 2, 1976 to February 1977 no action was taken to obtain an order for transcript of trial and no action was taken to perfect the appeal. On February 21, 1977 the district attorney filed a motion to dismiss the appeal. On March 14, 1977 respondent filed a petition for writ of certiorari in the Court of Appeals and the writ was issued by the Court of Appeals April 7, 1977. On April 18, 1977 Judge Lewis ordered a transcript of the trial to be prepared at State expense. On May 11, 1977 the court relieved respondent of further duties in the case and appointed other counsel to perfect the appeal.

In Burke County Case No. 76CR3480, *State v. Loys Randall Ray,* the respondent was appointed on April 20, 1976 to represent the defendant on an armed robbery charge. On September 16, 1976 the defendant was found guilty of common law robbery and sentenced to 10 years in prison. He gave notice of appeal and the court appointed respondent to perfect the appeal. An order for

the preparation of the transcript was entered September 30, 1976 and on November 17, 1976 respondent moved for and secured an order extending the time for serving the record on appeal for an additional 40 days. No further action was taken and on March 29, 1977 the district attorney filed a motion to dismiss. On May 2, 1977 an order for the arrest of the defendant was issued. On May 11, 1977 the court relieved respondent from any further duties in the case and appointed other counsel to pursue appellate review.

In Burke County Case No. 76CR6955, *State v. William Blane Hensley*, respondent was appointed to represent the defendant who was charged with rape. On November 10, 1976 the defendant was found guilty of first degree rape and sentenced to life imprisonment. He gave notice of appeal and respondent was appointed as his attorney to perfect the appeal. A transcript of the trial was prepared by the court reporter and delivered to respondent some time in January 1977. No further action was taken to perfect the appeal and on March 29, 1977 the district attorney filed a motion to dismiss. On May 11, 1977 the court relieved respondent of any further duties in the case and appointed other counsel to pursue appellate review.

In Burke County Case No. 76CR7000, *State v. Rex Carswell*, the defendant was charged with felonious breaking or entering and felonious larceny. He was represented by privately employed counsel who, with the permission of the court, withdrew prior to trial. On September 14, 1976 respondent was appointed to represent the defendant. On November 16, 1976 the defendant was found guilty as charged as to both counts and sentenced to 10 years imprisonment. He gave notice of appeal, and on the same day respondent was appointed counsel to perfect the appeal. A transcript of the trial was delivered to respondent on January 3, 1977. No further action was taken to perfect the appeal and on May 11, 1977 the court relieved respondent of any further duties in the case and appointed other counsel to pursue appellate review.

The failure of respondent to perfect the appeals in the above four cases was brought to the attention of Judge Snepp who, on 11 May 1977, entered the four orders discharging respondent as counsel and appointing other counsel in the above four cases.

On 13 May 1977 Judge Snepp issued a notice to respondent to appear in Superior Court at 9:30 a.m., 9 June 1977, to show cause why he should not be suspended from the practice of law or why his license to practice law should not be revoked. In the notice respondent was notified that the inquiry was concerning the above four cases. On 9 June 1977 respondent appeared as directed, respresented by counsel. The district attorney appeared and offered the record of the four cases and the testimony of the court reporter concerning when the transcripts were requested and when delivered.

The respondent offered evidence that he was an attorney of good character and reputation; that he requested that his name be put on the list of attorneys to be appointed to represent indigent defendants; that he pursued his trial duties diligently; that during part of the time involved in the four cases his wife, who was his legal secretary, was away from the office bearing and caring for their only child; that he did not have a copy of the Rules of Appellate Procedure; that he had never perfected an appeal to the appellate division, and did not know how.

By Order dated 20 June 1977 Judge Snepp found facts generally along the lines of the foregoing and adjudged and decreed that respondent be "suspended from the practice of law in the State of North Carolina for a period of one year from and after July 5, 1977, or, if the matter be appealed, from and after the date of the certification to the Clerk of Superior Court of Burke County of a final order of the Appellate Division affirming this judgment."

Respondent appealed.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Smith, Moore, Smith, Schell & Hunter, by James A. Medford, for respondent.

BROCK, Chief Judge.

In No. 74CR9136, *State v. Berry,* the respondent's client faced a prison sentence of seven to ten years, yet the record indicates that respondent took no action to perfect an appeal from 2 March 1976 until after the district attorney moved to dismiss the appeal on 21 February 1977. During that time respondent did not even seek an order for the trial transcript.

In No. 76CR3480, *State v. Ray,* the respondent's client faced a prison sentence of ten years, yet the record indicates that respondent failed to take any action beyond seeking one extension of time to serve the record on appeal.

In No. 76CR6955, *State v. Hensley,* the respondent's client faced life imprisonment, yet the record indicates that respondent took no action to perfect the appeal even though the trial transcript was in his possession.

In No. 76CR7000, *State v. Carswell,* the respondent's client faced a prison sentence of ten years, yet the record indicates that respondent took no action to perfect the appeal even though the trial transcript was in his possession.

In one of the four cases the record indicates that respondent took no action for more than a year, and it cannot be surmised how much longer respondent may have delayed in all four cases had Judge Snepp not taken action to appoint other counsel to perfect the appeals.

[1] There is no question that a Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment. *See In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962); *In re Hunoval,* 294 N.C. 740, 247 S.E. 2d 230 (1977); *In re Bonding Co.,* 16 N.C. App. 272, 192 S.E. 2d 33, *cert. denied* 282 N.C. 426 (1972); *Colon v. U.S. Attorney for the District of Puerto Rico,* CA 1, 5/17/78, 46 U.S.L.W. 2653; Annot. 96 A.L.R. 2d 823.

Respondent's argument that only the North Carolina State Bar has the authority to discipline an attorney who is licensed to practice in North Carolina was clearly rejected by this Court in *In re Bonding Co., supra,* and is clearly without merit.

[2] Likewise, respondent's argument that the Superior Court, Burke County was without jurisdiction to discipline him because notice of appeal had been given in the four cases in question is without merit. In the first place the mere giving of notices of appeal from the convictions in the four cases did not carry to the appellate division any question concerning the conduct of counsel, although it is true that either Court of the Appellate Division could have exercised its inherent power to deal with respondent had his defaults been brought to its attention. *See In re Hunoval, supra.* In the second place, it is incontrovertible that our courts have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the particular court exercising that authority. *In re Burton, supra; In re Bonding Co., supra.* In the third place, the records of the four cases were on file in Superior Court, Burke County and respondent was a resident of Burke County; therefore, that court was the most convenient and appropriate forum for the inquiry into respondent's conduct.

Respondent attacks the conduct of Judge Snepp in issuing the notice to respondent after having talked privately with the wife of one of the four defendants. It is perfectly understandable that one of the four defendants and his wife were concerned that no action had been taken to perfect his appeal. It is understandable that she would make inquiry of the highest judicial officer present in the county. It is appropriate that Judge Snepp would become concerned and investigate the records of his court. The other three cases must have been called to Judge Snepp's attention by someone, possibly someone in the Clerk's office, when Judge Snepp called for the records in the case in which the defendant's wife made inquiry. In any event, they came to Judge Snepp's attention in some manner and it was his duty to initiate an inquiry into all four cases.

[3] Respondent's argument that Judge Snepp had no authority to act unless a written complaint had been filed is without merit. Respondent relies upon *In re Burton, supra,* and *In re Bonding Co., supra,* for this argument. In those two cases the judge was acting upon matters not disclosed by the records of the court. Here Judge Snepp was making inquiry into conduct disclosed by the records of his court.

[4] Likewise, respondent's argument that it was improper for Judge Snepp to request the district attorney to present the evidence against respondent is without merit. Judge Snepp had the authority to designate the district attorney or any other licensed attorney to perform this function.

[5] Respondent's argument that this action was taken during a session of court for the trial of criminal cases instead of a session for the trial of civil matters is without merit. Although disciplinary proceedings against an attorney are civil in nature, in this case the judge was exercising an inherent power of the court which is not dependent upon the type of session of court over which he was then presiding.

Respondent argues that Judge Snepp displayed animosity towards him during the hearing. The record before us does not support this argument. Judge Snepp fully permitted respondent to offer all motions, arguments, and evidence that respondent tendered.

[6] We come now to a serious problem raised by respondent's appeal in this matter. That is the appearance of bias and prejudice in the specification of charges issued by Judge Snepp. Respondent argues, and we agree, that upon the face of the charges it appears that Judge Snepp prejudged respondent's conduct before hearing any evidence. We do not believe that Judge Snepp had in fact prejudged respondent's conduct. We think the wording of the specifications was an effort by Judge Snepp to fully advise respondent of the seriousness of the inquiry. Nevertheless it was an unfortunate and inappropriate choice of words and we cannot permit this record to stand. Specification No. 1, which will serve to demonstrate the language of the other three, reads as follows:

> On 2 March 1976 you were appointed by the Superior Court to represent the defendant in *State v. Harvey Berry*, 74CR9136, in connection with his appeal from a conviction of involuntary manslaughter. *You have negligently and willfully failed to perfect the appeal or to seek appellate review through other permissible means in violation of Disciplinary Rule 1-102(1) (5) and Disciplinary Rule 6-101(3) as set forth in the Code of Professional Responsibility.*

It would have appeared without bias and prejudice for Judge Snepp to have used wording substantially as follows in the place of those emphasized above:

> The records of this Court indicate that no action has been taken to perfect the appeal or otherwise seek appellate review. This inquiry is to hear evidence bearing upon why no action has been taken and to determine whether discipline should be imposed upon you by this Court.

We think Judge Snepp's unfortunate and inappropriate choice of words came from the idea of necessity for specific allegations in a third party complaint, rather than from bias or prejudice. Nevertheless, we must render our opinion from the record before us.

Having drafted his notice in the form of specific allegations of misconduct it was incumbent upon Judge Snepp to disqualify himself, as he was requested by respondent, and to refer the inquiry to another judge. To perform their high function in the best way our courts must not only do justice but they should give the appearance of doing justice. In our opinion Judge Snepp was in error when he refused to disqualify himself and his order must be vacated.

However, the vacating of Judge Snepp's order does not require dismissal of this proceeding nor does it require a remand for a new hearing. A new hearing would serve no useful purpose. The facts are not materially in dispute and respondent has been accorded full opportunity to present his evidence. We are here concerned with the inherent power of the court to discipline errant attorneys. The facts are before us as much so as if we had instituted this inquiry and had referred it to the Superior Court for hearing. Therefore, we will exercise our inherent power in this matter before us. The questions of mitigating circumstances and appropriate sanctions have been fully and zealously presented and argued in respondent's brief.

We therefore by this opinion notify respondent that we have before us the record as prepared and filed with us by respondent; that as soon as briefs have been filed, should respondent elect to do so, this matter will be further heard in this court on the record and briefs; that this court will consider what discipline, if any,

should be imposed upon respondent for his conduct as disclosed by the record before us; that this cause is set for rehearing before this court, as follows: respondent has until and including 20 October 1978 to file his brief addressing the questions of whether this court should exercise its inherent power to determine what discipline, if any, should be imposed upon respondent, and, if any, the extent thereof; and the State has until and including 9 November 1978 to file its brief addressing the same questions.

The result is that the order appealed from is vacated and this cause is retained in this court for further proceedings.

Order vacated.

Cause retained.

Judges CLARK and WEBB concur.

IN THE MATTER OF THE RIGHT TO PRACTICE LAW OF WHEELER DALE, ESQ.

No. 7725SC664

(Filed 29 August 1978)

Attorneys at Law § 11— disciplinary proceeding—notice of charges—appearance of bias by issuing judge—failure of judge to disqualify himself

Where the notice of charges issued by a superior court judge in a disciplinary proceeding against an attorney stated that respondent, who had been appointed to represent on appeal a defendant convicted of first degree rape, "negligently failed to perfect the appeal or to seek appellate review by any other means" in violation of DR 1-102 and DR 6-101(3) of the Code of Professional Responsibility, it appears on the face of the notice of charges that the judge may have prejudged respondent's conduct without hearing any evidence; therefore, the judge should have disqualified himself and referred the inquiry to another judge, and his order suspending respondent from the practice of law must be vacated. However, the Court of Appeals, in the exercise of its inherent power to discipline attorneys, will rehear this matter and will determine what discipline, if any, should be imposed on respondent for his conduct as disclosed by the record.

Judge BRITT concurring in the result.

APPEAL by respondent from *Snepp, Judge.* Order entered 20 June 1977 in Superior Court, BURKE County. Heard in the Court of Appeals 23 May 1978.

This disciplinary action was instituted by Judge Snepp on 13 May 1977 by filing a "Notice of Hearing and Specification of Charges" against respondent, Wheeler Dale, a practicing attorney of Burke County, alleging that it had come to Judge Snepp's attention that probable cause exists for a hearing into Dale's fitness to practice law. The specification reads:

> "On 3 June 1976 you were appointed to represent the defendant in *State v. Kenneth Mathis,* 76 CR 1377 upon appeal from conviction of first degree rape. You have negligently failed to perfect the appeal or to seek appellate review by any other means, in violation of Disciplinary Rule 1-102(1)(5) and Disciplinary Rule 6-101(3) as contained in the Code of Professional Responsibility."

On 10 June 1977, respondent filed motions to prohibit the district attorney from participating in the hearing; to dismiss the charges based upon insufficiency of the notice of hearing; and to request Judge Snepp to disqualify himself from hearing the proceeding on its merits.

All motions were denied. Judge Snepp noted that he had issued the notice based upon the public record and that that was all he knew about the matter.

The facts presented were not in dispute and tended to show that: on 17 February 1976, respondent, an attorney licensed by the State of North Carolina, who practiced and had an office in Burke County, was appointed by District Court Judge Beach to represent one Kenneth Mathis, who was charged with the offense of first degree rape occurring on or about 14 February 1976; the defendant, Mathis, respondent's client, was tried before a jury and found guilty of the offense charged on 3 June 1976 and was sentenced to death by asphyxiation; respondent gave notice of appeal on behalf of Mathis, and the trial court allowed 60 days for defendant to prepare and serve case on appeal on the State; on 30 July 1976, respondent filed a motion for extension of time to serve case on appeal which motion was allowed by Judge Thornburg on 30 July 1976; on 11 August 1976, respondent filed on

behalf of his client a motion for Stay of Execution of Judgment; on 23 August 1976, respondent received the transcript of the testimony of the trial of defendant Mathis; respondent failed to prepare this case on appeal; and in May 1977, Judge Snepp removed respondent as attorney for defendant Mathis.

Ruth Ann Hembry testified for respondent that: during her services as assistant clerk or deputy clerk of the Superior Court (for almost seven years), she had an opportunity to observe respondent as a practicing attorney in Burke County, and his relationship with the Office of the Clerk of Superior Court; as far as she knew, his work was filed promptly and was done thoroughly with the exception of this case; and his general character and reputation in the community is good.

Robert B. Byrd, a licensed attorney practicing in Burke County, testified that: he had practiced law in Burke County since 27 September 1955, and had an opportunity to observe respondent in the practice of law since about the mid sixties; respondent was doing primarily real estate, housing development, subdivision, and legal work of that sort, and did not maintain a law office when he first started to practice law; the work that he observed over the years that he personally knew of was done in a competent manner and that he worked on some titles with him; he observed him in the District Court but not in the Superior Court; and his general character and reputation is good in the community.

Wayne W. Martin, a licensed attorney in Morganton, testified: he has practiced law in Burke County since August 1967; he is president of the Burke County Bar Association; in his observation of respondent, he found his work to be done competently; his character and general reputation is good; and the Bar Association does not have any plans to institute a system whereby the attorneys on the indigent list would be divided between those who could represent a man charged with a misdemeanor and those who were competent to represent persons charged with a capital offense.

Wheeler Dale, respondent, testified that: he was 62 years old, received his law degree from Wake Forest University in 1941, and began practicing law in 1963 or 1964; he had tried serious criminal cases in the Superior Court and had taken one appeal to the Court of Appeals in 1968; he had served one term as District

Court Judge from 1970 to 1974; after his term as Judge, he let it be known that he would take appointed cases (indigent cases); and he was appointed in the Kenneth Mathis case without consultation. Mr. Dale stated:

> "[I] have no excuse for not doing it. It is inexcusable on my part for not doing it. I didn't have a savings account or any funds in the bank that I could live on. It was just a matter of me having to live and placing my priority on living instead of doing what I should have been doing, I guess. I had no animosity or ill-feelings of any kind against my client. . . ."

Judge Snepp entered his order on 20 June 1977 which held in part:

> "It appears from the evidence, without contradiction, that Respondent, contrary to the Ethical Consideration of Canon 6, CODE OF PROFESSIONAL RESPONSIBILITY, undertook to represent a client in an area of law in which he was not qualified, and should have known he was not. He did not thereafter become qualified through study and investigation, or by seeking the assistance of lawyers accustomed to handling appeals. He, representing a client convicted of a capital offense, did nothing to protect his right to review of his trial by the Supreme Court of North Carolina.
>
> The Court therefore concludes, as a matter of law, that Respondent willfully violated, by the conduct found above, Disciplinary Rules 6-101(A)(1)(2) and (3)."

The respondent appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward, for the State appellee.

Simpson, Baker & Aycock, by Dan R. Simpson and Samuel E. Aycock, for respondent appellant.

ERWIN, Judge.

The record shows this respondent did not take any action to perfect an appeal or seek judicial review for his client, who had been sentenced to death. Notice of appeal was given on 3 June

1976, and yet on 11 May 1977, the respondent had to be removed from the case because he had not perfected the appeal.

This Court held as follows in *In the Matter of the Right to Practice Law of: Harold Robinson, Esq.*, 37 N.C. App 671, 676, 247 S.E. 2d 241, 244 (1978):

> "There is no question that a Superior court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, had the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, imposition of costs, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State and disbarment. *See In re Burton,* 257 N.C. 534, 126 S.E. 2d 581 (1962); *In re Hunoval,* 294 N.C. ---, --- S.E. 2d --- (1977); *In re Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 33, *cert. denied* 282 N.C. 426 (1972); *Colon v. U. S. Attorney for the District of Puerto Rico,* CA 1, 5/17/78, 46 U.S.L.W. 2653; Annot. 96 A.L.R. 2d 823.
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> * * *
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> [R]espondent argues, and we agree, that upon the face of the charges it appears that Judge Snepp prejudged respondent's conduct before hearing any evidence. We do not believe that Judge Snepp had in fact prejudged respondent's conduct. We think the wording of the specifications was an effort by Judge Snepp to fully advise respondent of the seriousness of the inquiry. Nevertheless it was an unfortunate and inappropriate choice of words and we cannot permit this record to stand. . . .
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> * * *
>
> We think Judge Snepp's unfortunate and inappropriate choice of words came from the idea of necessity for specific allegations in a third party complaint, rather than from bias or prejudice. Nevertheless, we must render our opinion from the record before us.

> Having drafted his notice in the form of specific allegations of misconduct it was incumbent upon Judge Snepp to disqualify himself, as he was requested by respondent, and to refer the inquiry to another judge. To perform its high function in the best way our courts must not only do justice but they should give the appearance of doing justice. In our opinion Judge Snepp was in error when he refused to disqualify himself and his order must be vacated."

The language used in the specification in the case before us is almost identical to that used in *In the Matter of the Right to Practice Law of: Harold Robinson, Esq., supra.* There Judge Snepp's order was vacated as it must be here.

To provide for uniformity in these very similar cases, we adopt and follow *In the Matter of the Right to Practice Law of: Harold Robinson, Esq., supra.*

However, the vacating of Judge Snepp's order does not require dismissal of this proceeding nor does it require a remand for a new hearing. A new hearing would serve no useful purpose. The facts are not materially in dispute and respondent has been accorded full opportunity to present his evidence. We are here concerned with the inherent power of the court to discipline errant attorneys. The facts are before us just as if we had instituted this inquiry and had referred it to the Superior Court for hearing. Therefore, we will exerecise our inherent power in this matter before us. The questions of mitigating circumstances and appropriate sanctions have been fully and zealously presented and argued in respondent's brief.

We therefore by this opinion notify respondent that we have before us the record as prepared and filed with us by respondent; that as soon as briefs have been filed, should respondent elect to do so, this matter will be further heard in this Court on the record and briefs; that this Court will consider what discipline, if any, should be imposed upon respondent for his conduct as disclosed by the record before us; that this cause is set for rehearing before this Court as follows: respondent has until and including 20 October 1978 to file his brief addressing the questions of whether this Court should exercise its inherent power to determine what discipline, if any, should be imposed upon respondent, and, if any, the extent thereof; and the State has un-

til and including 9 November 1978 to file its brief addressing the same questions.

The result is that the order appealed from is vacated and this cause is retained in this Court for further proceedings.

Order vacated.

Cause retained.

Judge ARNOLD concurs.

Judge BRITT concurs in the result.

Judge BRITT concurring.

I concur with the result reached in the opinion written by Judge Erwin. However, I question the part of the statement quoted from *In the Matter of the Right to Practice Law of: Harold Robinson, Esq.*, to the effect that "as part of its inherent power to manage its affairs" a court now has the authority in imposing sanctions to suspend for a limited time the right to practice law in the State and to disbar an attorney.

STEWART G. BARBOUR, JOSEPHINE H. BARBOUR, D. ST. PIERRE DUBOSE, VALINDA HILL DUBOSE, HERBERT J. FOX, FRANCES HILL FOX, AND ORANGE SPEEDWAY, INC. v. GEORGE W. LITTLE, BRUCE A. LENTZ, NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES, AND NORTH CAROLINA DEPARTMENT OF ADMINISTRATION

No. 7715SC435

(Filed 29 August 1978)

1. Declaratory Judgment Act § 4.1— creation of Eno River State Park—constitutionality of statutes—plaintiffs not adversely affected—no controversy under Act

While the validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, this may be done only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby; therefore, where plaintiffs challenged the constitutionality of Art. 2 of G.S. Chap. 113, entitled "Acquisition and Control of State Forests and Parks," and Art. 3 of G.S. Chap. 113A, entitled "Natural and Scenic Rivers

System," on the ground that a "master plan" for development of the Eno River State Park to be devised by defendants might take some of their land, there was no genuine controversy cognizable under the Declaratory Judgment Act, since no "master plan" had been adopted by defendants; a "master plan," when adopted, was not a binding, unchangeable plan for the acquisition of property by the State; and no condemnation proceedings affecting any lands of the plaintiffs had as yet been instituted under any statute, the constitutionality of which they sought to have determined in this action.

2. **Rules of Civil Procedure § 56— denial of motion to dismiss—subsequent summary judgment permitted**

The denial of a motion to dismiss made under G.S. 1A-1, Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in G.S. 1A-1, Rule 56.

3. **Rules of Civil Procedure § 46— denial of motion to dismiss—question of validity preserved**

The question of the validity of the trial court's ruling denying defendants' motion to dismiss was properly preserved and brought forward on appeal by defendants' cross assignment of error made pursuant to G.S. 1A-1, Rule 10(d), and plaintiff's contention that defendants could not rely on their cross assignment of error because they failed to except to the court's order in the trial court is without merit, since, under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to the admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor, and defendants did this when they filed their motion to dismiss under Rule 12(b)(6).

APPEAL by plaintiffs from *Smith (David), Judge.* Judgment entered 1 April 1977 in Superior Court, ORANGE County. Heard in the Court of Appeals 3 March 1978.

Plaintiffs, owners of lands along the Eno River in Orange County, brought this action under G.S. 1-253 et seq. seeking a declaratory judgment that Art. 2 of G.S. Chap. 113, entitled "Acquisition and Control of State Forests and Parks," and Art. 3 of G.S. Chap. 113A, entitled "Natural and Scenic Rivers System," are unconstitutional and praying that defendants be permanently enjoined from adopting a "Master Plan" for the Eno River State Park.

In their complaint filed 14 May 1976 plaintiffs in substance alleged: Defendants have announced their intention to adopt a

"Master Plan" for the proposed Eno River State Park and have prepared several different plans for the park, each of which encompasses land of some of the plaintiffs and at least one of which encompasses land of all of the plaintiffs. Defendants have stated that the Eno River State Park will be established or augmented pursuant to one of the plans already proposed and have further stated that, once adopted, the "Master Plan" will determine with certainty and permanence the lands which would constitute the proposed Park. Plaintiffs are unwilling to sell their lands for such purposes. Article 2 of G.S. Chap. 113 and Article 3 of G.S. Chap. 113A are overly broad and constitute an unconstitutional delegation of legislative power to defendants.

On 15 June 1976 defendants filed a motion under Rule 12(b)(6) to dismiss the action for failure to state a claim upon which relief can be granted under the Declaratory Judgment Act inasmuch as there is no genuine controversy in existence at this time. On 17 September 1976 Judge Thomas H. Lee denied defendants' motion to dismiss and on the same date granted plaintiffs a preliminary injunction restraining defendants from adopting a "Master Plan" for the Eno River State Park including therein the lands of any or all of the plaintiffs.

On 7 October 1976 defendants filed answer in which they denied that there has been a final determination that the Eno River State Park will be augmented pursuant to any previously proposed plan. While admitting they had announced their intention to adopt a "Master Plan" for the Eno River State Park, defendants alleged that adoption of such a plan merely reflects the Division of Parks' concept of the Eno River State Park's ultimate boundaries and denied that the plan would determine with "certainty and permanence" the land which would ultimately constitute the Park. Defendants further alleged that they have taken no action regarding acquisition of any of plaintiffs' properties; that plaintiffs' lands are not subject to any condemnation proceedings by defendants; that plaintiffs have not suffered and are not threatened with loss of property; and that the constitutional issues plaintiffs seek to raise should properly be determined if and when defendants institute proceedings against any of the plaintiffs for condemnation of property.

On 17 March 1977 defendants filed a motion for summary judgment on the ground that there is no genuine issue as to any

material fact, supporting their motion by the pleadings, depositions, answers to interrogatories, and the affidavit of Ronald D. Johnson, Director of the Parks and Recreation Division of the North Carolina Department of Natural and Economic Resources. This affidavit, which was dated 17 March 1977, and the oral deposition of Mr. Johnson taken 10 September 1976, show the following: Since 1972 the development process for State parks has included the formulation of a master plan for each park. Such a plan serves as a guide to the Division of Parks and Recreation in proposing an orderly sequence of development and use to protect previous State investment in land to assure that natural resource values, adjacent property values, and potential recreation values are accommodated in an optimum manner. After the Division staff prepares a proposed plan for a project, it is presented at public hearings, and the plan is thereafter modified to incorporate suggestions made by interested and affected groups and individuals. There have been public hearings prior and subsequent to the formulation of three proposed master plans for the Eno River State Park. Due to the controversy engendered by public presentation of these plans on 2 August 1975, Johnson, as Director of the Parks and Recreation Division, directed that the three proposed plans be discarded and that the Master Plan Unit develop a new alternative which would accommodate to a better degree the conflicting wishes of landowners and potential users. Staff members of the State Planning Unit of the Division of Parks and Recreation are currently engaged in planning work preparatory to the development of a proposed master plan for the Eno River State Park. The planners' current proposal has not been submitted to public hearing due to restraints imposed on the Department by the injunction issued in this suit. The adoption of a master plan is merely a guide for the Division of Parks and Recreation in its budgeting for land acquisition and development to fulfill its statutory obligation to the people of North Carolina, and does not "irretrievably designate . . . land for park use." Revision of the plan is possible at any time in the planning process. Implementation of the plan involves checks and balances which allow for decisions based on the best judgment of those involved at the time. The Department of Administration and the Council of State must approve all acquisitions proposed, the Advisory Budget Commission must likewise be satisfied of the need for the lands acquired, and the General Assembly must provide the funds.

Thomas C. Ellis, Superintendent of State Parks, testified by oral deposition that in his opinion it would be practically impossible to remove a piece of land from an area encompassed by a master plan, noting that this was his feeling and may not be completely shared by others. He then testified that identification of a parcel of land in a master plan did not commit the State to purchase because of contingencies such as: deletion of that parcel by higher level decision within the Department of Natural and Economic Resources, lack of funds for purchase, changing circumstances over the period of years encompassed by a master plan, and other contingencies.

By answer to interrogatories, defendants admitted that prior to October 1975 three "Eno River State Park Master Plan Alternatives" were under consideration by the Parks and Recreation Division and that maps which depicted these proposed alternative plans disclosed that each of them included land belonging to some of the plaintiffs and that one of them included some land belonging to each of the plaintiffs.

Defendants' motion for summary judgment was heard by Judge David I. Smith who allowed the motion by judgment entered 1 April 1977. From this judgment, plaintiffs appeal.

Lucius M. Cheshire for plaintiffs appellants.

Attorney General Edmisten by Special Deputy Attorney General William A. Raney, Jr., and Associate Attorney JoAnne Sanford Routh for the State.

PARKER, Judge.

[1] By this action plaintiffs seek a declaratory judgment determining that certain of our General Statutes dealing with acquisition of lands for State parks are unconstitutional. While the validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under the Declaratory Judgment Act, G.S. 1-253 *et seq.*, "this may be done only when some specific provision(s) thereof is challenged by a person who is directly and adversely affected thereby." *Greensboro v. Wall*, 247 N.C. 516, 519-20, 101 S.E. 2d 413, 416 (1958). None of the plaintiffs in the present action has as yet been "directly and adversely affected" by any statute which they seek

to challenge in the present action, and plaintiffs have failed to show the existence of a genuine controversy cognizable under the Declaratory Judgment Act. A mere difference of opinion between the parties as to whether one has the right to purchase or condemn the property of the other—without any practical bearing on any contemplated action—does not constitute a genuine controversy. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450 (1942). The existence of such a genuine controversy is a jurisdictional necessity. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949); *Tryon v. Power Co., supra.*

No condemnation proceeding affecting any lands of the plaintiffs has as yet been instituted under any statute the constitutionality of which they seek to have determined in this action. All that has occurred is that employees of the Division of Parks and Recreation in the North Carolina Department of Natural and Economic Resources have made initial alternative planning proposals for a State park which contemplate ultimate acquisition of certain lands of the plaintiffs for park purposes. However, no "Master Plan" for the park in question has as yet been "adopted" by the Division of Parks and Recreation, and even when adopted, such a "Master Plan" will serve merely as a guide to the Division itself in carrying out its statutory functions. The making of such a plan is a sensible, and even a necessary, preliminary step if our State parks are to be developed in an orderly rather than a haphazard fashion. However, the adoption of the plan by the Division of Parks and Recreation in no way assures that it will ultimately be carried out or that any of the lands contemplated by the plan to be included in a State park will ever be acquired for that purpose. The continuing review and revision of the plan by the Division itself to keep it consistent with changing concepts and conditions, the requirement for review and approval by higher governmental authority within the executive branch, and the final necessity for legislative approval in the form of appropriation of funds, all present contingencies in the path leading to ultimate acquisition of any particular tract of land for park purposes. Clearly the inclusion of a particular tract of land within a plan at any stage of its development, including after its "adoption" by the Division of Parks and Recreation, does not constitute a taking of that land. The mere planning, including the making of preliminary surveys, is not a taking or damaging of the

property affected. *Browning v. Highway Commission*, 263 N.C. 130, 139 S.E. 2d 227 (1964); *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950).

[2, 3] There is no merit in plaintiffs' contention that, because Judge Lee denied defendants' motion made under Rule 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that there is no genuine controversy in existence, Judge Smith could not thereafter allow defendants' motion for summary judgment made on the same grounds. While one superior court judge may not overrule another, the two motions do not present the same question. *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E. 2d 885 (1971). The test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient. The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Therefore, the denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56. Moreover, in this case the question of the validity of Judge Lee's ruling denying defendants' motion to dismiss has been properly preserved and brought forward on this appeal by defendants' cross assignment of error made pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure. In this connection, plaintiffs' contention that defendants may not rely on their cross assignment of error because they failed to except to Judge Lee's order in the trial court is without merit. Under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor. This the defendants did when they filed their motion to dismiss under Rule 12(b)(6). No further action by defendants in the trial court was required to preserve their exception. In the record on appeal

defendants properly set out their exception to Judge Lee's order, as they were expressly permitted to do by Rule 10(d) of the Rules of Appellate Procedure. We find that the question of the validity of Judge Lee's order denying defendants motion to dismiss under Rule 12(b)(6) has been properly preserved by defendants' cross assignment of error and is before us on this appeal. We also find that Judge Lee committed error in denying defendants' motion to dismiss, since plaintiffs' complaint itself discloses that no genuine controversy exists such as to make this case cognizable under the Declaratory Judgment Act.

The judgment of Judge Smith allowing defendants' motion for summary judgment and dismissing this action is

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD GREGORY

No. 7810SC197

(Filed 29 August 1978)

1. Robbery § 4.3— armed robbery of theatre—sufficiency of evidence

Evidence was sufficient for the jury in a prosecution for robbery with a firearm where such evidence tended to show that defendant and two others planned to rob a theatre; the three drove to the scene of the crime in defendant's car; and defendant remained in the area as a means of the robbers' getaway.

2. Criminal Law § 33.2— robbery of theatre—plans to rob other theatres—evidence admissible to show intent

In a prosecution for armed robbery of a theatre, the trial court did not err in permitting a State's witness to testify as to certain conversations he had with defendant pertaining to possible robberies of theatres in certain other cities, since such evidence was competent to show defendant's intent.

3. Criminal Law § 96— prejudicial evidence—evidence promptly withdrawn

In a prosecution for armed robbery and conspiracy where a witness testified that he worked for defendant by working or burning—it is unclear which the witness said—a named theatre and "some breaking, entering and larceny," defendant was not prejudiced since the court promptly instructed the jury to disregard the testimony.

4. Criminal Law § 70— conspirators' conversation—admissibility of tape recording

In a prosecution for armed robbery of a theatre and conspiracy, the trial court properly allowed into evidence a tape recording of a conversation among the conspirators, one of whom was working undercover for the police and who had an electronic listening device hidden on his person during the conversation; moreover, a witness was properly allowed to use a transcript of the tape to refresh his memory.

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgment entered 6 October 1977 in Superior Court, WAKE County. Heard in the Court of Appeals 21 June 1978.

Defendant was indicted for armed robbery and conspiracy, convicted by a jury, and sentenced to consecutive terms of forty years and one day to ten years respectively.

State's evidence tended to show that: defendant owned and managed the State Theatre, and Douglas Newsome worked for him; defendant was in debt and suggested robbing a theatre; they discussed it for some time before deciding upon a specific robbery; defendant, Newsome, and Thomas Moody met on the night of 22 April 1977 and made plans to rob the Village Theatre; Moody was working undercover for the police and had an electronic listening device hidden on his person during this conversation; the police taped the conversation and had the Village Theatre under surveillance the following night; defendant bought a shotgun on 23 April 1977, and the three men involved (defendant, Newsome, and Moody) sawed down the barrel and test-fired the gun; they drove to the Village Theatre on the night of 23 April 1977 in defendant's car; and Newsome and Moody went into the theatre while defendant waited outside.

Newsome and Moody waited until the box office had closed, and then went to the manager's office and robbed him, with the shotgun, of about $1500. Defendant had driven around the shopping center and was waiting in his car at a nearby intersection. Newsome and Moody left the theatre and went to defendant's car at which time all three were arrested. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Stephen T. Smith, for defendant appellant.

ERWIN, Judge.

[1] Defendant raises several questions on this appeal. We will first consider his argument that the trial court should have granted his motion for judgment as of nonsuit as to robbery with a firearm, contending that at most, State's evidence tends to show that defendant was an accessory. He maintains that the evidence shows that he was neither physically nor constructively present at the scene during the robbery. We conclude that the evidence, considered in the light most favorable to the State, supports his constructive presence. Actual distance from the scene is not always determinative of constructive presence; however, defendant must be close enough to be able to render assistance if needed and to encourage the crime's actual perpetration. *State v. Buie*, 26 N.C. App. 151, 215 S.E. 2d 401 (1975).

As our Supreme Court observed in *State v. Price*, 280 N.C. 154, 158, 184 S.E. 2d 866, 869 (1971):

> "[O]ne who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. . . ."

The evidence shows that the three planned the crime, drove to the scene in defendant's car, and defendant remained waiting in the area. Newsome testified that "John (defendant) would drive his car there for the pickup. . . . When we went out of the theatre, we proceeded to walk across the street to the parking deck. We got to the parking deck and then turned and walked up towards Oberlin Road. As we neared Oberlin Road, I saw John's car. John pulled out to meet us."

Defendant relies on *State v. Buie, supra*, *State v. Alston*, 17 N.C. App. 712, 195 S.E. 2d 314 (1973), and *State v. Wiggins*, 16 N.C. App. 527, 192 S.E. 2d 680 (1972). The facts therein readily distinguish those cases from defendant's. We feel the controlling

authority is represented by such cases as *State v. Price, supra*, and *State v. Williams*, 28 N.C. App. 320, 220 S.E. 2d 856 (1976). We find no merit in this assignment of error.

[2] Defendant also contends that it was error to permit State's witness Newsome to testify as to certain conversations he had with defendant pertaining to possible robberies of theatres in certain other cities, asserting that such testimony went to defendant's character when his character was not in issue. This assignment of error is overruled.

As a general rule, in a prosecution for a particular crime, the State may not offer evidence that the defendant has committed other separate offenses. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (1977), *cert. denied*, --- U.S. ---, 54 L.Ed. 2d 288, --- S.Ct. --- (1977); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). This rule is, however, subject to exceptions, as expressed by Justice Ervin in *State v. McClain, supra* at 175, 81 S.E. 2d at 366:

> "2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." (Citations omitted.)

See also State v. May, supra; 1 Stansbury, N.C. Evidence, §§ 91 and 92 (Brandis rev. 1973).

[3] A further assignment of error relates to the trial court's failure to grant defendant's motion for a mistrial made because of the following testimony by Newsome:

> ". . . I was employed by Mr. Gregory.
>
> Q. What did you do for him at that time?
>
> A. Worked Studio I Theatre, and some breaking, entering and larceny."

The trial court allowed defendant's motion to strike, and then defendant moved for a mistrial. Newsome stated on voir dire that he had testified that he and defendant had "burnt down" the Studio I Theatre, although the trial court and the reporter understood him to say that he "worked" the Studio I Theatre.

Upon the jury's return, the trial court instructed the jury to disregard Newsome's answer.

Defendant argues, however, that the testimony was so prejudicial that no curative instruction could be effective. Generally, a motion for mistrial in non-capital cases is addressed to trial court discretion, and its ruling is not reviewable absent a showing of gross abuse of that discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). Where a trial court sustains a defendant's objection to the answer of a witness, strikes same, and instructs the jury not to consider it, the jury is presumed to have heeded the instruction and any prejudice is removed. *State v. Davis*, 10 N.C. App. 712, 179 S.E. 2d 826 (1971), *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971). Whether curative instructions can remove the prejudice depends on the nature of the evidence and the particular circumstances of the case. *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975).

Defendant relies on *State v. Hunt*, *supra*, and *State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967). In *Hunt*, however, the instructions to disregard came the day after the improper testimony. Here the trial court's curative instruction was prompt and specific. In *Aycoth*, an unresponsive answer revealed that defendant had been indicted for murder. We think that the testimony complained of here was not so inherently prejudicial that the curative instruction was insufficient to remove any prejudice and that the trial court properly refused to grant a mistrial.

[4] Defendant's remaining assignments of error relate to the tape recording and a transcript thereof. First, defendant argues that the tape recording was not properly authenticated and, therefore, should not have been admitted. We disagree.

State v. Lynch, 279 N.C. 1, 181 S.E. 2d 561 (1971), relied upon by defendant, establishes seven requirements for the proper foundation for the admission of a defendant's recorded confession or incriminating statement. Defendant asserts that two of the *Lynch* requirements are absent here, namely:

> ". . . (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly. . ." 279 N.C. at 17, 181 S.E. 2d at 571.

Our review of the testimony satisfies us that the above requirements were met, and this assignment of error is accordingly overruled.

Finally, defendant contends that the purported transcript of the tape recording was improperly admitted without authentication and evidence was improperly allowed as to its contents. The record clearly shows that the document would not be, and was not, shown to the jury. Rather, it was used by Officer Weathersbee to "refresh his recollection." *See* 1 Stansbury, N.C. Evidence, § 32 (Brandis rev. 1973). We find no error relating to the use of the transcript. When it appeared that the witness was reading from it, defendant's objection was sustained.

We find that defendant had a fair trial free of prejudicial error.

No error.

Judges BRITT and ARNOLD concur.

GUS Z. LANCASTER'S STOCK YARDS, INC. v. MRS. MURLEEN WILLIAMS, BRYAN HARGETT, TRENTON LIVESTOCK, INC., GREENVILLE LIVESTOCK, INC., AND DON C. FLOWERS, INC.

No. 777SC772

(Filed 29 August 1978)

Sales § 10.1— purchase of pigs by dishonored draft—resale of pigs by agents of purchaser—seller's right to recover from agents

Where the trial court found upon supporting evidence that original defendant paid for pigs purchased from plaintiff with a draft which was returned for insufficient funds, that additional defendants knew that original defendant had not paid plaintiff for the pigs and would not be able to do so and that plaintiff was seeking recovery of the purchase price or the pigs, and that the additional defendants were not purchasers of the pigs but acted as agent for the original defendant when they thereafter sold the pigs to third parties and applied the proceeds of the sale to debts owed by the original defendant to the additional defendants, the trial court properly held that title to the pigs remained in plaintiff, that plaintiff was entitled to follow the proceeds of the sale of the pigs, and that additional defendants were secondarily liable to plaintiff for the value of the pigs disposed of up to the balance of the purchase price due for the pigs.

APPEAL by defendants from *Fountain, Judge.* Judgment entered 25 April 1977 in Superior Court, NASH County. Heard in the Court of Appeals 20 June 1978.

This civil action was instituted by plaintiff to recover certain pigs transferred to defendant Murleen Williams, or $20,301.59, the alleged purchase price of the pigs. In answer to the complaint the defendant Williams admitted that she purchased the pigs from plaintiff and that the draft which she gave plaintiff was returned for insufficient funds. She alleged that the pigs were delivered to defendant Bryan Hargett, that she has not been paid therefor, and that the plaintiff should recover the pigs or the value thereof from defendant Hargett. The defendant Hargett in his answer denied the material allegations of the complaint.

On 1 April 1976 the plaintiff filed a motion seeking to join Trenton Livestock, Inc.; Greenville Livestock, Inc.; and Don C. Flowers, Inc. (hereinafter "Kinston Stock Yard"), as parties defendant and filed an amended complaint alleging that the named corporations were controlled by defendant Hargett; that on or about 19 December 1975 defendant Hargett was in possession of the pigs and was aware that defendant Williams was not the owner of the pigs; and that defendant Hargett sold some of the pigs and applied the proceeds to preexisting debts owed by defendant Williams to the other defendants. The plaintiff renewed its earlier prayer for relief seeking recovery of the pigs or the value thereof.

On 1 April 1976 the plaintiff moved for summary judgment against defendants Williams and Hargett. A hearing was conducted on the plaintiff's motion and on defendant Hargett's cross-motion for summary judgment. By judgment entered 4 May 1976 the court allowed the plaintiff's motion as to the defendant Williams in the amount of $20,301.59, denied the plaintiff's motion as to defendant Hargett and denied the defendant Hargett's cross-motion. No appeal was taken by defendant Williams.

At trial without a jury each party presented evidence. On 25 April 1977 the trial judge made findings of fact which are summarized and quoted as follows:

On 10 December 1975 defendant Williams, a small independent pig buyer, bought 357 pigs from the plaintiff. The plaintiff,

upon defendant Williams' request, drew a draft on her bank account in the amount of $20,301.59 with the understanding that title to the pigs would remain in the plaintiff until the draft was paid. The draft which was immediately presented for payment was returned to the plaintiff for insufficient funds. As of this date no portion of the purchase price has been paid to the plaintiff. At the time of the transaction plaintiff believed the draft would be paid while the defendant Williams was aware that she did not have sufficient funds to cover the draft. When the plaintiff was informed that the draft would not be paid, it "proceeded diligently with efforts to either collect the draft, or to locate and recover its pigs."

In December of 1975 defendant Hargett owned 98% of the stock of defendant Trenton Livestock, Inc.; 94% of the stock of defendant Greenville Livestock, Inc.; and 94% of the stock of Kinston Stock Yard. The remaining stock of these corporations was owned by members of defendant Hargett's family. Defendant Hargett is the president and managing officer of each of the three companies. At the time of the transaction defendant Williams was indebted to defendant Hargett and Trenton Livestock, Inc. in the amount of $22,000; she was also indebted to the other companies in an undetermined amount.

Defendant Hargett, acting under the authority of defendant Williams, picked up the pigs from the plaintiff and transported them to his farm. There he mixed the pigs with others previously purchased by defendant Williams. Within a few days after he brought the pigs to his farm, defendant Hargett was informed that defendant Williams had not paid plaintiff and would not be able to do so, and that plaintiff was seeking recovery of the purchase price or the pigs.

> 9. Sometime around December 19 or 23, 1975 and after the defendant, Hargett, knew that plaintiff was unpaid for the December 10, 1975, group of pigs and that plaintiff was looking for these pigs, the defendant, Hargett, agreed with the defendant, Mrs. Williams, that he would thereafter dispose of these pigs that were in his lot (consisting primarily of the 357 pigs purchased from plaintiff on December 10, 1975) and that he would use the proceeds of the sale of the pigs to reimburse the corporate defendants for the alleged preexisting debts owed these corporations by defendant, Mrs.

Williams. Beginning with December 29, 1975, and thereafter into April 1976, the defendant, Hargett, acting on behalf of his principal, Mrs. Williams, caused these pigs to be sold; he further endorsed the checks that were made payable to Mrs. Williams to be honored in her name by employees of the corporate defendants; and he caused the proceeds of these checks to be applied to the payment of alleged preexisting indebtedness owed by the defendant, Mrs. Williams, to the defendants, Trenton Livestock, Inc., Greenville Livestock, Inc. and Don C. Flowers, Inc. (Kinston Stock Yard). Altogether, the total amount of payments received from the sale of these pigs which were credited by the corporate defendants against alleged preexisting debts owed by Mrs. Williams were as follows:

Trenton Livestock, Inc.	$30,480.02
Greenville Livestock, Inc.	5,981.09
Don C. Flowers, Inc. (Kinston Stock Yard)	23,859.04

10. The pigs purchased by the defendants [sic], Mrs. Williams, from the plaintiff on December 10, 1975, as set out above, were not purchased from Mrs. Williams by any or all of the remaining defendants; rather, the defendants, Bryan Hargett, Trenton Livestock, Inc. and Greenville Livestock, Inc. purported to act as the agent of Murleen Williams in selling these pigs to third parties and then taking the proceeds from such sales which were in the name of Murleen Williams and applying such proceeds to the payment of alleged preexisting debts, as set out above.

The plaintiff has heretofore obtained judgment against defendant Williams in the amount of $20,301.59 plus interest; however, this judgment has not been satisfied. The defendants Hargett, Trenton Livestock, and Kinston Stock Yard are secondarily liable to the plaintiff to the extent of $20,301.59, and defendant Greenville Livestock is liable to the extent of $5,981.09.

Based on these findings the trial judge made the following conclusions of law:

A. A cash sale is one in which the title to the property and the purchase price pass simultaneously, and the title re-

mains in the seller until the purchase price is paid, even though possession of the property is delivered to the buyer. And where the seller draws a draft upon the buyer as the means of payment and delivers possession to the buyer in the belief that the draft is good and will be paid on presentation, no title whatever passes from the seller to the buyer until the draft is paid, and the seller may reclaim the chattel from the buyer in case the draft is not paid on due presentation.

B. Where a buyer obtains the possession of chattels in a cash sale by inducing the seller to draft the buyer's bank for the purchase price (the buyer knowing that he has insufficient funds in said bank), and the buyer thereafter causes such chattels to be sold, the seller is entitled to follow the proceeds of the sale.

C. Where an agent is aware that its principal has wrongfully acquired possesion of the property of another in a cash sale by causing a draft to be drawn for the purchase price which would be dishonored upon presentment; and where the agent is further aware that its principal cannot pay the purchase price; and the agent thereafter causes such chattels to be sold on the account of its principal and the agent converts the proceeds of such sales to the payment of alleged preexisting debts owed by the principal to the agent, the agent is liable to the true owner to the extent of the value of such chattels so disposed of by the agent (up to the balance of the purchase price due the true owner).

The court then ordered that the plaintiff recover "of the defendants altogether" $20,301.59 with the qualification that recovery against Greenville Livestock be limited to $5,981.09; and that judgment should be executed against defendants Hargett, Trenton Livestock, Greenville Livestock, and Kinston Stock Yard only after execution of judgment against defendant Williams has been returned unsatisfied, and if partially satisfied, then "execution shall only issue as to the balance remaining unpaid."

The defendants Hargett, Trenton Livestock, Greenville Livestock, and Kinston Stock Yard appealed.

Battle, Winslow, Scott & Wiley, by J. B. Scott, for the plaintiff appellee.

Brock & Foy, by Donald P. Brock, for the defendant appellants.

HEDRICK, Judge.

By their third, fifth, sixth, and eighth assignments of error the defendants challenge the trial judge's findings of fact numbers three, seven, nine, and twelve. These assignments raise the question of whether there is any competent evidence to support the facts found. *Gaston-Lincoln Transit, Inc. v. Maryland Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974). After careful examination we conclude that each finding is amply supported by the evidence in the record. No useful purpose would be served by further elaboration thereon.

The defendants' remaining assignments of error challenge the trial court's Finding of Fact Number Ten and all conclusions of law. Under these assignments the defendants apparently do not question the law as reflected in the conclusions. Instead, they devote their entire discussion to their contention that by accepting the pigs in satisfaction of preexisting debts the corporate defendants were good faith purchasers for value from defendant Williams and, as such, were protected from liability when they eventually disposed of the pigs. *See* G.S. 25-2-403; *Stratton Sale Barn, Inc. v. Reed*, 6 U.C.C. Rep. Serv. 922 (1969). Thus, we are faced with the question of whether the evidence supports the trial judge's finding that the pigs sold to defendant Williams by the plaintiff "were not *purchased* from Mrs. Williams by any or all of the remaining defendants" (emphasis added), but that the defendants acted as her agent in selling the pigs to third parties and applying the proceeds to preexisting debts. We think the evidence is overwhelming in its support of this finding.

"Agency" exists when one person is authorized to represent and act for another in dealings with third parties. *Julian v. Lawton*, 240 N.C. 436, 82 S.E. 2d 210 (1954). The defendant Williams testified that she was aware that title to the pigs would not pass to her until her draft was paid; and that she and defendant Hargett had entered into an agreement whereby he would sell the pigs for her, satisfy a personal debt from the proceeds of

the sale, and return the balance to defendant Williams with which she would pay to the plaintiff the purchase price of the pigs. Defendant Williams further testified that defendant Hargett was not authorized to apply the proceeds from the sale of the pigs to debts owed by defendant Williams to the corporate defendants. The defendant Hargett testified that in selling the pigs and in applying the proceeds to the preexisting debts he was acting according to the instructions of defendant Williams and, therefore, under her authority. In fact, all of the evidence depicts an arrangement whereby defendant Williams and defendant Hargett were transacting business in their respective roles of principal and agent. The defendants have cited no convincing evidence to the contrary.

Since the defendants do not seriously challenge the trial court's conclusions of law we deem it unnecessary to discuss them at length. We find each conclusion to be an accurate representation of the law of this State, *see Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E. 2d 329 (1968); and, in our opinion, the application thereof was warranted by the trial court's findings of fact, particularly Finding Number Ten. Accordingly, these assignments of error are overruled, and the judgment appealed from is affirmed.

Affirmed.

Judges PARKER and MITCHELL concur.

JAMES GRADY SIBBETT v. M.C.M. LIVESTOCK, INC.

No. 7713SC845

(Filed August 29 1978)

Animals § 2.3; Negligence § 57.10— livestock auction—escape of bull from display enclosure—injury to plaintiff—negligence

In an action to recover for personal injuries received when a bull knocked plaintiff from an elevated walkway in defendant's livestock auction house, plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to maintain proper supervision and a reasonably safe enclosure for the protection of his customers where it tended to show that defendant went to the auction house to buy a steer and was thus an invitee; a bull in the display pen became excited, jumped over the pen

enclosure, ran up onto the walkway and struck plaintiff; the display pen was enclosed by a fence constructed of iron pipe at a height of four feet nine inches; and at least one other bull had previously escaped from the enclosure.

APPEAL by plaintiff from *Bailey, Judge.* Judgment entered 27 May 1977 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 14 August 1978.

Plaintiff instituted this civil action to recover damages for personal injuries sustained as a result of a fall from an elevated walkway in defendant's livestock auction house.

Defendant filed answer denying all claims of negligence and alleging as a defense the contributory negligence of plaintiff.

Plaintiff introduced evidence at trial tending to show that on 27 January 1975 he was attending a livestock sale at defendant's place of business for the purpose of purchasing a steer to be butchered and processed for his family. Defendant maintained a large livestock auction house in which bleacher seats were built, amphitheater style, around a display pen where the animals were exhibited. At the top of the bleachers was a door opening to the outside of the building onto a catwalk built over the holding pens. On the day in question, plaintiff was standing on the catwalk observing the animals being unloaded when a bull in the display pen became excited. It suddenly jumped over the enclosure of the pen, ran up the bleachers and onto the catwalk, and knocked plaintiff to the ground. Plaintiff received injuries to his left heel resulting in some permanent disability and requiring extensive treatment.

Plaintiff's evidence further showed that the display pen was constructed of one and one-fourth inch (1¼") iron pipe at a height of four feet (4') nine inches (9"). Two witnesses had observed a bull escape from defendant's display pen on a previous occasion.

At the close of the plaintiff's evidence defendant moved for a directed verdict. The motion was allowed and plaintiff appealed.

D. F. McGougan, Jr. and Ray H. Walton, for the plaintiff.

Page & Britt, by W. Earl Britt, for the defendant.

MARTIN, Judge.

The question presented for decision is whether plaintiff's evidence was sufficient for submission to the jury. On a motion for a directed verdict by the defendant, the court must consider the evidence in the light most favorable to the plaintiff, and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Ward v. Swimming Club*, 27 N.C. App. 218, 219 S.E. 2d 73 (1975); *Snellings v. Roberts*, 12 N.C. App. 476, 183 S.E. 2d 872 (1971). Applying this test to the case at bar, it appears that the evidence presented was sufficient to go to the jury.

The evidence was sufficient to place the plaintiff at the time of his injury in the status of an invitee at the defendant's place of business. While the proprietor or owner of premises does not insure the safety of his invitees, nevertheless he is under the duty of exercising ordinary care to keep his premises in such reasonably safe condition as not to expose them unnecessarily to danger. He is under the obligation to give warning of any hidden danger or unsafe condition of which he has knowledge, express or implied. *Keith v. Reddick, Inc.*, 15 N.C. App. 94, 189 S.E. 2d 775 (1924).

Defendant relies on the general rule enunciated in *Sellers v. Morris*, 233 N.C. 560, 64 S.E. 2d 662 (1951). In *Sellers* the defendants were in the business of selling and auctioning livestock. Plaintiff was attending an auction conducted at their stables or barns. Plaintiff, a prospective purchaser, was crowded against the wall near where the mules were brought from the enclosure where they were kept until sold. The mule viciously and suddenly kicked plaintiff inflicting injuries for which he sought to recover compensation. Defendants demurred to the complaint for that it failed to state a cause of action in that it was not alleged (1) that the mule was the property of the defendants, or (2) that the mule was a vicious animal, or (3) that the defendants had any knowledge of the vicious propensities, if any, of the mule. The demurrer was overruled and defendants appealed.

The Supreme Court reversed, holding that to entitle plaintiff to recover for injuries, he must allege and prove (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one

termed in law as possessing a vicious propensity; and (2) that the *owner* or *keeper* knew or should have known of the animal's vicious propensity, character, and habits. In support of its holding, the Court cited *Plumidies v. Smith,* 222 N.C. 326, 22 S.E. 2d 713 (1942). *Plumidies* was an action against the *owner* for injuries inflicted by his dog. The Supreme Court held that nonsuit was error where plaintiff's evidence showed that for a year or more the dog, when plaintiff came to deliver papers, would run towards and bark at plaintiff so viciously that the *owner* would have to call the dog off, that the dog bit plaintiff's brother and was given away by defendant because of its vicious character.

The foregoing rule is conceded, but it does not control the facts in this case. In the first place, this suit is not against the *owner* or *keeper* of the bull but against a public stockyard company. The basis of the claim is the negligent failure of the proprietor or owner of the auction house to keep his premises in a reasonably safe condition. It is not based on the wrongful keeping of the animal with knowledge of its viciousness.

The owner of an animal is a person to whom it belongs. The keeper is one who, either with or without the owner's permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do. It is apparent that a keeper may or may not be its owner. The word "keep," as applied to animals, has a peculiar significance. It means "to tend; to feed; to pasture; to board; to maintain; to supply with necessaries of life." To keep implies "the exercise of a substantial number of the incidents of ownership by one who, though not the owner, assumes to act in his stead." *Swain v. Tillett,* 269 N.C. 46, 152 S.E. 2d 297 (1966).

In *Porter v. Thompson,* 74 Cal. App. 2d 474, 169 P. 2d 40 (1946), the plaintiff was a prospective purchaser of cattle at an auction sale being conducted by the defendant, and it was held the defendant had a duty to exercise reasonable care to maintain supervision, a reasonably safe enclosure, and seats for customers so they would not be injured by cattle attempting to escape the enclosure. In the opinion the Court said:

> "* * * The question to be determined is, what would a reasonably prudent person be required to do, under such circumstances, for the protection of his invited customers. The fact that the defendants did not actually know that the

particular cow in question was fractious, nervous or dangerous does not necessarily acquit them of negligence on that score. * * *" 169 P. 2d at page 42.

In *Thompson v. Yellowstone Livestock Comm.*, 133 Mont. 403, 324 P. 2d 412 (1958), the plaintiff brought an action for injuries sustained when struck by an unruly cow which climbed a barricade and fell upon the plaintiff as an invitee. The Court held the complaint stated a cause of action where the allegations established a legal duty by the defendant to the plaintiff, failure to perform such duty, and damages proximately resulting in injury to the plaintiff from such failure. The Court said it was the duty of the defendant to maintain such barrier of sufficient strength and height as to prevent animals, which had occasion to become frightened, from jumping over the fence and upon the patrons.

The Restatement of Law, Torts, § 518, Comment g, states the following rule:

> "One who keeps a domestic animal which possesses only those dangerous propensities which are normal to its class is required to know its normal habits and tendencies. He is, therefore, required to realize that even ordinarily gentle animals are likely to be dangerous under particular circumstances and to exercise reasonable care to prevent foreseeable harm * * *" (p. 39.)

The defendant, over a period of years, had operated an auction house for livestock, handling and selling cattle in the ordinary course of its business. It must be assumed that these animals had displayed a wide range of temperaments, tendencies and natures, and that the defendant knew and had notice that under the particular circumstances of a stockyard, some of the animals could and would become uncontrollable. Defendant chose to display the animals for sale in a pen enclosed by a fence constructed of one and one-fourth (1¼") inch iron pipe at a height of four feet (4') nine inches (9"). At least one other bull had escaped from this enclosure. Plaintiff was an invitee and a prospective purchaser of a steer on the defendant's premises, observing cattle being offered for sale from the place provided by the defendant for him to do so. It was the duty of the defendant to exercise reasonable care to maintain supervision and a reasonably

safe enclosure for the protection of his customers. Taken in its entirety, the evidence appears sufficient to warrant an inference of the essential elements of liability. A jury question has been presented as to whether plaintiff's injury was proximately caused by defendant's breach of the duty owed plaintiff.

Reversed.

Judges VAUGHN and MITCHELL concur.

STATE OF NORTH CAROLINA v. ENITH LESTER TAYLOR

No. 7817SC279

(Filed 29 August 1978)

1. Constitutional Law § 46— motion for new lawyer—denial proper

The trial court did not err in denying defendant's motion that a new lawyer be appointed to defend him, since, in the absence of any substantial reason for replacement of court appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense.

2. Criminal Law § 105— motion for nonsuit upon multiple counts—reviewability on appeal

The State's argument that, where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count is without merit, and the improper phrasing of a motion to dismiss will not destroy reviewability on appeal.

3. Criminal Law § 114.2— misstatement of evidence—no expression of opinion

In a prosecution of defendant for forging and uttering two forged checks, the trial court's statement that the State must prove that defendant passed one of the checks "to some store, I believe," did not amount to an expression of opinion prejudicial to defendant.

4. Criminal Law § 124.4.— multiple charges—guilty verdict—acquittal of charge not mentioned

In a prosecution for breaking and entering, larceny, forgery and uttering forged checks where the jury announced guilty verdicts on all of the charges except larceny, upon which no verdict was announced, the trial court erred in failing to arrest judgment as to the larceny charge, since a verdict which does not refer to all the crimes charged amounts to an acquittal on those charges not mentioned.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 4 November 1977, in Superior Court, SURRY County. Heard in the Court of Appeals 16 August 1978.

Defendant was charged upon proper bills of indictment with one count of breaking and entering and larceny and with two counts of forging and falsely making checks. At trial, the State's evidence tended to show that one Thelma Hair, who operated and lived in a rooming house in Mount Airy, leased a room to defendant; that on 10 April 1977, Mrs. Hair went to church and upon her return noticed that the door of her apartment had been damaged; and that approximately $59 in small bills and change and three loose checks were missing from her apartment. Mrs. Hair could identify Exhibits 1 and 2 (each of which was a check for $130.08 made payable to defendant and signed with Mrs. Hair's name) as two of the missing checks, and she testified that she did not write these checks and that her signatures on them were forgeries. Phyllis Eads, a teller at the Bank of Pilot Mountain, testified that she cashed Exhibit 2 for defendant. Thaddeus Raleigh, a taxi cab driver in Mount Airy, stated that defendant had asked him to change some coins for him, that defendant had some $40 or $50 in coins, and that Raleigh drove him to a convenience store to change the coins into currency.

Defendant presented no evidence. The jury returned a verdict of guilty of breaking and entering and of forging and uttering the two checks. Although no verdict was ever announced on the larceny charge contained in the breaking and entering indictment, the trial judge noted in his judgment that defendant had been convicted of both breaking and entering and larceny, and he entered a "consolidated" judgment of ten years. On the forgery and uttering charges, defendant was given a consolidated suspended sentence. He appeals.

Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill and Deputy Attorney General William W. Melvin, for the State.

Neaves, Everett & Peoples, by Charles M. Neaves and Hugh H. Peoples, for defendant appellant.

MARTIN, Judge.

I.

[1] The defendant's first argument, that the trial court erred in denying defendant's motion that a new lawyer be appointed to defend him, is without merit. In *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667 (1965), the Supreme Court stated that in the absence of any substantial reason for replacement of court-appointed counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense. In the present case, the following exchange took place in the presence of the jury:

> "MR. NEAVES: Your Honor, my client said that he would like to make a motion.
>
> "COURT: Well, you represent him, what is that?
>
> "MR. NEAVES: It is new to me, Your Honor, I don't know what it is. (AFTER CONSULTATION) Your Honor, he wants to make a motion to have a new lawyer appointed.
>
> "COURT: Motion is denied.
>
> "MR. NEAVES: Exception."

No reason was given for defendant's request for a new attorney. While the trial court might have investigated the situation more thoroughly by conducting a *voir dire* hearing, we can find, and defendant shows us, no prejudicial error in the trial court's ruling on defendant's motion. *See also State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976).

II.

A second argument brought forward by defendant is that the trial court erred in denying defendant's motion, made at the close of the State's evidence, for judgment as of nonsuit on all charges. In his brief, defendant limits his argument to the charge of forging and uttering Exhibit 1. After reviewing the evidence presented by the State in the light most favorable to the State, as must be done on a motion for nonsuit, *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976), we conclude that defendant's argument must be rejected. While the charge of forging and uttering

Exhibit 1 was supported by the least direct evidence, there was sufficient circumstantial evidence to warrant submitting that issue to the jury.

[2] We must, however, reject the State's argument that where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count. The State cites *State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960), in support of its argument. G.S. 15A-1227 which covers motions to dismiss for insufficiency of evidence must be read to allow this Court to consider the sufficiency of all the evidence without regard to whether a motion to dismiss has been made at trial. G.S. 15A-1227(d). We believe that a motion to dismiss, if improperly phrased, will not destroy reviewability on appeal.

III.

[3] A third argument made by defendant is that the trial judge erred in his instructions to the jury when he stated the following:

> "Now members of the jury, the defendant is charged in each of these bills of indictment on the two forgeries and uttering cases he is charged also with uttering. Now uttering is fraudulently offering to another some instrument, it could be a check which has been falsely made but appears to be genuine. It is passing or getting cash or attempting to get cashed a falsely made instrument that is called uttering. So the Court charges you for you to find the defendant guilty of uttering a forged instrument or a forged check in this instance the State must prove five things beyond a reasonable doubt. First, that the check was falsely made and second, that it appeared to be genuine and third, that the defendant passed or attempted to pass the check in one instance to the bank [and in the other instance to some store I believe,]
>
> APPELLANT'S EXCEPTION NO. 9
>
> and fourth, that the defendant knew that the instrument was falsely made and fifth, that the defendant intended to defraud."

Defendant contends that the trial judge's "and in the other instance to some store I believe" amounted to the expression of an opinion in violation of G.S. 1-180. We do not agree. In *State v.*

Holden, 280 N.C. 426, 185 S.E. 2d 889 (1972), the Supreme Court gave us a yardstick by which to measure whether a trial judge's statement amounts to error:

> "Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, 'and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.' *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960)." *Id.* at 430, 185 S.E. 2d at 892.

In view of the total charge to the jury we do not believe that this minor infraction amounted to error prejudicial to defendant.

IV.

[4] The final argument we consider on this appeal is that the trial court erred in failing to arrest judgment as to the larceny charge to which the jury never returned a verdict. We agree with defendant's contention. Our courts have held that a verdict which refers to only one charge amounts to an acquittal on any other charges being tried at the same time. *See, e.g. State v. Teachey*, 26 N.C. App. 338, 215 S.E. 2d 805 (1975). *See also* 4 Strong's N.C. Index 3d, Criminal Law § 124.4 and cases cited therein. Since the trial judge obviously thought that guilty verdicts had been returned as to both the breaking and entering charge and the larceny charge and since he sentenced defendant on both charges, this case must be remanded for re-sentencing. *State v. Hardison*, 257 N.C. 661, 127 S.E. 2d 244 (1962).

Remanded for entry of judgment of acquittal in the larceny charge and re-sentencing for the crime of breaking and entering.

Remanded.

Chief Judge BROCK and Judge MITCHELL concur.

STATE OF NORTH CAROLINA v. DOROTHY ROBERSON

No. 7814SC313

(Filed 29 August 1978)

1. **Assault and Battery § 14— communicating a threat—threat to hit with rock**

The State's evidence was sufficient for the jury in a prosecution for communicating a threat in violation of G.S. 14-277.1 where it tended to show that defendant threatened to hit the victim with a rock if the victim attempted to continue trimming branches from defendant's rose bushes which extended across defendant's property line and hung over the victim's driveway, since defendant could be held liable under the statute for conditional threats where the condition was one which she had no right to impose.

2. **Assault and Battery § 13; Criminal Law § 65— communicating a threat—defendant's mental state**

In a prosecution for communicating a threat, evidence regarding defendant's apparent mental state was relevant to a determination of whether the victim believed the threat would be carried out, and the trial judge did not express an opinion as to defendant's credibility when he stated that there was evidence to show that defendant was emotional and upset when the events occurred.

3. **Assault and Battery § 13— communicating a threat—right to trim overhanging rose bushes**

In a prosecution for communicating a threat by threatening to hit the victim with a rock if she continued to trim rose bushes belonging to defendant, evidence that the victim was on her property when the events occurred was relevant to a determination of whether the victim was within her rights in attempting to trim the rose bushes; furthermore, the trial court properly instructed the jury that the victim had a legal right to trim overhanging branches in her yard even though the roots of the plant might be growing on someone else's land.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 23 November 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 August 1978.

Defendant was charged with communicating threats in violation of G.S. 14-277.1. After trial in district court, she appealed to superior court.

At trial in superior court, the State presented evidence to show that rose bushes on defendant's land had grown until their branches extended across defendant's property line over the driveway belonging to defendant's neighbor, Cora Ives. The overhanging branches with their thorns made it difficult for Mrs.

Ives to get in and out of her car. For that reason she sought assistance from another neighbor, George Harris, to trim the branches hanging over her driveway. When Harris began trimming, defendant came out of her house and directed him to stop. Mrs. Ives told defendant that Harris was only going to trim enough to permit her to get in and out of her car, but defendant "wouldn't hear of it and started one of her tantrums." Harris and Mrs. Ives retreated onto the porch of the Ives residence, whereupon defendant came onto Mrs. Ives's driveway, picked up a rock, and told Mrs. Ives, " 'If you come any closer, I will hit you with it.' " The disturbance ended when an officer arrived.

The jury found defendant guilty as charged. The judgment imposed a sentence of imprisonment, suspended upon the condition that defendant abide by terms of probation. Defendant appealed.

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

James B. Maxwell for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the court's denial of her motions for nonsuit. Relying on *State v. Hall*, 251 N.C. 211, 110 S.E. 2d 868 (1959), defendant first contends that a person may not be punished for an offense he may commit in the future. The conduct proscribed by G.S. 14-277.1, however, is the making and communicating of the threat in the manner described in the statute, with no requirement that the threat be carried out. Here, there was ample evidence from which the jury could find that the threat was made and communicated by defendant "in a manner and under circumstances which would cause a reasonable person to believe that the threat [was] likely to be carried out" and that "[t]he person threatened believe[d] that the threat [would] be carried out." This was all that was required to show a violation of G.S. 14-277.1.

We do not accept defendant's contention that no violation of the statute occurred because her threat to Mrs. Ives, though completed, was a conditional threat made under circumstances such that it did not actually amount to a threat.

First, the evidence shows that the threat was a genuine threat and was perceived as such. Threatening language can amount to an offer to injure a person even though it is a conditional offer. The condition, "[i]f you come any closer," can have a reasonable likelihood of occurring and does not negate an intention to carry out the threat. Such a condition is distinguishable from the condition imposed in the statement, " 'Were you not an old man, I would knock you down.' " The condition imposed in this latter statement is so restrictive as to indicate that there may actually have been no present intention to knock the old man down. *State v. Crow,* 23 N.C. 375 (1841). Not only do the terms of the threat shown by the evidence in the present case indicate an intention to carry out the threat, but also the surrounding circumstances show that Mrs. Ives reasonably perceived the threat as genuine. Defendant and Mrs. Ives had previously been involved in similar disputes involving the rose bushes. One dispute occurred a year prior to the present incident, and another occurred just two days earlier. In each instance, Mrs. Ives found it necessary to refrain from cutting the bushes. In the incident which led to this action, defendant's threat was preceded by "one of her tantrums," and her actions caused Mrs. Ives and George Harris to stop cutting the bushes and to withdraw onto Mrs. Ives's porch. When the officer arrived, defendant told him that she would use the rock "if she had to."

Secondly, defendant's threat to hit Mrs. Ives with a rock did not become lawful merely because defendant indicated she had no intention to strike if Mrs. Ives did not "come any closer." Admittedly, the threat gave Mrs. Ives the power to avoid the threatened consequences by simply complying with the condition imposed by defendant. The condition, however, was one which defendant had no right to impose. The terms of the threat coupled with other evidence show that defendant, who came onto Mrs. Ives's land to accomplish her purpose, was threatening to hit Mrs. Ives unless she stopped cutting the overhanging rose bushes. Mrs. Ives had the legal right to be on her own land and to trim defendant's rose bushes to the extent they were hanging over Mrs. Ives's land. Annot., 18 A.L.R. 655 (1922), *supplemented in* Annot., 76 A.L.R. 1111 (1932) *and* Annot., 128 A.L.R. 1221 (1940). Applying principles long established in cases involving assault, *see State v. Douglas,* 268 N.C. 267, 150 S.E. 2d 412 (1966); *State v. Horne,* 92

N.C. 805 (1885); *State v. Myerfield*, 61 N.C. 108 (1867), defendant may be held liable under G.S. 14-277.1 for conditional threats where, as here, the condition is one which she had no right to impose. Defendant's first assignment of error is overruled.

Defendant's remaining assignments of error are directed to comments by the trial judge. Her first contention is that the judge made a comment to the district attorney during her cross-examination which tended to cast doubt upon her credibility as a witness. We perceive no such intimation of opinion in the statement. The record contains only a fragment of a sentence. The rest of the statement was inaudible, rendering the audible portion virtually meaningless.

[2] Defendant next contends that the judge, in summarizing the evidence for the jury, expressed an opinion as to defendant's credibility when he stated that there was evidence to show that defendant was emotional and upset. We disagree. The State presented evidence that defendant was emotional and upset when the events occurred, and, as the judge instructed the jury, evidence regarding defendant's apparent mental state was relevant to a determination of whether Mrs. Ives believed the threat would be carried out.

[3] The judge also instructed the jury that there was evidence that Mrs. Ives was on her property when the events occurred. Again, this instruction is supported by uncontradicted evidence in the record, and, contrary to defendant's contention, such evidence is relevant to a determination of whether Mrs. Ives was within her rights in attempting to trim the rose bushes.

Finally, defendant contends that the judge committed error in instructing the jury that Mrs. Ives had a legal right to trim overhanging branches in her yard even though the roots of the plant might be growing on someone else's land. This is a correct statement of the law. It was also relevant to a determination of whether defendant had a right to prevent Mrs. Ives from trimming the rose bushes.

Defendant's assignments of error directed to comments by the trial judge are overruled. In defendant's trial and in the judgment entered, we find

No error.

Judges CLARK and ERWIN concur.

WILLOW MOUNTAIN CORPORATION, A NORTH CAROLINA CORPORATION v. ROBERT L. PARKER

No. 7729SC654

(Filed 29 August 1978)

1. **Rules of Civil Procedure § 15.1— amendment of complaint—no abuse of discretion**

There was no showing of abuse of discretion by the trial court in permitting plaintiff to amend its complaint.

2. **Mortgages and Deeds of Trust § 40.1— action to set aside foreclosure sale—findings supported by evidence**

In an action to set aside a foreclosure sale, evidence was sufficient to support the trial court's finding that defendant interfered with plaintiff's efforts to survey the property in question.

3. **Mortgages and Deeds of Trust § 9— purchase money deed of trust—foreclosure—release of 42 acre tract**

In an action to set aside a foreclosure sale and to recover a 42 acre tract which the contract to purchase provided could be selected by purchaser and released from a purchase money deed of trust without any payment being made on the balance of the purchase price, defendant was not entitled to judgment as a matter of law since the provision of the note and deed of trust which provided for release of the 42 acres was intended by the parties to be set apart and treated differently from other releases; the general terms of the provision relating to releases gave way to the specific terms of the provision relating to release of the 42 acres; and even if the formal request for the release of the 42 acres was not received by the trustee until after foreclosure and after the trustee's deed had been delivered, plaintiff was nevertheless entitled to the release since there was evidence that defendant had been informed of plaintiff's intention to obtain release of the parcel and that a survey was in progress several months previously and since the 42 acre tract was not in fact subject to the deed of trust.

APPEAL by defendant from *Grist, Hasty, and Baley, Judges.* Orders entered 8 September 1975, 24 May 1976, and judgment

entered 14 March 1977 in Superior Court, HENDERSON County. Heard in the Court of Appeals 4 May 1978.

In 1973, defendant conveyed a certain 460-acre tract of land to Karl Kandell, subject to a purchase money deed of trust. The contract to purchase contained a clause stating that a tract of not more than 42 acres, to be selected by the purchaser, would be released from the deed of trust without any payment being made on the balance of the purchase price. The note and deed of trust were expressly executed subject to this provision. Plaintiff made a down payment of $93,400 on the purchase price of $467,000 and then sought to have the tract surveyed. However, due to various delays and problems in getting a proper survey of the entire tract, the survey of the 42 acres was not completed until after a foreclosure sale.

Plaintiff corporation, which had assumed the obligation, was in default, and foreclosure proceedings were begun on 14 March 1975. At the foreclosure hearing, the clerk permitted the trustee to proceed with the sale. At the sale, defendant was the highest bidder, and on 19 May 1975, the trustee executed and delivered a deed to defendant.

On 23 June 1975, plaintiff filed this complaint to set aside the sale and recover the 42-acre tract. After various amendments and motions, the matter was tried before Judge Baley, who held that defendant had no right, title or interest in the 42-acre tract and that the deed of trust was not a lien on the 42 acres. Defendant appeals.

Redden, Redden & Redden, by Monroe M. Redden and Monroe M. Redden, Jr., for plaintiff appellee.

Prince, Youngblood, Massagee & Creekman, by James E. Creekman, and Whitmire & Whitmire, by Robert L. Whitmire, Jr., for defendant appellant.

ERWIN, Judge.

[1] Defendant presents three questions on this appeal. He first contends that Judges Grist and Hasty erred in permitting plaintiff to amend its complaint. G.S. 1A-1, Rule 15(a), gives trial courts extensive discretion in determining whether or not leave to

amend will be granted after the time for amending as a matter of course has expired. Indeed, "leave shall be freely given when justice so requires." G.S. 1A-1, Rule 15(a). The discretion of the trial court in allowing amendments is not reviewable absent a showing of abuse thereof. *Forbes v. Pillmon*, 18 N.C. App. 439, 197 S.E. 2d 226 (1973); *Galligan v. Smith*, 14 N.C. App. 220, 188 S.E. 2d 31 (1972), *cert. denied*, 281 N.C. 514, 189 S.E. 2d 36 (1972). We find no such abuse of discretion, and this assignment of error is overruled.

[2] Defendant next excepts to the trial court's finding of fact No. 12, which, in part, determines that defendant interfered with plaintiff's efforts to survey the property. The finding as a whole goes to explain why plaintiff was late in obtaining a proper survey to be used to identify the desired 42 acres, that defendant was aware of plaintifff's intent to seek release of a 42-acre parcel, and that plaintiff exercised due diligence. Suffice it to say that the finding objected to is amply supported by the evidence. When a jury trial is waived, the trial court's findings of fact have the same force and effect of a jury verdict and are conclusive on appeal if supported by evidence, even though there may be evidence to sustain contrary findings. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971).

[3] Defendant finally contends that he was entitled to judgment as a matter of law. The note and deed of trust were expressly subject to the following pertinent provisions:

> "7. No releases will be permitted at any time when the debt represented by this note is in default.
>
> * * *
>
> 9. One tract of not more than forty-two (42) acres, to be selected by the undersigned Purchaser and surveyed at his expense, will be released from the lien of the deed of trust securing this note without any payment on the debt secured by said deed of trust, and the Trustee is expressly authorized to execute said release without joinder of the holder of this note."

We do not think that Paragraph 9 is subject to Paragraph 7. It is apparent that the parties intended to set apart and treat differently other releases from the release of the 42 acres. The release

of the 42 acres was to be made "without any payment on the debt." Paragraph 9 is the last of the "special terms and conditions," and Paragraph 8 allows the trustee to execute releases "on the terms and conditions *hereinabove set out.*" (Emphasis added.) The only conditions attached to the release of the 42 acres are the selection of such tract by the purchaser and the purchaser's bearing the cost of survey. No restriction is placed on the purchaser as to which tract of 42 acres is to be released, so long as the tract does not exceed 42 acres. Paragraph 9 is tantamount to the exception of a 42-acre tract from the operation of the deed of trust, with the purchaser having sole discretion to select it.

We do not perceive a conflict between the provisions of Paragraphs 7 and 9. Even assuming such conflict, however, the general terms of Paragraph 7 give way to the specific terms of Paragraph 9. *See Contracting Co. v. Ports Authority,* 284 N.C. 732, 202 S.E. 2d 473 (1974).

Defendant stresses that the formal request for the release of the 42 acres was apparently not received by the trustee until after foreclosure and after the trustee's deed had been delivered. However, there was evidence that defendant had been informed of plaintiff's intention to obtain release of the parcel and that a survey was in progress several months previously. In any event, we conclude that the trial court's conclusions of law were correct:

> "UPON THE FOREGOING FACTS, THE COURT CONCLUDES AS A MATTER OF LAW:
>
> That the deed dated October 25, 1973, to Karl A. Kandell from Robert L. Parker conveyed the entire boundary which included the forty-two acres involved in this action, and Kandell and his assignee, the plaintiff corporation, received title to the forty-two acres wherever it might be located by survey; that no additional payment was to be made by the purchaser with respect to the forty-two acre tract, and its location by survey at the sole discretion of the purchaser was the only remaining act required; that the deed of trust contained the same description as the deed, and the entire boundary was included in the deed of trust but subject to the location by survey of any forty-two acres to be selected by purchaser; that neither the seller nor the Trustee under the terms of the deed of trust secured any title or right to the

forty-two acres and could not convey any right by foreclosure; that plaintiff acted with reasonable diligence and within a reasonable time to secure a survey of the forty-two acre tract; that plaintiff demanded a release deed from the Trustee within a reasonable time and was entitled to such deed; that the foreclosure action was void and ineffectual with regard to the forty-two acres and did not convey title to the forty-two acres selected and surveyed by plaintiff; that plaintiff is the owner in fee simple and entitled to the possession of the forty-two acre tract . . ."

We feel that defendant's reliance on *Barefoot v. Lumpkin*, 28 N.C. App. 721, 222 S.E. 2d 919 (1976), and G.S. 45-21.29A for the proposition that the right to have property released from a deed of trust does not survive foreclosure pursuant to such deed of trust is misplaced. In reality, the 42-acre tract was not subject to the deed of trust, as Judge Baley concluded. Further, in *Barefoot, supra*, there was a condition to the release, namely, that the parties approve a mutually agreeable development plan. No such condition appears here.

We are cautious to add that our decision herein is specifically limited to the facts of this case and to the language of the pertinent documents. We note that plaintiff's assignor made a substantial down payment on the property, the trial court found plaintiff had used due diligence in obtaining a survey and seeking release, and that defendant/seller was high bidder at the foreclosure sale. These factors have been of importance in reaching our decision.

Accordingly, the judgment of the trial court is

Affirmed.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES WILLIE GRACE

No. 7814SC294

(Filed 29 August 1978)

1. Criminal Law § 29— finding of competency to stand trial—supporting evidence

The evidence supported the trial court's determination that defendant was competent to stand trial where a doctor who examined defendant on two occasions testified that, in his opinion, defendant was competent to stand trial notwithstanding his apparent confusion as to the particular grade of the charged offenses.

2. Criminal Law § 113.1— instructions—no statement of fact not in evidence

In a trial of defendant upon three charges of felonious assault with intent to kill, the trial court's statement in its recapitulation of the evidence that "various police officers at various times reported to the scene and that additional shots were fired, and that a search was commenced for the defendant" did not constitute a statement of a material fact not in evidence that shots were fired at police officers at the scene of the incident where the court had clearly stated in an earlier portion of its recapitulation of the evidence that only three shots were fired by defendant on the occasion in question.

APPEAL by defendant from *Albright, Judge.* Judgment entered 22 September 1977 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 August 1978.

Defendant was charged in three separate bills of indictment with the crime of felonious assault with intent to kill. He entered a plea of not guilty by reason of insanity to all the charges.

The State offered evidence at trial tending to show that on the night of 22 December 1976, William Brown, Damon Singleton and Thomas Lennon were standing in front of a store on the corner of South Street and Enterprise Street in Durham when defendant, standing across the intersection from the store, pulled a pistol from his field jacket and fired it three times in their direction. One of the shots struck a water cooler next to which Brown was standing. Defendant then proceeded down Enterprise Street and was overheard by State's witness Johnson to say, "If they can do it I can do it too" or words to that effect. Officer Reed investigated the incident and stated that upon approaching defendant's home, he heard the back door slam and later heard what he thought was gunfire. The day following the incident Officer Rigsbee went to defendant's home and while there, seized a U. S. Army field jacket with defendant's last name over the pocket.

Defendant's evidence tended to show that during the month preceding 22 December, defendant's behavior had been abnormal. Defendant had eaten dog food on occasions stating that he was a dog. He had told his mother that he saw dogs running through the house and that she changed size before his eyes, neither of these incidences having in fact occurred. Dr. Billy Royal, an expert in psychiatry, testified that in his opinion such activity was consistent with mental illness causing one not to know the nature and quality of his acts or the difference between right and wrong.

The jury returned a verdict of guilty of three charges. From judgment imposing three consecutive eight (8) to ten (10) year sentences, defendant appealed.

Attorney General Edmisten, by Associate Attorney Douglas A. Johnston, for the State.

Gene Dodd, for the defendant.

MARTIN, Judge.

[1] Prior to trial, and pursuant to defendant's motion, a hearing was conducted to determine defendant's mental capacity to stand trial. At the close of the evidence, the trial court made findings of fact and based on these findings concluded "that the defendant is competent to stand trial and has the capacity to proceed in the trial of these actions." Defendant assigns error to the court's ruling contending that the court in reaching its decision confused the proper test of a defendant's competence to stand trial with the test for determining a defendant's mental capacity to commit a criminal act.

The proper test for determining a defendant's competence to stand trial is succinctly stated by our Supreme Court in *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977):

> "The test of a defendant's mental capacity to proceed to trial is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." (Citation omitted.)

The trial court's findings of fact thereon, if supported by competent evidence, are conclusive on appeal. *State v. Willard, supra; State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1974).

In the instant case, the evidence adduced at the competency hearing indicated that defendant was evaluated regarding his competence to stand trial on 21 January and 4 March 1977. He was then considered competent to stand trial by the examining doctor. Defendant was again examined in July 1977 and late August 1977, three weeks prior to the subject hearing. It was the opinion of the examining doctor that on each of these latter occasions defendant was competent to stand trial notwithstanding his apparent confusion as to the particular grade of the charged offenses. The above responses of the expert witness were elicited by inquiries directed to defendant's competence to stand trial in terms substantially identical to those approved in the *Willard* case. We are of the opinion that there was sufficient competent evidence from which the trial court could find as it did. This assignment of error is overruled.

[2] Defendant next contends that the trial court erred in its recapitulation of the evidence to the jury. He argues that the trial court referred to a material fact not in evidence. We cannot agree.

Defendant excepted to the following portion of the court's recapitulation of the evidence:

> "That various police officers at various times reported to the scene and that additional shots were fired, and that a search was commenced for the defendant. . . ."

Defendant argues that the implication of the challenged portion of the charge is that shots were fired at police officers at the scene of the incident. Although concededly inartfully worded, we cannot perceive of any prejudice to defendant arising therefrom. The recapitulation of the evidence clearly states, at an earlier point, that only *three shots* were fired by defendant while he was standing across from the store. This assignment of error is overruled.

Defendant's remaining assignment of error is without merit. In the trial we find no prejudicial error.

No error.

Judges VAUGHN and MITCHELL concur.

LEVITON MANUFACTURING CO., INCORPORATED v. BUTCH MANUFACTURING COMPANY

No. 7725SC878

(Filed 29 August 1978)

Uniform Commercial Code § 27; Sales § 10.2— action for price of goods sold— prima facie case—defendant's burden of going forward with evidence

In an action to recover the price of goods sold wherein defendant contended it was overcharged for the goods, plaintiff's evidence tending to show delivery at invoice prices, acceptance and use of the goods by defendant buyer at invoice prices, demand for payment by plaintiff seller, acknowledgment of the debt, agreement by defendant to pay, and failure of defendant to pay, established a *prima facie* case for recovery of the account, and the burden of going forward with evidence then shifted to defendant. The trial court's finding that defendant had failed to satisfy the court by the greater weight of the evidence that plaintiff and defendant had agreed upon prices that differed from the prices plaintiff charged defendant for the goods did not constitute a finding that defendant had the burden of proof on the issue of price but meant that plaintiff's evidence had established a *prima facie* case for recovery and that defendant's evidence failed to overcome the weight of plaintiff's case. G.S. 25-2-709(1).

APPEAL by defendant from *Snepp, Judge.* Judgment entered 6 June 1977, in Superior Court, BURKE County. Heard in the Court of Appeals 17 August 1978.

Plaintiff instituted this action to collect a $13,520.78 debt allegedly due it by defendant. Through his answer, defendant denied owing the debt to plaintiff. Prior to trial the parties stipulated that defendant owed plaintiff $6,703.78 but that defendant denied liability for the remaining $6,825 claimed by plaintiff.

At trial without a jury, plaintiff's credit manager, Frank J. Voci, testified that, between 1973 and 1976, plaintiff sold equipment to defendant on an open account; that since 29 August 1975, nothing had been paid on defendant's account, which had a balance of $13,520.78; and that defendant had promised to clear the account on several occasions but had failed to do so. Mr. Voci further stated that defendant had accepted all merchandise shipped to it and had never complained to Mr. Voci about the pricing of any item prior to the filing of this lawsuit. Mr. Voci had nothing to do with the setting of unit prices and had no personal knowledge of any price agreement between plaintiff and defendant.

Defendant's evidence consisted of testimony by its vice president, Walter Thompson, who stated that in May 1973, he had an agreement with Jim Rosenwall, plaintiff's marketing director, to purchase Item 4158, a socket, for one year at $17.50 per hundred but that during the year plaintiff raised the price to $18.50 per hundred; that he called plaintiff about the increase and was told originally that he could deduct from the invoice the difference between the two prices but was later told that the difference would be made up in materials. Defendant paid the difference. In May 1974, Thompson negotiated another agreement for the purchase of Item 4158 at a price of $21 per hundred, a price to be firm for ninety (90) days; ninety days later the agreement was renewed; plaintiff, however, began to bill defendant at $23, then $25.50, per hundred. Defendant, according to Thompson's testimony, continued to accept the shipments of Item 4158 because it had to meet obligations to its customers. Although defendant recieved invoices with each shipment, it did not object to the overbilling immediately because defendant did not always read the invoices. According to defendant's evidence, plaintiff overbilled defendant $6,825 for Item 4158.

At the conclusion of all the evidence, the trial court found, *inter alia*, that during the periods of time that defendant contends it was overcharged for Item 4158, defendant continued to order the items from plaintiff and accepted and used them at prices clearly stated in the written invoice and that defendant had failed to satisfy the court by the greater weight of the evidence that plaintiff had agreed to charge defendant a lower price for Item 4158 than the one actually billed. The court concluded that defendant owed plaintiff the full account balance of $13,520.78. Defendant appeals.

Patton, Starnes & Thompson, by Thomas M. Starnes, for plaintiff appellee.

Turner, Enochs, Foster & Burnley, by James H. Burnley, IV and E. Thomas Watson, for defendant appellant.

HEDRICK, Judge.

Defendant's contentions are that the trial court erred by improperly shifting to defendant the burden of proof as to the price

of Item 4158 and that the evidence was insufficient to support the trial court's findings of fact regardless of the burden of proof problem. In Finding of Fact No. 5, the trial court stated:

> "(5) The Defendant has failed to satisfy the Court by the greater weight of the evidence that the Plaintiff and the Defendant had agreed upon one or more prices for the aforesaid Part No. 4158 that differed from the prices that the plaintiff actually charged to the defendant for the said Part No. 4158;"

While we believe that this finding of fact represents an unfortunate and, technically speaking, erroneous choice of language, we cannot find that it constitutes reversible error.

In an action under G.S. 25-2-709(1) for the price of goods sold, the seller must carry the burden of proof as to four elements: (1) acceptance by the buyer of the goods; (2) the price of the goods accepted; (3) the past due date of the price; and (4) the failure of the buyer to pay. In the present case, plaintiff seller presented competent evidence tending to show delivery at invoice prices, acceptance and use of the goods by defendant buyer, at invoice prices, demand for payment by plaintiff seller, acknowledgment of the debt and agreement by defendant to pay, and failure to pay. At the close of the plaintiff's evidence which established a *prima facie* case, the burden of going forward with the evidence had shifted to defendant. *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56 (1950). The import of the trial court's Finding of Fact No. 5 was not that defendant had the burden of proof on the issue of price, but rather that plaintiff's evidence had established a *prima facie* case for recovery of the account and that defendant's evidence failed to overcome the weight of plaintiff's case. This result is somewhat clearer when Finding of Fact No. 5 is considered in conjunction with Finding of Fact No. 4:

> "(4) During the periods of time that the Defendant contends that the agreed price of Part No. 4158 was different from the price actually charged to the Defendant by the Plaintiff, quantities of said Part No. 4158 were ordered by the Defendant from the Plaintiff, shipped by the Plaintiff to the Defendant, accepted and used by the Defendant, and charged to the Defendant by the Plaintiff at prices clearly reflected upon the written invoices;"

In reviewing the record as a whole, we can find no error which necessitates reversing this case. The findings of fact are supported by competent evidence and, in turn, the conclusions of law are supported by adequate findings of fact.

Affirmed.

Chief Judge BROCK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. BOBBY GENE MOORE

No. 7826SC302

(Filed 29 August 1978)

Criminal Law § 142.3— subjection to warrantless search as condition of probation—condition proper

Defendant, by agreeing to the terms of suspended sentence and probation, waived his constitutional right not to be searched without a search warrant, notwithstanding the provisions of G.S. 15A-1343(b)(15) which forbid requiring as a part of a probationary sentence the condition that a defendant consent to a warrantless search by anyone other than a probation officer, since defendant was convicted before the effective date of that statute, and it was therefore inapplicable to his case.

APPEAL by defendant from *Walker (Ralph A.), Judge.* Judgment entered 10 November 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 August 1978.

On 14 January 1977, the defendant pled guilty to felonious possession of heroin and felonious possession of heroin with intent to sell. He received a suspended sentence and was placed on probation. One of the terms of the suspension of the sentences and the probation judgment was the waiver by the defendant of his rights under the United States Constitution and the North Carolina Constitution as to search and seizure so far as any law enforcement officer is concerned. At the November 1977 term of Superior Court of Mecklenburg County, the defendant was tried for possession of heroin with intent to sell and deliver, second offense, possession of cocaine, and obstructing an officer in the performance of his duties. The defendant moved to suppress evidence obtained as a result of the search of his person and a *voir dire* hearing was held.

At the *voir dire* hearing the State's evidence showed that on 23 May 1977, L. D. Blakney a member of the Charlotte Police Department received information from a confidential informant, who had previously given him reliable information, that the defendant had heroin in the crotch of his trousers. Mr. Blakney stopped the defendant in a public park and patted him down, but did not touch the area of defendant's person at which Mr. Blakney had been informed the heroin would be. The defendant refused to remove his trousers in a public park and Mr. Blakney told the defendant he would carry him to the Law Enforcement Center to which the defendant replied "anything except here." The defendant was handcuffed and taken to the Law Enforcement Center. The defendant's trousers were removed and "suspected heroin" was removed from the crotch of his trousers. After the *voir dire* hearing, the court found the defendant had consented to the search and the officers acted reasonably in taking the defendant to the Law Enforcement Center. The court allowed the fruits of this search to be admitted into evidence.

At the trial, the State offered evidence substantially as was offered at the *voir dire* hearing and also evidence that after Mr. Blakney recovered the materials from defendant he started a "booking procedure" preliminary to placing the defendant in jail. He told the defendant he would have to surrender $963.00 the defendant had in his possession for use as evidence. The defendant refused to surrender the money and when one of the officers tried to take it from him, the defendant put his hands on the officer's throat and choked him. The State's evidence further showed that when analyzed, the materials taken from the defendant contained 75 bags which had two percent heroin and the other bags which contained 146 milligrams of cocaine.

The defendant was convicted of the three things for which he was tried. Following this conviction, the court revoked the probation on which the defendant was placed in January 1977 and the suspended sentences were put into effect. From the conviction on the three separate charges and the revocation of probation, the defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Barry M. Storick, for defendant appellant.

WEBB, Judge.

As to the three crimes of which the defendant was convicted and the revocation of his probation, the defendant has brought forward twelve assignments of error. All of them are based on the admission into evidence of the heroin and cocaine taken from the defendant by the officers. The defendant contends this evidence was the fruit of an illegal search and he was not properly convicted of the two drug charges. He contends that since the search was illegal there was not probable cause for arrest, and he had a right to resist the officer. Finally, he contends that his probation should not have been revoked because the conviction on which the revocation was based was founded on this illegally obtained evidence.

We believe the evidence was properly admitted and we find no error in the trial. At the time the officers searched the defendant, he was on probation. As a part of the probationary sentence, the defendant waived his constitutional right against a search without a warrant by a law enforcement officer. This was a valid condition of the suspension of the sentence and probation. *State v. Mitchell*, 22 N.C. App. 663, 207 S.E. 2d 263 (1974) and *State v. Craft*, 32 N.C. App. 357, 232 S.E. 2d 282 (1977). The defendant contends that G.S. 15A-1343(b)(15) governs. This section is a part of the Criminal Procedure Act and it forbids requiring as a part of a probationary sentence the condition that a defendant consent to a warrantless search by anyone other than a probation officer.

This section was adopted as a part of Chapter 711 of the 1977 Session Laws. Section 39 of this Chapter says:

> "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him . . . ."

Since the defendant was convicted before the effective date of the statute, it has no application in this case. We hold that the defendant, by agreeing to the terms of suspended sentence and probation, waived his constitutional right not to be searched

without a search warrant and the evidence taken in the search was properly admitted into evidence.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

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

No. 7719SC869

(Filed 29 August 1978)

1. **Appeal and Error § 67; Rules of Civil Procedure §§ 12, 56— remand by Supreme Court for trial de novo—allowance of motion to dismiss**

The fact that the Supreme Court had directed that this case "be remanded to the superior court for a trial *de novo*" did not prohibit the superior court upon remand from allowing defendant's motion for dismissal under Rule 12(b)(6) or under Rule 56, since the directive of the Supreme Court did not render the Rules of Civil Procedure inapplicable to further proceedings in the case.

2. **Frauds, Statute of § 6— agreement to purchase land at foreclosure sale and reconvey—statute of frauds**

Summary judgment was properly entered for defendant in an action to recover damages for defendant's breach of an alleged agreement to purchase plaintiffs' farm at a foreclosure sale and to convey a portion of that land to plaintiffs where all the materials presented at the summary judgment hearing showed that the promise sued on was orally made and that there was no writing, since such a contract was required by the statute of frauds to be in writing, and the oral agreement was void. G.S. 22-2.

3. **Appeal and Error § 2— exceptions within scope of prior appeal—no consideration by appellate court**

The appellate court will not consider assignments of error based on exceptions which were within the scope of a prior appeal of this case.

APPEAL by plaintiffs from *Collier, Judge.* Judgment entered 27 July 1977 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 16 August 1978.

Plaintiffs instituted this action in 1969 to recover damages from defendant for breach of an alleged contract to buy and sell

land. Defendant answered, denying the contract and pleading the statute of frauds. The case was before this court on four previous appeals and was once before our Supreme Court. See *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). The Supreme Court directed that the case be remanded to the superior court for trial de novo. Upon remand, defendant moved under G.S. 1A-1, Rule 12 (b)(6) to dismiss the action for failure of the complaint to state a claim upon which relief can be granted. In the alternative, defendant moved under G.S. 1A-1, Rule 56 for summary judgment. The court allowed both motions. From judgment dismissing the action, plaintiffs appeal.

Ottway Burton for plaintiffs appellants.

Moser and Moser by D. Westcott Moser for defendant appellee.

PARKER, Judge.

[1] Plaintiffs contend it was error for the superior court to dismiss their action because our Supreme Court had directed that the case "be remanded to the superior court for a trial *de novo*." *Britt v. Allen*, 291 N.C. at 639, 231 S.E. 2d at 614. In making this contention, plaintiffs mistake the import of the Supreme Court's directive. That directive did not render the Rules of Civil Procedure inapplicable to the further proceedings in this case. For plaintiffs to be entitled to a jury trial, it was still necessary that their action be sufficient to withstand defendant's motions for dismissal under Rule 12 (b)(6) and under Rule 56.

[2] We hold that defendant's motion under Rule 56 for summary judgment was properly granted and therefore find it unnecessary to pass upon the additional question whether the trial court was also correct in dismissing plaintiffs' action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs' claim for damages was based upon defendant's breach of an alleged agreement to purchase plaintiffs' farm at a foreclosure sale and to convey a portion of that land to plaintiffs. Such a contract falls within the statute of frauds, G.S. 22-2, and is void "unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." All of the materials presented at the hearing on

defendant's motion for summary judgment show that the promise alleged in this case was orally made and that there was no writing. The alleged contract therefore is void by reason of the statute of frauds, and there can be no recovery of damages for breach of such a void contract. *Carr v. Good Shepherd Home*, 269 N.C. 241, 152 S.E. 2d 85 (1967). Summary judgment in favor of defendant was properly entered. *Henry v. Shore*, 18 N.C. App. 463, 197 S.E. 2d 270 (1973).

[3] In view of our decision that summary judgment in favor of defendant was properly entered on the grounds noted above, we find it unnecessary to pass on plaintiffs' two remaining assignments of error, since even had there been error in the rulings sought to be challenged by these assignments, summary judgment for defendant would nevertheless have been proper and would have been dispositive of the case. We do note, however, that one of these assignments of error relates to an order entered 21 July 1969 which struck portions of plaintiffs' complaint on motion of defendant and the other relates to an order entered in January 1970 which denied plaintiffs' motion to strike portions of defendant's answer. The exceptions on which these assignments of error are based were within the scope of the first appeal of this case, which was heard in this court in 1971, the opinion in which is reported in 12 N.C. App. 399, 183 S.E. 2d 303. On that appeal, plaintiffs made the same assignment of error which they now again attempt to make to the court's denial of their motion to strike portions of defendant's answer, but they then presented no argument and cited no authority to support that assignment of error. It was, therefore, abandoned on the earlier appeal. As to the 21 July 1969 order which allowed defendant's motion to strike portions of plaintiffs' complaint, plaintiffs noted an exception in the record but failed on the first appeal to make this exception the basis of an assignment of error. Our appellate procedure makes no provision for "holding in abeyance exceptions made at a former trial beyond the time allowed by law for appeal." *Howe v. Hall*, 128 N.C. 167, 169, 38 S.E. 734, 735 (1901); *accord, Riley v. Sears*, 156 N.C. 267, 72 S.E. 367 (1911).

The judgment dismissing plaintiffs' action is

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. DENNIS EUGENE DAVIS

No. 7812SC292

(Filed 29 August 1978)

Automobiles § 129— driving under the influence—failure to instruct on lesser offense of reckless driving

In a prosecution for driving under the influence, third offense, the trial court erred in failing to instruct the jury concerning the lesser included statutory offense of reckless driving under G.S. 20-140(c), since evidence that defendant had been drinking and that he had been observed driving at an excessive speed with at least half his car over the center line and weaving severely was some evidence from which a jury might find that defendant was driving after consuming "such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle."

APPEAL by defendant from *McLelland, Judge.* Judgment entered 2 November 1977 in Superior Court, HOKE County. Heard in the Court of Appeals 16 August 1978.

Defendant was tried on a warrant charging him with a third offense of operating a motor vehicle on a public highway while under the influence of intoxicating liquor. Defendant stipulated that he had been convicted of driving under the influence of intoxicating liquor in 1968 and in 1969.

The State offered evidence that defendant was observed by two deputy sheriffs on the night of 31 January 1977 as he drove his car on Rockfish Road in Hoke County. He was speeding and weaving in the road, crossing the center line repeatedly. When the arresting officer approached the car after it was stopped, he found defendant behind the wheel. He had thrown up on himself; his eyes were red; his speech was slurred; and he smelled of alcohol. At the Sheriff's Department, defendant had difficulty with a series of performance tests. He refused to submit to a breathalyzer analysis. Both the arresting officer and the breathalyzer operator were of the opinion that defendant was intoxicated.

Defendant offered no evidence. He was found guilty of driving while under the influence of intoxicating liquor and was sentenced for a third offense.

Attorney General Edmisten, by Assistant Attorney General Mary I. Murrill and Deputy Attorney General William W. Melvin, for the State.

Willcox & McFadyen, by Duncan B. McFadyen III, for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the court's refusal to charge the jury that it might find him guilty of a violation of G.S. 20-140(c). That section provides:

> "(c) Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended."

The application of this statute is illustrated by opinions of this Court in *State v. Burrus*, 30 N.C. App. 250, 226 S.E. 2d 677 (1976) and *State v. Pate*, 29 N.C. App. 35, 222 S.E. 2d 741 (1976). In the *Burrus* case, the driver was found passed out behind the wheel of his car after it had broken through a highway barrier. There was uncontradicted evidence that he had been drinking but the degree of his intoxication was a question for the jury. The Court held that in such a case it was error not to instruct the jury concerning the possible verdict of reckless driving after consuming such quantity of intoxicating liquor as directly and visibly affects the operations of a motor vehicle. In *State v. Pate*, on the other hand, the defendant was found behind the wheel of his truck after an accident. There was evidence that he had been drinking. There was also uncontradicted evidence that the collision occurred when an oncoming car crossed the center line and struck his truck. This Court held that where the record "is devoid of any evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of his motor vehicle immediately prior to his arrest for driving under the influence" the judge correctly omitted instructions with respect to reckless driving. *State v. Pate*, *supra*, at 37.

In this case defendant, who had obviously been drinking, was observed driving at an excessive speed with at least half the car over the center line at times and weaving severely. This was some evidence from which a jury might find that defendant was driving after consuming "such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle." The jury should, therefore, have been instructed concerning the statutory offense of reckless driving under G.S. 20-140(c), and the failure of the court to do so was prejudicial error.

New trial.

Judges MARTIN and MITCHELL concur.

MARY FRANKLIN CARTER COLE v. JAMES DURRELL COLE

No. 774DC934

(Filed 29 August 1978)

Process § 3— service after 30 days—no extension of time or alias or pluries summons

The trial court was without jurisdiction to enter judgment against defendant where process was served on defendant more than thirty days after it was issued, the summons was not endorsed for an extension of time, and no alias or pluries summons was issued.

APPEAL by defendant from *Turner, Judge.* Order entered 23 September 1977 in District Court, ONSLOW County. Heard in the Court of Appeals 23 August 1978.

Joseph C. Olschner, for plaintiff appellee.

Cherry and Wall, by James J. Wall, for defendant appellant.

VAUGHN, Judge.

The appeal stems from defendant's efforts to set aside a judgment rendered against him in the District Court of Onslow County.

Plaintiff caused summons to be issued in this action for alimony on 25 August 1975. Defendant at that time lived in

Albany, Georgia, where the summons was served on him personally on 4 October 1975. The summons was not endorsed for an extension of time, nor was an alias or pluries summons issued. On 11 November 1975, judgment was entered awarding plaintiff the sum of $500 per month alimony to be secured by a lien on plaintiff's real property in Onslow County.

Defendant moved under Rule 60(b) to set aside the judgment. The motion was based on the court's lack of personal jurisdiction over him due to the passage of more than 30 days between the time the summons was issued and was served. The motion was not allowed.

No useful purpose would be served by a discussion of the procedural posture this case has taken in the District Court. It suffices to say that the judgment should have been set aside. It is clear on the face of the original summons that the defendant was served with process more than thirty days after it was issued. No extension of time was obtained, nor was defendant served with alias or pluries summons. G.S. 1A-1, Rule 4(e) provides that "[w]hen there is neither endorsement by the clerk nor issuance of alias or pluries summons . . . , the action is discontinued as to any defendant not theretofore served with summons within the time allowed." Where the summons is not served within the statutory period, it loses its vitality and does not confer jurisdiction over the person of the defendant. There is no statutory authority for the service of summons after the date fixed for its return. *Webb v. Seaboard Air Line Railroad Co.*, 268 N.C. 552, 151 S.E. 2d 19 (1966); *see also Byrd v. Trustees of Watts Hospital, Inc.*, 29 N.C. App. 564, 225 S.E. 2d 329 (1976). Thus the court was without jurisdiction to enter judgment against defendant on 11 November 1975. This judgment, being void, must be set aside.

Defendant has not waived his objections to the judgment. "A general appearance to move to vacate a void judgment does not validate a judgment rendered without service of process. 'A nullity is a nullity, and out of nothing nothing comes.'" *City of Monroe v. Niven*, 221 N.C. 362, 365, 20 S.E. 2d 311, 313 (1942), (quoting from *Harrell v. Welstead*, 206 N.C. 817, 819, 175 S.E. 283 (1934)). The judgment, being void, was not validated by subsequent acts of the court.

The order entered 23 September 1977 is reversed, and the cause is remanded for entry of a judgment vacating the judgment dated 7 November 1975 and filed 11 November 1975.

Reversed and remanded.

Judges MARTIN and MITCHELL concur.

STATE OF NORTH CAROLINA v. LAWRENCE E. SPENCER

No. 782SC288

(Filed 29 August 1978)

Jury § 7.7— challenge for cause denied—failure to exhaust peremptory challenges—challenge for cause waived

Though a juror was subject to challenge for cause since he had served on a jury within the preceding two years, defendant waived objection to the denial of his motion to challenge for cause, since defendant had not exhausted his peremptory challenges when the jury was empaneled and he did not peremptorily challenge the juror.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 24 January 1978 in Superior Court, TYRRELL County. Heard in the Court of Appeals 16 August 1978.

The defendant was charged and convicted of the offense of speeding in excess of 15 miles per hour over the 55 mile per hour speed limit.

During the *voir dire* examination of prospective jurors, juror No. 6 stated that he had served as a juror within the preceding two years. Counsel for defendant moved to challenge the juror for cause on the grounds that he was disqualified pursuant to G.S. 9-3. It was stipulated on appeal that the challenged juror had served as a juror in the January 1977 Session. The motion was denied and counsel for defendant excepted.

Defendant did not peremptorily challenge the juror and the juror was seated on the panel. It was stipulated on appeal that at the time the jury panel was completed, defendant had not exhausted his peremptory challenges.

After judgment, defendant filed a written motion in arrest of judgment on the grounds that the challenged juror was not qualified to serve on the jury. The motion was denied.

Attorney General Edmisten by Associate Attorney T. Michael Todd for the State.

Wilkinson & Vosburgh by James R. Vosburgh for defendant appellant.

CLARK, Judge.

The defendant assigns as error the denial of a challenge for cause of juror No. 6 pursuant to G.S. 9-3. This statute provides:

> "All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years. . . . Persons not qualified under this section are subject to challenge for cause."

There is no question that the juror was subject to challenge for cause since he had served on a jury within the preceding two years.

Defendant, however, waived objection to the denial of the motion to challenge for cause since he had not exhausted his peremptory challenges.

State v. Brittain, 89 N.C. 481 (1883), is directly on point. In *Brittain,* a juror was called who had served on a jury in the same court within the preceding two years. The juror was challenged for cause and the court overruled the challenge. The jury was selected before the defendants had exhausted their peremptory challenges. On appeal the court held that the defendants were not entitled to a *venire de novo.* The court cited *State v. Cockman,* 60 N.C. 484 (1864), as authority for its decision. *Cockman* held that an improper denial of a challenge for cause was not prejudicial. The defendant had excused the jurors in question and had several peremptory challenges remaining when the jury was seated.

The rule is succinctly stated in *State v. Chavis,* 24 N.C. App. 148, 175, 210 S.E. 2d 555, 573 (1974), *cert. denied* 287 N.C. 261, 214 S.E. 2d 434 (1975), *cert. denied* 423 U.S. 1080 (1976). "[I]n order for

a defendant to perserve his exception to the court's denial of a challenge for cause, he must (1) excuse the challenged juror with a peremptory challenge, (2) exhaust his peremptory challenges before the panel is completed, and (3) thereafter seek, and be denied, peremptory challenge to an additional juror."

The defendant did not comport with the rule set out in *Chavis, supra.* Defendant had a peremptory challenge remaining which he could have used to excuse the challenged juror from the panel. His failure to exhaust peremptory challenges waived objection to the overruling of his challenge for cause.

No error.

Judges PARKER and ERWIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 29 AUGUST 1978

ANDREWS v. ANDREWS No. 7715DC791	Orange (74CVD985)	Vacated and Remanded
BRYANT v. BRYANT No. 7719DC682	Randolph (77CVD255)	Affirmed
LAND COMPANY, INC. v. AVONDET No. 7718DC839	Guilford (76CVD6898)	Reversed and Remanded
PRICE v. PATTERSON No. 7719SC873	Randolph (76SP204)	Appeal Dismissed
STATE v. CUMMINGS No. 7815SC275	Orange (76CRS8761) (77CRS3714)	No Error
STATE v. DUNN No. 782SC330	Beaufort (77CRS4347A)	No Error
STATE v. ELLIS No. 787SC291	Wilson (77CR7459) (77CR7460)	No Error
STATE v. STALLINGS No. 774SC1078	Duplin (77CRS2881) (77CRS2884)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

TOPICS COVERED IN THIS INDEX

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Animals
Appeal and Error
Arbitration and Award
Arrest and Bail
Assault and Battery
Attorneys at Law
Automobiles

Betterments
Bills of Discovery
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Burglary and Unlawful Breakings

Cancellation and Rescission of Instruments
Carriers
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ACCOUNTS

§ 2. Accounts Stated

Where defendant claimed that the evidence established as a matter of law the existence of an account stated between the parties, plaintiff's evidence was sufficient to raise the defense of mistake of fact in signing an audit statement of the account. *Carroll v. Industries, Inc.*, 10.

ADVERSE POSSESSION

§ 25.1. Sufficiency of Evidence

Trial court in a processioning proceeding did not err in refusing to submit an issue to the jury as to whether defendants and those under whom they claimed had acquired title to a disputed area by adverse possession. *Sipe v. Blankenship*, 499.

ANIMALS

§ 2.3. Liability of Owner for Injuries Caused by Domesticated Animals

In an action to recover for personal injuries received when a bull knocked plaintiff from an elevated walkway in defendant's livestock auction house, plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in failing to maintain proper supervision and a reasonably safe enclosure for the protection of his customers. *Sibbett v. Livestock, Inc.*, 704.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court

The appellate court will not consider assignments of error based on exceptions which were within the scope of a prior appeal. *Britt v. Allen*, 732.

§ 6.11. Appealability of Real Property Matters

An order limiting the scope of lis pendens filed by plaintiffs was not immediately appealable. *Whyburn v. Norwood*, 610.

§ 38. Settlement of Case on Appeal

For failure of defendant to comply with the Rules of Appellate Procedure, which are mandatory, defendant's appeal is dismissed. *Triplett v. Triplett*, 283.

§ 67. Force and Effect of Decisions of Supreme Court

The fact that the Supreme Court had directed that this case be remanded to superior court for a trial de novo did not prohibit superior court upon remand from allowing defendant's motion for dismissal. *Britt v. Allen*, 732.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

A provision of a joint venture agreement stating that "Any and all disputes of any kind under or in connection with this Agreement will be submitted to" a named person "for absolute and final decision" did not pertain only to on-the-job management and administrative decisions during the course of the work but required that any dispute arising under the joint venture agreement be resolved in binding arbitration, including any amount allegedly owed to plaintiff by defendant under the terms of the agreement. *Construction Co. v. Management Co.*, 549.

ARBITRATION AND AWARD—Continued

§ 3. Appointment of Arbitrators

A provision for binding arbitration in a joint venture agreement between plaintiff and defendant was not unenforceable because the person named in the agreement to be arbitrator was the president of defendant's parent company. *Construction Co. v. Management Co.*, 549.

ARREST AND BAIL

§ 3.6. Legality of Warrantless Arrest for Robbery

Officers had probable cause to stop and search defendant's automobile and then to arrest defendant without a warrant for armed robbery of a convenience store. *S. v. Cox*, 356.

§ 6. Resisting Arrest

Where a probation officer had probable cause to believe that defendant had violated a condition of probation, the officer's arrest of defendant was constitutional and legal. *S. v. Waller*, 133.

ASSAULT AND BATTERY

§ 11.3. Warrant for Assault on an Officer

A warrant charging a violation of G.S. 14-33(b)(4) is sufficient if it alleges only in general terms that the officer was discharging a duty of his office at the time he was assaulted by defendant. *S. v. Waller*, 133.

§ 14. Sufficiency of Evidence

Defendant was properly convicted of the offense of communicating a threat where the evidence showed that defendant threatened to hit the victim with a rock if the victim attempted to continue trimming branches from defendant's rose bushes which hung over the victim's driveway. *S. v. Roberson*, 714.

§ 14.4. Assault With Firearm; Sufficiency of Evidence

Circumstantial evidence was sufficient for the jury in a prosecution for assault with a deadly weapon inflicting serious injury. *S. v. White*, 394.

§ 15.1. Assault With Deadly Weapon; Instructions

Defendant in a felonious assault prosecution was not entitled to an instruction on accident or misadventure. *S. v. Efird*, 66.

§ 15.7. Self-Defense; Instruction Not Required

Evidence of the victim's provocation in an assault case was insufficient to require the trial court to give an instruction upon the doctrine of self-defense. *S. v. Brooks*, 206.

§ 16. Instruction on Lesser Offense

In a prosecution for assault with a deadly weapon where the evidence tended to show that defendant was a male over 18 years of age and the victim was a female, an instruction on the offense of simple assault was not necessary. *S. v. Barnhill*, 612.

ATTORNEYS AT LAW

§ 4. Testimony by Attorney

An attorney was not barred by the Code of Professional Conduct from testifying in a prosecution for the issuance of two worthless checks where the attorney represented the prosecuting witness in attempting to procure payment by defendant of the debts for which the worthless checks were given and the attorney had no official responsibility in the conduct of defendant's criminal trial. *S. v. Passmore*, 5.

§ 7.5. Allowance of Fees As Part of Costs

Trial court properly refused to award attorney's fees to a plaintiff who prevailed in a suit to recover for deceptive acts and practices in the sale of a house. *Stone v. Homes, Inc.*, 97.

§ 10. Disbarment

A superior court has the inherent authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. *In re Robinson*, 671.

§ 11. Disbarment Procedure Generally

The State cannot obtain appellate review of an adverse decision in a judicial disbarment proceeding either by appeal or writ of certiorari. *In re Palmer*, 220.

Superior court was not without jurisdiction to discipline an attorney for failure to perfect appeals in four criminal cases because notice of appeal had been given in the four cases, or because no written complaint had been filed. *In re Robinson*, 671.

It was not improper for a district attorney to present evidence against an attorney in a disciplinary proceeding, and the proceeding was properly held at a criminal session of court. *Ibid.*

A superior court judge should have disqualified himself in a disciplinary proceeding against an attorney where the notice of charges issued by the judge stated that respondent, in each of four criminal cases in which he had been appointed to perfect the appeal, "negligently and willfully failed to perfect the appeal or seek appellate review through other permissible means," since it appears on the face of the notice that the judge may have prejudged respondent's conduct before hearing any evidence. *Ibid.*

A superior court judge should have disqualified himself in a disciplinary proceeding against an attorney where the notice of charges issued by the judge stated that respondent, who had been appointed to represent on appeal a defendant convicted of first degree rape, "negligently failed to perfect the appeal or to seek appellate review by any other means." *In re Dale*, 480.

AUTOMOBILES

§ 1.1. Authority to Revoke Driver's License

The phrase "liquor laws" as contained in G.S. 20-19(e) is not unconstitutionally vague or overbroad, and the crime of public drunkenness is a violation of the liquor laws as that term is used in the statute. *In re Harris*, 590.

§ 6.2. Liability of Seller for Defective Conditions

An automobile buyer had no right to revoke her acceptance of an automobile because the odometer was not working when the car was delivered or because the fan belt broke two days after the delivery. *Imports, Inc. v. Credit Union*, 121.

AUTOMOBILES – Continued

§ 6.5. Liability for Fraud in Sale of Motor Vehicles

Evidence was insufficient to show fraud in the sale of an automobile because of its mileage. *Imports, Inc. v. Credit Union,* 121.

Defendant was not entitled to damages under the Vehicle Mileage Act where there was only a technical failure to comply with the Act. *Ibid.*

§ 38. Exemptions from Speed Restrictions

SBI agent's failure to observe the rules of the road while pursuing defendant did not constitute contributory negligence as a matter of law. *Wade v. Grooms,* 428.

§ 63.1. Striking Children Darting Into Road

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to see a child moving toward the road so as to bring his vehicle under control and avoid striking the child. *Jackson v. Fowler,* 195.

§ 113.1. Sufficiency of Evidence of Homicide

In a prosecution for manslaughter, evidence that deceased died as a result of a collision with defendant's vehicle was sufficient to be submitted to the jury and expert testimony with respect to cause of death was unnecessary. *S. v. Smith,* 64.

Evidence was sufficient to convict defendant of manslaughter where it tended to show that defendant was driving under the influence of alcohol at an excessive rate of speed and was weaving from one side of the highway to the other when he struck the victim's well-lighted motorcycle from behind. *S. v. Thompson,* 444.

§ 114. Instructions in Homicide Case

Trial court in a prosecution for manslaughter properly pointed out that with respect to the offense of death by vehicle the State was not required to prove any intentional or reckless conduct on the part of the defendant. *S. v. Thompson,* 444.

§ 129. Driving Under the Influence; Instructions

In a prosecution for driving under the influence, third offense, the trial court erred in failing to instruct the jury concerning the lesser included statutory offense of reckless driving under G.S. 20-140(c). *S. v. Davis,* 735.

§ 134. Driving Without Consent of Owner

Defendant could not be convicted of feloniously receiving stolen goods in violation of G.S. 14-71 when tried on an indictment charging felonious possession of a motor vehicle in violation of G.S. 20-106. *S. v. Carlin,* 228.

BETTERMENTS

§ 3. Amount of Recovery

Where defendant vendors were unable to convey to plaintiff clear title to land pursuant to an option contract, plaintiff was entitled to recover the sum which she paid under the option agreement and could recover an amount by which improvements made by her enhanced the value of the land. *Passmore v. Woodard,* 535.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Denial of motions at trial for discovery of descriptions of the robbers given by a State's witness to the police was harmless error. *S. v. Miller,* 163.

BOUNDARIES

§ 15.1. Sufficiency of Evidence

Trial court did not err in denying defendants' motion for a directed verdict in a processioning proceeding since a bona fide dispute existed as to the true location of the dividing line between the parties' properties. *Sipe v. Blankenship*, 499.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

G.S. 14-54 which makes it a felony to break or enter any building with intent to commit any felony or larceny therein does not violate the equal protection or due process provisions of either the State or Federal Constitutions. *S. v. Killian*, 234.

§ 5.3. Aiding and Abetting; Sufficiency of Evidence

State's evidence was insufficient to support defendant's conviction of aiding and abetting the actual perpetrators of a breaking and entering and larceny but was sufficient to show that defendant was an accessory before the fact. *S. v. Glaze*, 155.

§ 5.5. Breaking and Entering; Sufficiency of Evidence

Testimony by an automobile owner that respondent and his companion told the owner that they had entered the car to rest was sufficient to make out a prima facie case of breaking or entering against respondent. *In re Ashby*, 436.

§ 10. Indictment for Possession of Housebreaking Implements

An indictment which contained a mixture of the first two offenses defined by G.S. 14-55 was not sufficiently clear to allow defendant to understand the offense with which he was charged. *S. v. Searcy*, 68.

§ 10.3. Possession of Housebreaking Implements; Sufficiency of Evidence

In a prosecution for possession of burglary tools, one defendant's motion for nonsuit should have been allowed where the only evidence linking him to the contraband was that he was a passenger in the vehicle in which contraband was found, but evidence was sufficient against another defendant who was the driver of the car. *S. v. Searcy*, 68.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 3.1. Cancellation for Duress

Evidence on a motion for summary judgment raised issues as to whether defendant held title to land as trustee for plaintiffs and whether plaintiffs were induced to enter a contract by defendant's breach of his fiduciary duty by refusing to convey the land to plaintiffs and threatening to destroy a low income housing project in which the parties were jointly engaged. *Housing, Inc. v. Weaver*, 284.

Evidence on a motion for summary judgment raised issues as to whether (1) defendants breached a 1971 agreement in which the parties agreed to engage jointly in a low income housing project, (2) the breach induced a 1972 agreement settling a dispute between the parties, and (3) the breach amounted to duress. *Ibid.*

CARRIERS

§ 12. Liability for Payment of Transportation Charges

Defendant shipper was entitled to retain possession of plaintiffs' household goods until plaintiffs paid $339.41 more than the contract price agreed upon by the parties for moving plaintiffs' goods across the country. *Matthews v. Transit Co.*, 59.

CLERKS OF COURT

§ 11. Assistant Clerks

An assistant clerk of court had authority to assess the cost of taking plaintiff's deposition as an item of costs taxed against plaintiff where plaintiff took a voluntary dismissal before the case was calendared. *Thigpen v. Piver*, 382.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Defendant husband had no standing to attack the constitutionality of the privy examination statute. *Spencer v. Spencer*, 481.

§ 24.7. Jurisdiction Over Nonresidents

Courts of this State had personal jurisdiction over nonresident defendants in an action to recover on promissory notes guaranteeing payment to plaintiff N. C. corporation for merchandise delivered to a Virginia corporation. *Buying Group, Inc. v. Coleman*, 26.

§ 28. Due Process in Criminal Proceedings

G.S. 14-54 which makes it a felony to break or enter any building with intent to commit any felony or larceny therein, and G.S. 14-72 which makes larceny of property of the value of $200 or less a misdemeanor except in three instances do not violate the equal protection or due process provisions of either the State or Federal Constitutions. *S. v. Killian*, 234.

§ 30. Discovery in Criminal Proceedings

Denial of motions at trial for discovery of descriptions of the robbers given by a State's witness to the police was harmless error. *S. v. Miller*, 163.

§ 40. Right to Counsel Generally

The Department of Corrections may make deductions from the earnings of a prisoner on work-release as a reimbursement to the State for court-appointed counsel. *S. v. Killian*, 234.

Statement made by the infant respondent was improperly admitted where there was no showing that he waived his right to counsel, but such error was not prejudicial. *In re Ashby*, 436.

§ 46. Removal of Appointed Counsel

Trial court did not err in denying defendant's motion that a new lawyer be appointed to defend him. *S. v. Taylor*, 709.

§ 48. Effective Assistance of Counsel

A defendant convicted of second degree murder was not denied effective assistance of counsel for failure to assign as error on appeal the court's instructions placing on defendant the burden of disproving malice and proving self-defense. *S. v. Watson*, 399.

CONSTITUTIONAL LAW—Continued

§ 68. Right to Call Witnesses

A defendant charged as an accessory after the fact of armed robbery was not prejudiced by the fact the three robbers indicated that, on the advice of their counsel, they would refuse to testify in defendant's trial. *S. v. Cox*, 356.

CONTEMPT OF COURT

§ 6. Hearings on Orders to Show Cause

Trial court had no authority to change a show cause hearing into a hearing on the issue of modification of defendant's visitation rights. *Lee v. Lee*, 371.

§ 6.2. Sufficiency of Evidence

Trial court was not required to find that plaintiff had the present ability to perform in accordance with a child support order in order to hold plaintiff in contempt for failure to comply with such order. *Lee v. Lee*, 371.

Plaintiff's defiance of a child visitation order was willful and not justified by the fact that when plaintiff took her daughter to defendant's apartment on one occasion she found the apartment in a state of disarray and that defendant had bloodshot eyes and alcohol on his breath. *Ibid.*

CONTRACTS

§ 20.2. Conduct by Adverse Party Preventing Performance

In an action for breach of a contract to haul cargo for plaintiff in defendant's truck, trial court erred in failing to instruct the jury on justification for prevention of performance of a contract and repudiation as breach of a contract. *Transfer, Inc. v. Peterson*, 56.

§ 26. Competency of Evidence in Contract Action

In an action to reform a provision of a written contract for mutual mistake, trial court did not err in refusing to allow plaintiffs' witnesses to testify that an "agreement" other than the written contract had been reached and in instructing the jury to consider the word "agreement" only as it related to preparation of a final draft for adoption of the parties. *Munchak Corp. v. Caldwell*, 240.

§ 29.3. Special Damages

Defendant husband's breach of a provision of a separation agreement relating to payment of income taxes was not the breach of a "personal" contract provision for which the wife could recover special damages for mental anguish or loss of reputation in the community because of a tax lien placed on her home, nor could she recover punitive damages for such breach. *Stanback v. Stanback*, 324.

COSTS

§ 3. Taxing of Costs

An assistant clerk of court had authority to assess the cost of taking plaintiff's deposition as an item of costs taxed against plaintiff where plaintiff took a voluntary dismissal before the case was calendared. *Thigpen v. Piver*, 382.

COUNTIES

§ 3.1. Authority of County Commissioners

Defendant was entitled to summary judgment in an action by plaintiff, executive secretary to the Wilkes County Board of Elections, to recover sums allegedly owed to her for overtime work. *Goodman v. Board of Commissioners*, 226.

CRIME AGAINST NATURE

§ 3. Evidence

State's evidence was sufficient for the jury in a prosecution for crime against nature and taking indecent liberties with a minor. *S. v. Phillips*, 202.

CRIMINAL LAW

§ 11. Accessories After the Fact

State's evidence was sufficient for the jury in a prosecution for accessory after the fact of armed robbery of a convenience store. *S. v. Cox*, 356.

§ 26.5. Former Jeopardy

Trial of defendant on a charge of accessory after the fact of armed robbery after defendant was found not guilty of armed robbery did not violate the principle of double jeopardy. *S. v. Cox*, 356.

§ 29. Mental Capacity to Stand Trial

Evidence supported the trial court's determination that defendant was competent to stand trial. *S. v. Grace*, 723.

§ 34.6. Evidence of Other Offenses to show Knowledge or Intent

Testimony by the prosecuting witness in a worthless check case that defendant had previously issued him another worthless check was admissible to show defendant's knowledge of the status of his bank account. *S. v. Passmore*, 5.

§ 35. Evidence that Offense Was Committed by Another

Trial court in a felonious assault case properly excluded as hearsay testimony by defendant's sister that she heard a stranger tell defendant, "I got the son of a bitch, didn't I?" *S. v. Honeycutt*, 50.

§ 57. Evidence in Regard to Firearms

Shotgun shells and a bullet slug were sufficiently identified by an officer as those he observed at the crime scene. *S. v. White*, 394.

§ 62. Lie Detector Tests

The results of a polygraph test were properly admitted in a robbery case where defendant, his attorney, and the district attorney had stipulated that the results would be admissible in evidence. *S. v. Thompson*, 651.

§ 66. Evidence of Identity by Sight

It was not improper to permit witnesses to identify one of the robbers as "defendant." *S. v. Thompson*, 651.

§ 66.1. Witness's Opportunity to Observe Defendant

Trial court properly admitted evidence relating to an officer's identification of defendant. *S. v. Thompson*, 628.

CRIMINAL LAW—Continued

§ 66.4. Lineup Identification

A non-testimonial identification order was not required for defendant's appearance in a lineup where defendant was in custody on another charge. *S. v. Thompson*, 651.

§ 66.5. Right to Counsel at Lineup

Defendant was not denied the presence of counsel at a lineup by the fact that his attorney was on the other side of a one-way glass. *S. v. Drakeford*, 346.

§ 66.6. Suggestiveness of Lineup

The fact that defendant wore brown pants in a lineup while other participants wore blue pants did not render the lineup procedure impermissibly suggestive. *S. v. Drakeford*, 346.

A lineup was not impermissibly suggestive because it was held only two days after photographic identifications of defendant by the witnesses. *S. v. Thompson*, 651.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Photographic identification procedures were not impermissibly suggestive so as to taint in-court identifications of defendant by three witnesses. *S. v. Miller*, 163.

Pretrial photographic identifications of defendant were not impermissibly suggestive because only six or seven photographs were shown to the witnesses or because more than one photograph of defendant was included in those shown. *S. v. Thompson*, 651.

§ 66.12. Confrontation in Courtroom

A robbery victim's in-court identification of defendant was not tainted by the victim's viewing of defendant at his preliminary hearing. *S. v. Drakeford*, 346.

§ 66.15. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Lineups

In-court identification was not tainted by a lineup identification where the lineup procedure was not impermissibly suggestive and the in-court identification was of independent origin. *S. v. Davis*, 173.

In-court identifications of defendant by two robbery victims and another witness were of independent origin and not tainted by pretrial lineup or photographic identifications. *S. v. Thompson*, 651.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Evidence supported trial court's determination that in-court identifications by three witnesses in an armed robbery case were of independent origin and not tainted by photographic identification procedures. *S. v. Miller*, 163.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Other Pretrial Identification Procedures

Though identification of defendant at the crime scene by the victim and identification of defendant by the victim and a third person at the police station were impermissibly suggestive, they did not taint an in-court identification of defendant. *S. v. Becton*, 421.

CRIMINAL LAW—*Continued*

§ 70. Tape Recordings

In a prosecution for armed robbery of a theatre and conspiracy, trial court properly allowed into evidence a tape recording of a conversation among the conspirators. *S. v. Gregory*, 693.

§ 73. Hearsay Testimony

A statement against the penal interest is not recognized as an exception to the hearsay rule in this State. *S. v. Honeycutt*, 50.

§ 73.2. Statements Not Within Hearsay Rule

An officer's testimony concerning remarks by a trailer owner about a bag of money and permission to enter the trailer was not hearsay and was competent to show authorization to enter the trailer. *S. v. Bates*, 276.

§ 75.7. What Constitutes Custodial Interrogation

An officer's inquiry as to whether defendant knew "what was going on" did not constitute custodial interrogation so as to require the Miranda warnings. *S. v. Phillips*, 202.

§ 75.9. Volunteered Statements

A statement by one defendant made just after his arrest that all the hashish in a van was his and that he did not want to get anyone else in trouble was voluntary. *S. v. Thompson*, 628.

§ 76.2. When Voir Dire Hearing Required

Trial court in a drunken driving case erred in admitting over objection defendant's incriminating answers to an officer's questions after his arrest without conducting a voir dire to determine the admissibility of the in-custody statements. *S. v. Goins*, 223.

§ 80.1. Foundation for Admission of Records

A proper foundation was laid in a worthless check prosecution for the admission of a computerized bank report showing that two checks drawn on defendant's account were returned for insufficient funds and a computerized monthly statement of defendant's account. *S. v. Passmore*, 5.

§ 81. Best and Secondary Evidence

A photostatic copy of a computerized bank report was admissible if the original report was admissible. *S. v. Passmore*, 5.

§ 86.9. Credibility of Accomplice

An accomplice was not incompetent to testify against defendant because a police officer had promised to do whatever he could to help the accomplice or because the accomplice had used drugs on the day of the crimes. *S. v. Edwards*, 47.

§ 88.1. Scope of Cross-Examination

Trial court did not abuse its discretion in limiting defendant's cross-examination of a State's witness. *S. v. Lancaster*, 528.

§ 89.10. Witness's Prior Criminal Conduct

The State was properly permitted to impeach defendant by asking him whether he robbed certain persons on certain dates, even if the prosecutor was looking at indictments pending against defendant as defendant was being cross-examined. *S. v. Thompson*, 651.

CRIMINAL LAW—Continued

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

Trial of defendant on a charge of accessory after the fact of armed robbery after a directed verdict of not guilty was entered in a trial of defendant for armed robbery did not violate the joinder of offenses statute so as to require dismissal of the accessory charge. *S. v. Cox*, 356.

§ 92.4. Consolidation Held Proper

Charges of rape, aggravated kidnapping and crime against nature against one defendant were properly consolidated for trial. *S. v. Creech*, 261.

§ 93. Order of Proof

Defendant was not denied an opportunity to present evidence by the trial court. *S. v. Moore*, 248.

§ 99.5. Court's Admonition of Counsel

Trial court's remarks to defense counsel did not deny defendant his rights to effective counsel and confrontation of witnesses. *S. v. Miller*, 163.

§ 101. Conduct Affecting Jurors

Defendant was not prejudiced where two jurors were seen talking to a defense witness, the trial judge called the jurors into his chambers, and the judge attempted to explain to the other jurors why he had called the two into his chambers. *S. v. Bowden*, 191.

§ 101.4. Conduct During Deliberation

Defendant was not entitled to a mistrial when the jury foreman advised the court that the jury stood 11 to 1 for guilty. *S. v. McClendon*, 230.

Trial judge's sending of exhibits into the jury room, absent a request from the jury and consent by defendants, did not amount to an expression of opinion on the truthfulness of the exhibits. *S. v. Lancaster*, 528.

§ 102. Argument of Counsel

Trial court did not err in allowing counsel for the State to read a statute to the jury and in refusing to allow defense counsel to read the evidence recited in certain court decisions. *S. v. Board*, 581.

§ 104. Consideration of Evidence on Motion to Nonsuit

Discrepancies in the State's evidence did not warrant nonsuit. *S. v. Hester*, 448.

§ 105. Necessity for and Functions of Motion to Nonsuit

The State's argument that, where a motion to nonsuit is not limited to a particular count but is addressed to all counts, the motion cannot be allowed where there is sufficient evidence to support any count is without merit. *S. v. Taylor*, 709.

§ 112. Instructions on Burden of Proof

Trial court's erroneous statement made to a group of prospective jurors that the State had the burden of proving defendants' guilt by the greater weight of the evidence was not prejudicial to defendants. *S. v. Moore*, 248.

§ 112.1. Instructions on Reasonable Doubt

Trial court is not required to define reasonable doubt in the absence of a specific request to do so. *S. v. Joyner*, 216.

CRIMINAL LAW—Continued

Charge on reasonable doubt was not insufficient in failing to include the words "satisfied to a moral certainty." *S. v. Hester*, 448.

§ 112.2. Particular Charges on Reasonable Doubt

Trial court's definition of reasonable doubt was proper. *S. v. Staley*, 18.

§ 113.1. Recapitulation of Evidence

Trial court's instruction in felonious assault case did not constitute a statement of a fact not in evidence that shots were fired at officers at the crime scene. *S. v. Grace*, 723.

§ 113.7. Charge as to Acting in Concert

Trial court's jury instructions on acting in concert were proper. *S. v. Moore*, 248.

§ 114.4. Prejudicial Expression of Opinion in Statement of Evidence

Where defendant admitted firing the gun that killed decedent but contended that he acted in self-defense, trial court expressed an opinion when he instructed that "there is evidence which tends to show that defendant confessed that he committed the crime charged in this case." *S. v. Bray*, 43.

§ 117.4. Charge on Credibility of State's Witnesses

The trial court did not err in failing to recapitulate evidence that a State's witness had consumed drugs on the day of the events to which he testified or to instruct the jury to scrutinize the witness's testimony because of his drug use. *S. v. Edwards*, 47.

§ 119. Requests for Instructions

Failure of the trial court to give defendant's requested instruction with regard to alibi evidence was not prejudicial to defendant. *S. v. Staley*, 18.

§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict

Where the jury deliberated for 2½ hours before stating they could not reach a verdict, trial court's instructions to the jury to try again to reach a verdict did not tend to coerce the jury into rendering a verdict of guilty. *S. v. Glaze*, 155.

§ 124.1. Sufficiency of Verdict; Uncertainty

Where the jury had already rendered a verdict of guilty of attempted armed robbery against defendant, the fact that the jury asked for an explanation of elements of attempted armed robbery during its deliberations as to a codefendant did not show the jury did not understand the elements of the charges against defendant. *S. v. Oxner*, 600.

§ 124.4. Verdict of Guilty Where There Are Several Counts

Where the jury announced guilty verdicts on all of the charges except larceny, upon which no verdict was announced, the trial court erred in failing to arrest judgment as to the larceny charge. *S. v. Taylor*, 709.

§ 124.5. Inconsistency of Verdict

It is not required that the jury's verdict be consistent. *S. v. Board*, 581.

§ 127.1. Motion in Arrest of Judgment; Grounds

A motion in arrest of judgment was not the proper method for raising a jurisdictional question. *S. v. Creech*, 261.

CRIMINAL LAW—Continued

§ 134.4. Youthful Offenders

Trial court erred in sentencing defendants who were under the age of 21 as adult offenders without first finding that they would not benefit from treatment as "committed youthful offenders." *S. v. Drakeford*, 340.

Trial court was not required to supply supporting reasons for finding that defendant "would not derive benefit from treatment and supervision as a committed youthful offender," and no specific language was required by G.S. 148-49.14 to make the no benefit finding effective. *S. v. White*, 394.

§ 138.1. More Lenient Sentence to Codefendant

A sentence of 25 to 30 years imposed on defendant for attempted armed robbery did not constitute cruel and unusual punishment or a penalty for defendant's not guilty plea because an accomplice who had previously pled guilty to the same offense received a sentence of only 10 years. *S. v. Davis*, 173.

Disparity between sentences given to defendant and to an accomplice resulted from consideration of defendant's criminal record and was not improper. *S. v. Hester*, 448.

§ 138.7. Evidence Considered in Determining Sentence

Trial court properly considered defendant's criminal record in imposing sentence. *S. v. Hester*, 448.

§ 138.11. Different Punishment on New Trial

The court upon retrial did not err in imposing a more severe sentence upon defendant than was imposed at his first trial since the judge on retrial found that defendant had an intervening conviction of possession of marijuana. *S. v. Board*, 581.

§ 142.3. Conditions of Probation

The Parole Commission may, but is not required to, implement the recommendation of the sentencing court for restitution as a condition of parole. *S. v. Killian*, 234.

Any order or recommendation of the sentencing court for restitution or restoration to the aggrieved party as a condition of attaining work-release privileges must be supported by the evidence, and the sum ordered or recommended must be reasonably related to the damages incurred. *Ibid.*

The Department of Corrections may make deductions from the earnings of a prisoner on work-release as a reimbursement to the State for court-appointed counsel. *Ibid.*

Defendant, by agreeing to the terms of suspended sentence and probation, waived his constitutional right not to be searched without a search warrant, notwithstanding the provisions of G.S. 15A-1343(b)(15), since defendant was convicted before the effective date of that statute. *S. v. Moore*, 729.

§ 162. Necessity for Objection or Motion to Strike

Defendant's assignment of error to his cross-examination which allegedly violated his right to remain silent is overruled since defendant neither objected nor moved to strike. *S. v. Riley*, 213.

DAMAGES

§ 12.1. Pleading Punitive Damages

Plaintiff's allegation that defendant wrongfully and willfully breached a provision of a separation agreement as to payment of income taxes was insufficient as a basis for punitive damages. *Stanback v. Stanback,* 324.

DECLARATORY JUDGMENT ACT

§ 4.1. Validity of Statutes

Where plaintiffs challenged the constitutionality of G.S. 113, Art. 2, and G.S. 113A, Art. 3 on the ground that a "master plan" for development of the Eno River State Park to be devised by defendants might take some of their land, there was no genuine controversy cognizable under the Declaratory Judgment Act. *Barbour v. Little,* 686.

DEDICATION

§ 5. Title and Rights Acquired by Dedication

Where a statement of dedication signed by plaintiff manifested her intent to dedicate some portion of her property for public use and the State accepted the property, the dedication was irrevocable and defendants could properly install a water line within the right-of-way accepted by the State. *Watkins v. Lambe-Young,* 30.

DEEDS

§ 1. Nature and Requisites in General

Trial court erred in granting summary judgment in a partition proceeding where there was a genuine issue of fact with respect to the identity of the land conveyed in a deed. *Garrison v. Blakeney,* 73.

§ 6. Requirement of Seal

Summary judgment was improper where there was a genuine issue of fact as to whether a grantor placed a sign on a deed and adopted it as his seal. *Garrison v. Blakeney,* 73.

§ 7.3. Registration

Where a deed to a grantee was not recorded until after the grantee had conveyed the property to a third person, grantee's deed to the third person was nevertheless valid. *Garrison v. Blakeney,* 73.

§ 8.1. Sufficiency of Consideration

In a partition proceeding where the petitioners' interest in the land in question depended upon the validity of two deeds which petitioners claimed were invalid, petitioners' contention that one of the deeds was invalid because it was a deed of gift and not recorded within two years of its execution was without merit. *Garrison v. Blakeney,* 73.

§ 14. Reservations and Exceptions

A provision in a deed which reserved in the grantors the right to "any monies or benefits received from the North Carolina State Highway Commission for the sale of" a 20 foot right-of-way in the property conveyed did not constitute a void

DEEDS—Continued

restraint on alienation and gave the grantors the right to all proceeds resulting from condemnation of the right-of-way by the State. *Board of Transportation v. Turner*, 14.

§ 21. Stipulation for Reconveyance of Land to Grantor

Plaintiff's action for specific performance of a covenant in a deed to reconvey the land conveyed therein to plaintiff if defendant failed to build on it within a certain time was not barred by laches. *Harris & Gurganus v. Williams*, 585.

DISORDERLY CONDUCT AND PUBLIC DRUNKENNESS

§ 1. Nature and Elements of Offense

The crime of public drunkenness is a violation of the "liquor laws" as that term is used in G.S. 20-19(e). *In re Harris*, 590.

DIVORCE AND ALIMONY

§ 14.2. Adultery; Competency of Testimony by Spouses

Defendant husband could not be compelled to give testimony in support of the wife's allegation that he committed adultery so as to render admissible a photograph showing the husband engaged in acts of adultery. *vanDooren v. vanDooren*, 333.

§ 14.3. Adultery; Competency of Evidence

Photographs showing defendant engaged in acts of adultery were not admissible as substantive evidence but would have been admissible only for illustrative purposes. *vanDooren v. vanDooren*, 333.

§ 16.5. Alimony Without Divorce; Competency and Relevancy of Evidence

Evidence of defendant's earnings and earning capacity was competent in an alimony action to support plaintiff's allegation that defendant willfully failed to provide plaintiff with necessary subsistence according to his means. *vanDooren v. vanDooren*, 333.

§ 16.6. Alimony Without Divorce; Sufficiency of Evidence

An issue as to abandonment was properly submitted to the jury in an action for alimony without divorce where the evidence was conflicting. *Murray v. Murray*, 406.

§ 17.3. Alimony Upon Divorce from Bed and Board; Amount

Trial court did not err in reducing the amount of alimony awarded plaintiff because of indignities committed against defendant and the court was not required to set out the amount of the reduction in alimony in its judgment. *Self. v. Self*, 199.

§ 19.2. Modification of Alimony; Procedure

Trial court erred in dismissing plaintiff's motion for modification of a consent judgment to increase the amount of support defendant was required to pay, since plaintiff alleged that the amount of alimony as set forth in the consent judgment was "totally inadequate under the circumstances." *White v. White*, 471.

DIVORCE AND ALIMONY—Continued

§ 19.5. Effect of Consent Decree on Alimony

District court erred in concluding as a matter of law that the property division and support provisions embodied in a consent judgment were reciprocal consideration and thus the support provision was not subject to modification. *White v. White*, 471.

§ 24.9. Child Support; Findings

Evidence was sufficient to support the trial court's findings that defendant's income and assets were sufficient to enable him to pay increased child support and plaintiff's attorney fee, though defendant offered evidence that his net income was lower than his expenses, since all of defendant's expenses were not necessary. *Beasley v. Beasley*, 255.

§ 25.7. Modification of Child Custody Order

Trial court had no authority to change a show cause hearing into a hearing on the issue of modification of defendant's visitation rights. *Lee v. Lee*, 371.

DURESS

§ 1. Generally

Evidence on a motion for summary judgment raised issues as to whether defendant held title to land as trustee for plaintiffs and whether plaintiffs were induced to enter a contract by defendant's breach of his fiduciary duty by refusing to convey the land to plaintiffs and threatening to destroy a low income housing project in which the parties were jointly engaged. *Housing, Inc. v. Weaver*, 284.

Evidence on a motion for summary judgment raised issues as to whether (1) defendants breached a 1971 agreement in which the parties agreed to engage jointly in a low income housing project, (2) the breach induced a 1972 agreement settling a dispute between the parties, and (3) the breach amounted to duress. *Ibid.*

Plaintiffs did not ratify a contract obtained by duress by retaining property transferred to them as a result of the contract or by making payment to defendants under the contract. *Ibid.*

EJECTMENT

§ 6. Nature and Essentials of Remedy

Plaintiffs who were legally barred from suing a city for damages for construction of a permanent street on their land could not maintain an action to eject the city from the land. *Costner v. City of Greensboro*, 563.

ELECTRICITY

§ 2.7. Service; Proceedings of Utilities Commission

The Utilities Commission did not err in issuance of a certificate of public convenience and necessity to Duke Power Company for the construction of a nuclear powered generating facility on the Yadkin River. *In re Duke Power Co.*, 138.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

In a prosecution for embezzling nuts and bolts, defendant employee's contention that the State did not prove the crime of embezzlement since defendant was on his employer's premises after normal working hours and was therefore a trespasser is without merit. *S. v. Lancaster*, 528.

EMINENT DOMAIN

§ 13. Actions by Owner for Compensation or Damages

Plaintiffs who were legally barred from suing a city for damages for construction of a permanent street on their land could not maintain an action to eject the city from the land. *Costner v. City of Greensboro*, 563.

EQUITY

§ 2.2. Applicability of Laches to Particular Proceedings

Plaintiff's action for specific performance of a covenant in a deed to reconvey the land conveyed therein to plaintiff if defendant failed to build on it within a certain time was not barred by laches. *Harris & Gurganus v. Williams*, 585.

EVIDENCE

§ 11.3. What Constitutes Transaction with Decedent

Petitioner's testimony that she did not observe deceased with large sums of money on certain dates did not violate the dead man's statute. *Archer v. Norwood*, 432.

§ 11.7. Particular Evidence Barred by Dead Man's Statute

The dead man's statute did not render incompetent as to the corporate defendant testimony by plaintiff concerning conversations with the deceased individual defendant, but did render such testimony incompetent as to the deceased's executrix. *Stone v. Homes, Inc.*, 97.

Testimony by the payee of a note concerning deceased's execution and delivery of the note and a deed of trust and his failure to pay the note when due should have been excluded under the dead man's statute. *In re Cooke*, 575.

§ 11.8. Waiver of Right to Rely on Dead Man's Statute

Defendants did not waive their exceptions to plaintiffs' testimony made incompetent by the dead man's statute when they cross-examined plaintiffs concerning their personal transactions with decedent. *Stone v. Homes, Inc.*, 97.

§ 13. Communications Between Attorney and Client

Testimony by attorneys authenticating letters they had written on behalf of respondent and the letters themselves did not fall within the attorney-client privilege. *Archer v. Norwood*, 432.

§ 17. Negative Evidence

Testimony by two witnesses that deceased did not possess large sums of money on certain dates was not incompetent negative evidence. *Archer v. Norwood*, 432.

EVIDENCE — Continued

§ 25. Photographs

Photographs showing defendant engaged in acts of adultery were not admissible as substantive evidence but would have been admissible only for illustrative purposes. *vanDooren v. vanDooren*, 333.

§ 29.1. Letters

Letters in which defendant failed to refer to certain instruments were competent on the question of the authenticity of those instruments. *Archer v. Norwood*, 432.

§ 31. Best and Secondary Evidence Relating to Writings

Testimony by plaintiff concerning the parties' debts did not violate the best evidence rule. *Cleary v. Cleary*, 272.

§ 45. Evidence as to Value

A proper foundation was not laid for testimony by defendant with respect to the value of improvements made on the subject property. *Passmore v. Woodard*, 535.

§ 48. Competency and Qualification of Experts

The trial court did not err in permitting plaintiffs' witness to testify as an expert that plaintiffs' house was not built according to acceptable construction and engineering standards prevailing in the area at the time. *Stone v. Homes, Inc.*, 97.

§ 49. Hypothetical Questions

The trial court did not err in permitting defendants' expert, who had given his opinion in response to a hypothetical question, to explain how he arrived at his opinion. *Zahren v. Maytag Co.*, 143.

§ 49.1. Basis of Hypothetical Questions

Defendants' expert was properly allowed to answer hypothetical questions which included his opinion from an examination of photographs taken by plaintiffs' expert and testimony by plaintiffs and their expert. *Zahren v. Maytag Co.*, 143.

FORGERY

§ 2.2. Sufficiency of Evidence

State's evidence was insufficient for the jury in a prosecution for forgery and uttering where it failed to show the purported maker of the check was a fictitious person or that the maker's signature was placed on the check without authority. *S. v. Bean*, 40.

FRAUD

§ 12. Sufficiency of Evidence

Plaintiffs' evidence was insufficient to support a claim against the executrix of a deceased defendant for fraud in the sale of a house. *Stone v. Homes, Inc.*, 97.

§ 13. Damages

Fraud in the sale of a house constituted an unfair or deceptive act or practice for which the buyer was entitled to treble damages. *Stone v. Homes, Inc.*, 97.

FRAUDS, STATUTE OF

§ 6. Contracts Affecting Realty

An alleged oral agreement to purchase plaintiffs' farm at a foreclosure sale and convey a portion of that land to plaintiffs was void. *Britt v. Allen*, 732.

HIGHWAYS AND CARTWAYS

§ 3. Highway Patrol

SBI agent's failure to observe the rules of the road while pursuing defendant did not constitute contributory negligence as a matter of law. *Wade v. Grooms*, 428.

HOMICIDE

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

Trial court properly submitted involuntary manslaughter to the jury where the evidence tended to show that defendant shot deceased during a scuffle after leveling a gun at him. *S. v. Godfrey*, 452.

§ 24.2. Instructions on Defendant's Burden of Meeting or Overcoming Presumption of Malice

A defendant tried for murder waived objection to the court's instructions placing on defendant the burden to disprove malice and to prove self-defense when he failed to except to such instructions or assign them as error in his appeal from a conviction of second degree murder. *S. v. Watson*, 399.

§ 28. Instructions on Self-Defense

Trial court did not err in failing to instruct the jury that self-defense was a defense to involuntary manslaughter. *S. v. Godfrey*, 452.

HUSBAND AND WIFE

§ 3. Agency of One Spouse for the Other

A wife's retention of benefits from a contract negotiated by the husband is a circumstance giving rise to an inference the husband was authorized to act for the wife. *Passmore v. Woodard*, 535.

§ 10. Separation Agreement; Compliance with Statutory Formalities

Defendant husband had no standing to attack the constitutionality of the privy examination statute. *Spencer v. Spencer*, 481.

§ 11.2. Separation Agreements; Construction

Trial court properly concluded that an indebtedness secured by a second deed of trust on the parties' homeplace was defendant's obligation. *Cleary v. Cleary*, 272.

In an action to recover sums due under a separation agreement which provided that plaintiff should receive one-fourth of defendant's income for the preceding year, trial court erred in disallowing adjustments to gross income due to losses on the rental of defendant's beach cottage. *Spencer v. Spencer*, 481.

INDICTMENT AND WARRANT

§ 17.1. Variance Between Averment and Proof; Charging Same Offense

There was no fatal variance between an indictment for embezzlement and proof that defendant aided and abetted a codefendant in the embezzlement. *S. v. Lancaster*, 528.

INFANTS

§ 5. Jurisdiction to Award Custody

Trial court had jurisdiction over the child in a custody proceeding though the child was not present in the State. *Dishman v. Dishman*, 543.

§ 6.2. Modification of Custody Order

In a hearing on plaintiff's motion to set aside a child custody order, trial court did not err in refusing to consider visitation rights. *Dishman v. Dishman*, 543.

§ 6.3. Custody Contest Between Parent and Third Party

Trial court's findings failed to support the court's award of custody of a child to its natural mother. *In re Kowalzek*, 364.

§ 20. Juvenile Order; Dispositional Alternatives

Where the court adjudicated the juvenile defendant delinquent but initially deferred disposition and announced conditions of defendant's probation, whereupon defendant openly informed the court that he would not comply with those conditions, the court's entry of disposition committing defendant to training school was proper. *In re Samuels*, 71.

INJUNCTIONS

§ 13.2. Irreparable Injury

Plaintiff showed irreparable injury resulting from a breach of a covenant not to compete sufficient to entitle it to a preliminary injunction. *Amdar, Inc. v. Satterwhite*, 410.

INSURANCE

§ 2.3. Action Against Agent for Failure to Procure Insurance

Trial court properly directed a verdict for plaintiff on defendant's counterclaim which alleged plaintiff's failure to procure insurance on a Franklin Logger. *Sloan v. Wells*, 177.

§ 45. Accident Insurance

Defendant was obligated under its contract upon a finding that insured died from accidental injury, and an air embolism which occurred after surgery removing insured's left arm and shoulder and which caused her death was an accidental bodily injury under the terms of the contract. *Dixon v. Insurance Co.*, 595.

§ 87.3. Drivers Insured; Delegation of Permission by Permittee

Trial court properly concluded that at the time of the collision in question a driver was lawfully in possession of a car insured by plaintiff where the evidence tended to show that the driver had the express permission of insured's son to drive the car. *Engle v. Insurance Co.*, 126.

§ 94. Cancellation of Automobile Insurance

An automobile liability insurance policy was cancelled by surrender of the policy where an insurance agent signed the insured's name on a lost policy cancellation release form pursuant to insured's instructions. *Insurance Co. v. Jackson*, 349.

INTOXICATING LIQUOR

§ 2.5. Violations Without Knowledge of Permittee

The holders of a beer license knowingly allowed the use of their premises for an unlawful purpose where their employee sold heroin on the premises. *Dove v. Board of Alcoholic Control,* 605.

JUDGMENTS

§ 37.3. Res Judicata; Preclusion or Relitigation of Issues

Plaintiff's action to quiet title to a lot in a 1956 division of land was not barred by res judicata or collateral estoppel because of two prior cases involving other lots in the 1956 division. *Blake v. Norman,* 617.

JURY

§ 6.3. Propriety of Voir Dire Examination

Trial court properly sustained the State's objections to questions of defendant's counsel made during the examination of prospective jurors which would tend to commit jurors to a decision on the performance of their duties prior to an instruction by the court. *S. v. Hunt,* 315.

§ 7.1. Grounds for Challenge

Defendant's contention that use of the tax rolls and voter registration books to compile a jury list is unconstitutional since some segments of the population are underrepresented is without merit. *S. v. Thompson,* 444.

§ 7.7. Waiver of Challenge

Defendant waived objection to the denial of his motion to challenge for cause a juror who had served within the preceding two years since defendant had not exhausted his peremptory challenges. *S. v. Spencer,* 739.

§ 7.10. Challenge for Cause; Social, Business or Professional Relationships

Trial court did not err in denying defendant's challenge for cause of a prospective juror who was a police officer and who had heard defendant's case discussed by other police officers. *S. v. Hunt,* 315.

LANDLORD AND TENANT

§ 13.2. Renewals and Extensions of Lease

Trial court properly concluded as a matter of law that a lease between plaintiffs' predecessor in title and defendants was a lease for a term of 10 years with a valid and enforceable covenant for perpetual renewal. *Dixon v. Rivers,* 168.

LARCENY

§ 1. Elements of the Crime

G.S. 14-72 which makes larceny of property of the value of $200 or less a misdemeanor except in three instances does not violate the equal protection or due process provisions of either the State or Federal Constitutions. *S. v. Killian,* 234.

§ 7.1. Proof of Intent

Evidence was sufficient to show respondent had the intent permanently to deprive the owner of a stolen vehicle from his property and to convert it to his own use. *In re Ashby,* 436.

LARCENY—Continued

§ 7.7. Larceny of Automobile

Evidence was sufficient to convict respondent, a passenger in a stolen automobile, of larceny of the vehicle. *In re Ashby*, 436.

LIBEL AND SLANDER

§ 5.1. Libel Per Se

It was libelous per se to write of an employee that she was a trouble maker and gossip who could not get along well with other employees. *Arnold v. Sharpe*, 506.

§ 6. Publication

There was sufficient evidence for the jury to find that a libelous typewritten memorandum prepared by a bank vice president was communicated to the bank president. *Arnold v. Sharpe*, 506.

§ 10.1. Qualified Privilege

Evidence was sufficient to support a finding that a bank vice president's libelous memorandum about plaintiff employee was induced by actual malice and that the doctrine of qualified privilege thus did not apply. *Arnold v. Sharpe*, 506.

§ 15. Competency of Evidence

Financial statements of a bank were admissible on the question of punitive damages in a libel action against the bank. *Arnold v. Sharpe*, 506.

MALICIOUS PROSECUTION

§ 8. Pleadings

Plaintiff's complaint was insufficient to state a claim for relief for malicious prosecution where it failed to allege termination of the prior action in plaintiff's favor but alleged only that "the action of the defendant against the plaintiff was dismissed by the court." *Stanback v. Stanback*, 324.

MASTER AND SERVANT

§ 3. Employee or Independent Contractor

A contract between defendant moving company and defendant Western Electric for the moving of telephone equipment established the relationship of employer and independent contractor. *Robinson v. Moving and Storage, Inc.*, 638.

§ 11.1. Trade Secrets; Solicitation of Former Employer's Customers

Terms of defendant's covenant not to compete were not unreasonable where defendant was prohibited from engaging in the business of teaching dancing or soliciting dancing pupils in an area within a 25 mile radius of plaintiff's business and such restriction was to last for a period of one year. *Amdar, Inc. v. Satterwhite*, 410.

MORTGAGES AND DEEDS OF TRUST

§ 1. Definitions and Nature

Evidence was insufficient to support a jury finding that an absolute deed and option to repurchase constituted a mortgage. *Hodges v. Hodges*, 459.

MORTGAGES AND DEEDS OF TRUST—Continued

§ 9. Release of Part of Land from Lien

In an action to set aside a foreclosure sale and to recover a 42 acre tract which the contract to purchase provided could be selected by purchaser and released from a purchase money deed of trust without any payment being made on the balance of the purchase price, defendant was not entitled to judgment as a matter of law. *Willow Mountain Corp. v. Parker,* 718.

§ 25. Foreclosure by Exercise of Power of Sale

Introduction of a promissory note with evidence of execution and delivery supported the finding of a valid debt in a foreclosure proceeding. *In re Cooke,* 575.

There was sufficient evidence in a foreclosure proceeding that the beneficiaries of the trust were "holders" of the notes secured thereby. *Ibid.*

§ 32.1. Restriction of Deficiency Judgment for Purchase Money Deed of Trust

The statute prohibiting a deficiency judgment after the foreclosure of a purchase money deed of trust has no application to a suit on the underlying obligation. *Realty Co. v. Trust Co.,* 33.

MUNICIPAL CORPORATIONS

§ 30.3. Validity of Zoning Ordinance Generally

A town substantially complied with a statute requiring that its zoning ordinance be filed and indexed in an ordinance book. *Johnson v. Town of Longview,* 61.

§ 30.11. Zoning; Specific Businesses or Activities

If a city zoning officer determined that a concrete mixing operation was a permitted use of premises zoned "limited industrial," the officer acted pursuant to authority granted by the zoning ordinance and the city could not enjoin the use of the premises for a concrete mixing business. *City of Winston-Salem v. Concrete Co.,* 186.

§ 30.20. Procedure for Amendment of Zoning Ordinance

A zoning board was not required to conduct public hearings before making its recommendations to the town board for amendment of the town zoning ordinance. *Johnson v. Town of Longview,* 61.

§ 39.2. Power to Levy Particular Taxes

Trial court erred in holding that a town could impose a $1.00 penalty on plaintiff for failure to pay the town license tax imposed on motor vehicles within the time required by ordinance where there was no evidence the vehicle was licensed by the State. *Cooke v. Futrell,* 441.

§ 43. Action Against City for Trespass and Damage to Lands

Plaintiffs who were legally barred from suing a city for damages for construction of a permanent street on their land could not maintain an action to eject the city from the land. *Costner v. City of Greensboro,* 563.

NARCOTICS

§ 1.3. Elements of Statutory Offenses

Defendant could be convicted both of possession with intent to deliver and sale and delivery of the same controlled substances. *S. v. Joyner,* 216.

NARCOTICS—Continued

§ 4.2. Defense of Entrapment

Evidence with respect to entrapment by an undercover agent was properly submitted to the jury. *S. v. Board,* 581.

§ 4.3. Constructive Possession

Evidence was sufficient for the jury in a prosecution for possession of hashish found in a van. *S. v. Thompson,* 628.

§ 4.6. Instructions as to Possession

Defendant was not prejudiced by the trial court's instruction relating to defendant's proximity to drugs. *S. v. Thompson,* 628.

§ 4.7. Instructions on Lesser Offenses

In a prosecution for possession with intent to sell marijuana and hashish, trial court erred in failing to charge on the lesser offense of felony possession of marijuana in excess of one ounce, and the trial court also erred in instructing on possession of hashish with intent to sell. *S. v. Cloninger,* 22.

NEGLIGENCE

§ 27. Competency of Evidence

In an action by plaintiff to recover for injuries sustained when a switching bay fell on him while it was being moved, trial court did not err in excluding a pamphlet of defendant Western Electric which detailed procedures for handling switching bays. *Robinson v. Moving and Storage, Inc.,* 638.

§ 54. Contributory Negligence of Invitee

A contributory negligence issue was properly submitted to the jury in an action to recover for injuries received when plaintiff fell on a concrete ramp leading from defendant hospital's emergency room. *Prevette v. Hospital,* 425.

§ 57. Nonsuit in Action by Invitee

In an action by plaintiff to recover for injuries, trial court properly granted summary judgment for the owner of the building in which the injuries occurred. *Robinson v. Moving and Storage, Inc.,* 638.

§ 57.10. Action by Invitee; Cases Where Evidence Sufficient

In an action to recover for personal injuries received when a bull knocked plaintiff from an elevated walkway in defendant's livestock auction house, plaintiff's evidence was sufficient for the jury on the issue of defendant's negligence in failing to maintain proper supervision and a reasonably safe enclosure for the protection of his customers. *Sibbett v. Livestock, Inc.,* 704.

PARENT AND CHILD

§ 6.3. Proceedings to Determine Custody

Trial judge is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. *In re Kowalzek,* 364.

Trial court's findings failed to support the court's award of custody of a child to its natural mother. *Ibid.*

PARTITION

§ 7. Actual Partition

Absence of one of three commissioners because of illness when a drawing was held before the clerk to determine the allotment of separate parcels did not invalidate the drawing. *Dunn v. Dunn*, 159.

Evidence supported the court's finding that property could be divided without injury to the cotenants with owelty charged to one parcel. *Phillips v. Phillips*, 388.

A $2,100 diminution in value when property worth $280,000 was partitioned was not a substantial or material impairment of the rights of the cotenants so that an actual partition would be unconscionable. *Ibid.*

§ 7.2. Appeal

The appellate court will not review findings of commissioners as to the value of property in partitioning proceedings. *Phillips v. Phillips*, 388.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 5.2. Licensing of Psychologists

No question as to the constitutionality of sections of the Practicing Psychologist Licensing Act was presented to the court upon the review of the decision of the Board of Examiners of Practicing Psychologists denying a license to petitioner. *In re Partin*, 302.

The statutory requirement that an applicant for a license as a practicing psychologist must have received his doctoral degree "based on a program of studies the content of which was primarily psychological" was neither vague nor uncertain. *Ibid.*

The Board of Examiners of Practicing Psychologists did not exceed the rule-making power delegated it by statute in adopting a rule requiring that an applicant's doctoral degree, if not based on a Ph.D. program in psychology, must have been based on a program of studies which was psychological in nature with a minimum of 60 hours of graduate study in standard psychology courses. *Ibid.*

§ 18. Leaving Foreign Substance in Patient's Body

Plaintiff's evidence was insufficient to show negligence on the part of defendant surgeon in leaving the tip of a scalpel blade embedded in plaintiff's back at the conclusion of disc surgery, and the doctrine of res ipsa loquitur was inapplicable. *Williams v. Dameron*, 491.

PLEADINGS

§ 11.1. Counterclaims

Trial court in a husband's action for absolute divorce erred in striking the wife's counterclaim for alimony without divorce because the wife had previously instituted an action for alimony based upon the same allegations. *vanDooren v. vanDooren*, 333.

§ 32. Right to Amend

A motion to file supplemental pleadings should be allowed unless its allowance would impose a substantial injustice upon the opposing party. *vanDooren v. vanDooren*, 333.

PLEADINGS – Continued

§ 33.3. Amendment to Conform to Proof

Trial court properly denied plaintiffs' motion to amend their complaint to conform to evidence of fraud. *Munchak Corp. v. Caldwell,* 240.

§ 34. Amendment as to Parties

Trial court did not err in refusing to allow plaintiff to amend his complaint to add a party defendant where plaintiff's claim against such defendant would be barred by the statute of limitations. *Callicutt v. Motor Co.,* 210.

PROCESS

§ 3. Time of Service

Trial court was without jurisdiction to enter judgment against defendant where process was served on defendant more than 30 days after it was issued, the time for service was not extended, and no alias or pluries summons was issued. *Cole v. Cole,* 737.

§ 9.1. Nonresident Individuals; Minimum Contacts Test

Courts of this State had personal jurisdiction over nonresident defendants in an action to recover on promissory notes guaranteeing payment to plaintiff N.C. corporation for merchandise delivered to a Virginia corporation. *Buying Group, Inc. v. Coleman,* 26.

§ 19. Actions for Abuse of Process

Plaintiff's complaint was insufficient to allege abuse of process where it failed to allege any bent or inappropriate act in an otherwise proper proceeding. *Stanback v. Stanback,* 324.

PROSTITUTION

§ 1. Constitutionality of Statutes

That portion of G.S. 14-186 which states that it is a misdemeanor for persons of the opposite sex to occupy the same bedroom in any hotel or motel for any immoral purpose is too vague and indefinite to comply with constitutional due process standards. *S. v. Sanders,* 53.

RECEIVING STOLEN GOODS

§ 2. Indictment

Defendant could not be convicted of feloniously receiving stolen goods in violation of G.S. 14-71 when tried on an indictment charging felonious possession of a motor vehicle in violation of G.S. 20-106. *S. v. Carlin,* 228.

§ 6. Instructions

Trial court did not err in instructing the jury to return a verdict of guilty if defendant, at the time of receiving the stolen goods, knew or had reasonable grounds to believe the goods had been stolen. *S. v. Bowden,* 191.

REFORMATION OF INSTRUMENTS

§ 6. Competency of Evidence

In an action to reform a provision of a written contract for mutual mistake, trial court did not err in refusing to allow plaintiffs' witnesses to testify that an "agreement" other than the written contract had been reached and in instructing the jury to consider the word "agreement" only as it related to preparation of a final draft for adoption of the parties. *Munchak Corp. v. Caldwell*, 240.

ROBBERY

§ 1.1. Armed Robbery

Defendant could be convicted of armed robbery where he contended that the money taken in the robbery was owed him by the victim from the victim's sale of marijuana for defendant. *S. v. Oxner*, 600.

§ 4.3. Armed Robbery Cases Where Evidence Sufficient

Property was taken from the presence of the victim and the crime constituted armed robbery where the victim was forced at gunpoint to leave an office and enter a bathroom and the property was then taken from the office. *S. v. Thompson*, 651.

Nonsuit was not required in an armed robbery case because one victim testified she "couldn't tell if it was a toy pistol." *Ibid.*

Evidence was sufficient for the jury in a prosecution for robbery of a theatre with a firearm. *S. v. Gregory*, 693.

§ 4.6. Cases Involving Multiple Perpetrators, Including Accessories and Accomplices

Evidence was sufficient for the jury to find that defendant acted in concert with another in an armed robbery, and the trial court did not err in failing to submit to the jury the lesser included offense of larceny. *S. v. Moore*, 248.

State's evidence was sufficient to show defendant was a participant in an armed robbery. *S. v. Drakeford*, 340.

State's evidence was sufficient for the jury in a prosecution for accessory after the fact of armed robbery of a convenience store. *S. v. Cox*, 356.

§ 5.4. Instructions on Lesser Included Offenses

Trial court in an armed robbery case was not required to submit common law robbery because of the failure of the State's witnesses to testify that the shotgun used by defendant was not a toy. *S. v. Davis*, 173.

Trial court in an armed robbery case was not required to charge on the lesser included offense of common law robbery because of a victim's uncertainty as to whether one of two guns used in the robbery was real. *S. v. Thompson*, 651.

§ 6. Verdict

Trial court properly accepted a verdict of guilty of attempted robbery with a firearm after the jury foreman first indicated the jury found defendant "guilty of attempted firearm." *S. v. Davis*, 173.

Where the jury had already rendered a verdict of guilty of attempted armed robbery against defendant, the fact that the jury asked for an explanation of the elements of attempted armed robbery during its deliberations as to a codefendant did not show the jury did not understand the elements of the charges against defendant. *S. v. Oxner*, 600.

RULES OF CIVIL PROCEDURE

§ 12. Defenses and Objections; Motion for Dismissal

The fact that the Supreme Court had directed that this case be remanded to superior court for a trial de novo did not prohibit superior court upon remand from allowing defendant's motion for dismissal. *Britt v. Allen*, 732.

The trial court erred in granting judgment on the pleadings in an action for a declaration of rights in a right-of-way across defendants' land. *Pipkin v. Lassiter*, 36.

§ 13. Counterclaims

Trial court in a husband's action for absolute divorce erred in striking the wife's counterclaim for alimony without divorce because the wife had previously instituted an action for alimony based upon the same allegations. *vanDooren v. vanDooren*, 333.

§ 15.1. Discretion of Court to Allow Amendment of Pleadings

Trial court did not err in refusing to allow plaintiff to amend his complaint to add a party defendant where plaintiff's claim against such defendant would be barred by the statute of limitations. *Callicutt v. Motor Co.*, 210.

A motion to file supplemental pleadings should be allowed unless its allowance would impose a substantial injustice upon the opposing party. *vanDooren v. vanDooren*, 333.

§ 37. Sanctions for Failure to Make Discovery

There is no requirement that the court find that the failure to appear for a deposition was willful before the court may impose sanctions for failure to appear. *Imports, Inc. v. Credit Union*, 121.

Trial court did not err in granting judgment against defendant as a sanction for defendant's failure to appear for a deposition. *Imports, Inc. v. Credit Union*, 121.

In an action to recover on a construction contract where defendants failed to comply with a discovery order requiring specific information with respect to three of defendants' defenses, trial court did not abuse its discretion in entering an order striking those defenses. *Plumbing Co. v. Associates*, 149.

§ 41.1. Voluntary Dismissal

A voluntary dismissal under G.S. 1A-1, Rule 41, will lie only prior to entry of final judgment. *Wood v. Wood*, 570.

§ 41.2. Voluntary Dismissal; Failure to Pay Costs

Trial court properly dismissed plaintiff's action because of plaintiff's failure to pay the costs of a prior action against defendant based on the same claim. *Thigpen v. Piver*, 382.

§ 46. Objections and Exceptions

The question of the validity of the trial court's ruling denying defendants' motion to dismiss was properly preserved and brought forward on appeal. *Barbour v. Little*, 686.

§ 50.2. Directed Verdict Against Party With Burden of Proof

Trial court erred in directing a verdict in favor of plaintiff in a trespass action where plaintiff's right to recover depended upon the credibility of her witnesses. *Schell v. Rice*, 377.

RULES OF CIVIL PROCEDURE—Continued

§ 50.3. Grounds for Motion for Directed Verdict

Defendants' failure to state specific grounds for their motion for directed verdict at the close of all the evidence was not fatal in this case. *Hodges v. Hodges*, 459.

§ 50.5. Appeal of Motion for Directed Verdict

An appellate court could not direct entry of judgment in accordance with the motion for directed verdict made at the close of all the evidence where the movant did not make a motion for judgment n.o.v. *Hodges v. Hodges*, 459.

§ 52. Findings by Court

A court need not make findings as to meritorious defense after a hearing on a motion to set aside a judgment for excusable neglect when it concludes there was no excusable neglect shown, but it would be the better practice to make such findings. *Dishman v. Dishman*, 543.

§ 56. Summary Judgment

Where there was no showing that an affidavit was based upon the personal knowledge of the affiant or that he was otherwise competent to testify to the matters stated therein, the court could not consider the affidavit upon plaintiff's motion for summary judgment. *Nugent v. Beckham*, 557.

The denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment. *Barbour v. Little*, 686.

§ 56.5. Findings on Motion for Summary Judgment

In a hearing upon the parties' motions for summary judgment, trial court did not err in failing to find facts, even though petitioners filed a written request for findings. *Garrison v. Blakeney*, 73.

§ 60. Relief from Judgment or Order

An order awarding custody of the parties' child to defendant was a final order under G.S. 1A-1, Rule 60(b) though the order could be changed subsequently upon a proper showing of change of circumstances. *Dishman v. Dishman*, 543.

§ 60.1. Motion for Relief from Judgment; Notice

Even though an order striking a divorce judgment on plaintiff's motion was entered during the same term as the divorce judgment itself, before the judgment of divorce could be stricken notice should have been given to defendant and a hearing should have been held. *Wood v. Wood*, 570.

§ 60.2. Grounds for Relief from Judgment

In a hearing on plaintiff's motion to set aside a child custody order on the ground of excusable neglect, negligence of plaintiff's attorney should not be imputed to plaintiff. *Dishman v. Dishman*, 543.

SALES

§ 10.1. Action for Purchase Price

Where the original defendant gave plaintiff a worthless check for the purchase price of pigs and the additional defendants acted as agent for the original defendant

SALES—Continued

when they thereafter sold the pigs to third parties and applied the proceeds of the sale to debts owed by the original defendant to the additional defendants, title to the pigs remained in plaintiff and plaintiff was entitled to recover proceeds of the sale of the pigs from the additional defendants. *Stock Yards v. Williams*, 698.

§ 10.2. Burden of Proof and Sufficiency of Evidence in Action for Purchase Price

Plaintiff's evidence established a prima facie case for recovery of the invoice prices of goods sold, and defendant's evidence failed to overcome the weight of plaintiff's case. *Manufacturing Co. v. Manufacturing Co.*, 726.

§ 19. Damages for Breach of Warranty

Trial court properly instructed the jury that the measure of damages for breach of implied warranty in the sale of a house was either the difference in fair market value or the amount required to bring the house up to the standard of the warranty. *Stone v. Homes, Inc.*, 97.

Breach of express and implied warranties in the sale of a house did not constitute unfair trade practices. *Ibid.*

§ 22. Defective Goods; Action for Personal Injuries

Failure of the manufacturer of a clothes dryer to install a fail-safe device on the dryer did not constitute negligence. *Zahren v. Maytag Co.*, 143.

§ 23. Inherently Dangerous Articles

A clothes dryer was not a dangerous instrumentality. *Zahren v. Maytag Co.*, 143.

SCHOOLS

§ 1. Maintenance of Schools

The Dyslexia School of N. C., Inc., a nonprofit corporation, could not receive appropriations and expenditures from the county's unappropriated general fund as a constitutionally permissible means of achieving the desirable end of assisting in the education of dyslexic children of Gaston County. *Hughey v. Cloninger*, 107.

SEALS

§ 1. Generally

Summary judgment was improper where there was a genuine issue of fact as to whether a grantor placed a sign on a deed and adopted it as his seal. *Garrison v. Blakeney*, 73.

Where the maker of a note offered evidence on a motion for summary judgment that he did not adopt the word "SEAL" as his seal, there was a genuine issue of fact as to whether the maker adopted that word as his seal and, thus, whether the note was a sealed instrument subject to the ten-year statute of limitation. *Bank v. Cranfill*, 182.

The word "seal" beside the maker's signature created a presumption of consideration where there was no proof the maker did not adopt it as her seal. *In re Cooke*, 575.

SEARCHES AND SEIZURES

§ 11. Probable Cause to Search Vehicles

Officers had probable cause to search defendant's automobile for the fruits of an armed robbery of a convenience store. *S. v. Cox*, 356.

An officer had probable cause to conduct a warrantless search of defendant's car for marijuana based on information received from a previously unknown informant. *S. v. Tickle*, 416.

Arrest of defendants and search of their vehicle based upon an officer's prior unlawful seizure of a shot glass from the vehicle were improper, and evidence seized by virtue of the arrest and searches should have been excluded. *S. v. Beaver*, 513.

§ 14. Voluntary Consent to Search

Defendant's consent, while in custody, for a search of his home was valid. *S. v. Phillips*, 202.

Evidence was sufficient to support the trial court's conclusion that a search of defendant's automobile was made with his consent, and the court did not err in failing specifically to find that the voluntary consent was given without duress. *S. v. Hunt*, 315.

§ 17. Consent by Owner of Premises

Officers properly seized a bag of money from a trailer where the owner gave her consent to search. *S. v. Bates*, 276.

§ 28. Issuance of Warrant

Commanding officers of military bases qualify as neutral and detached magistrates for the purpose of determining probable cause to issue search warrants, and searches and seizures made pursuant to authority issued by the commanding officer of a military installation upon probable cause, even though not supported by oath or affirmation, are valid and constitutional. *S. v. Long*, 662.

§ 30. Description of Place to be Searched

Description in a search warrant of the premises to be searched together with the executing officer's testimony that he knew the premises and had seen defendant about the premises on several occasions adequately described the premises to be searched. *S. v. Cloninger*, 22.

§ 32. Items Which May be Searched for and Seized

A limited frisk for weapons could constitutionally be made of all individuals present in a private residence for which officers had a search warrant for contraband, and officers reaching into defendant's boot in no way transformed the frisk of defendant for weapons into a complete search for contraband. *S. v. Long*, 662.

§ 34. Items in Plain View in Vehicle

Tinfoil wrapped packages of hashish seized without a warrant from the recessed tray beneath the dashboard of the van in which defendants were sitting were properly admitted into evidence. *S. v. Thompson*, 628.

§ 35. Search Incident to Arrest

Where officers had a warrant for defendant's arrest, seizure of a pistol from under the pillow on which defendant was resting his head was incident to a lawful arrest whether defendant had been formally arrested at the time of the seizure or not. *S. v. Bates*, 276.

SEARCHES AND SEIZURES — Continued

§ 43. Motion to Suppress Evidence

Defendants waived any right to challenge on constitutional grounds the admission of evidence seized during a search of one defendant's motel room where the record failed to show whether defendants moved to suppress the seized evidence pursuant to Art. 53 of G.S. Ch. 15A. *S. v. Drakeford*, 340.

STATE

§ 6. Employees of State Under Tort Claims Act

The director of a county department of social services was acting as an agent of the State in administering a foster home program funded by the State Foster Home Fund, and the Industrial Commission had jurisdiction of a claim based on alleged negligence in the placement of a child in a foster home under such program. *Vaughn v. Dept. of Human Resources*, 86.

§ 8.2. Negligence of State Employee; Particular Actions

Evidence supported the Industrial Commission's determination that defendant's employees were actionably negligent in this action to recover for injuries suffered by plaintiff when a fog machine being used for a stage production at the School of the Arts exploded. *Potter v. School of the Arts*. 1.

§ 10. Appeal of Tort Claim Proceeding

No appeal lies from an interlocutory order of the Industrial Commission. *Vaughn v. Dept. of Human Resources*, 86.

TAXATION

§ 7.1. Public Purpose

The Dyslexia School of N. C., Inc., a nonprofit corporation, could not receive appropriations and expenditures from the county's unappropriated general fund as a constitutionally permissible means of achieving the desirable end of assisting in the education of dyslexic children of Gaston County. *Hughey v. Cloninger*, 107.

§ 26. License Taxes

Trial court erred in holding that a town could impose a $1.00 penalty on plaintiff for failure to pay the town license tax imposed on motor vehicles within the time required by ordinance where there was no evidence the vehicle was licensed by the State. *Cooke v. Futrell*, 441.

§ 28. Individual Income Tax

No parol trust for the benefit of petitioners' son was created in one of three lots received by petitioners in the sale of their farm, and petitioners received more than 30% of the selling price in the year of sale and were not permitted to report the income from the sale of their farm on the installment basis. *Riggs v. Coble*, 266.

§ 38. Remedies of Taxpayer Against Collection of Tax

State income tax paid by plaintiff on unemployment compensation could not be recovered where plaintiff paid voluntarily and without compulsion, even if the taxes were levied unlawfully, in the absence of plaintiff's demand for refund within 30 days after payment. *Stenhouse v. Lynch*, 280.

TRESPASS

§ 4. Parties Who May Sue

A life tenant of land had the right to maintain an action for trespass based on defendant's construction of a building on the land. *Schell v. Rice*, 377.

§ 7. Sufficiency of Evidence

Trial court did not err in denying defendants' motion for directed verdict in an action to recover damages for cut timber since the evidence was sufficient to permit the jury to determine what trees, and the value thereof, which each party had cut across the boundary line of the land of the other. *Sipe v. Blankenship*, 499.

TRESPASS TO TRY TITLE

§ 1. Nature of Right of Action

A life tenant of land had the right to maintain an action for trespass based on defendant's construction of a building on the land. *Schell v. Rice*, 377.

§ 4. Sufficiency of Evidence of Title

Plaintiff's evidence was sufficient to show title by adverse possession under color of title. *Schell v. Rice*, 377.

§ 4.1. Fitting Descriptions to Land Claimed

Plaintiff's evidence in a trespass action was sufficient to establish the location on the ground of the boundary lines of the property described in the complaint. *Schell v. Rice*, 377.

TRIAL

§ 15. Objections to Evidence; Voir Dire

Error in the trial court's denial of a motion to conduct a voir dire to determine a witness's personal knowledge of defendant's testing procedures about which he testified was harmless. *Zahren v. Maytag Co.*, 143.

§ 52.1. Setting Aside Verdict for Excessive Award

Trial court did not err in failing to remit a portion of the verdict in an action for breach of warranty and fraud in the sale of a house. *Stone v. Homes, Inc.*, 97.

TROVER AND CONVERSION

§ 4. Damages

Plaintiff was entitled under the common law to recover compensatory damages for conversion of a mobile home and its contents but was not entitled under the common law or G.S. 99A-1 to recover punitive damages for such conversion. *Russell v. Taylor*, 520.

TRUSTS

§ 19. Resulting and Constructive Trusts

No parol trust for the benefit of petitioners' son was created by an agreement that, if the sale of their farm was consummated, their son would receive one of the three lots which the purchaser was to convey as partial consideration for the farm or the money derived from the sale of one of the lots if the purchaser sold the lots pursuant to the planned purchase contract. *Riggs v. Coble*, 266.

TRUSTS—Continued

Plaintiff's claim that his brother held property conveyed to him by plaintiff in trust for plaintiff was not supported by the evidence. *Hodges v. Hodges*, 459.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Fraud in the sale of a house constituted an unfair or deceptive act or practice for which the buyer was entitled to treble damages, but breach of express and implied warranties in the sale of the house did not constitute such an act or practice. *Stone v. Homes, Inc.*, 97.

Trial court properly refused to award attorney's fees to a plaintiff who prevailed in a suit to recover for deceptive acts and practices in the sale of a house. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 20. Acceptance of Goods

Defendant accepted an automobile sold to her by plaintiff. *Imports, Inc. v. Credit Union*, 121.

§ 24. Revocation of Acceptance of Goods

An automobile buyer had no right to revoke her acceptance of an automobile because the odometer was not working when the car was delivered or because the fan belt broke two days after the delivery. *Imports, Inc. v. Credit Union*, 121.

§ 27. Seller's Remedies

Plaintiff's evidence established a prima facie case for recovery of the invoice prices of goods sold, and defendant's evidence failed to overcome the weight of plaintiff's case. *Manufacturing Co. v. Manufacturing Co.*, 726.

§ 46. Commercial Reasonableness in Sale of Collateral

In an action to obtain a deficiency judgment, trial court erred in directing verdict for plaintiff where defendant offered evidence of gross inadequacy of price received for the collateral. *Allis-Chalmers Corp. v. Davis*, 114.

UTILITIES COMMISSION

§ 15. Regulation of Electric Companies

The Utilities Commission did not err in issuance of a certificate of public convenience and necessity to Duke Power Company for the construction of a nuclear powered generating facility on the Yadkin River. *In re Duke Power Co.*, 138.

VENDOR AND PURCHASER

§ 5. Specific Performance

Trial court did not err in granting specific performance of a contract to convey, abatement and an accounting though plaintiffs did not specifically pray for an abatement and accounting in their complaint. *Nugent v. Beckham*, 557.

VENDOR AND PURCHASER—Continued

§ 5.1. Matters Precluding Specific Performance

Plaintiff was not entitled to specific performance or partial specific performance of an option contract where there was no evidence to show the proper amount of reduction in the purchase price because of encumbrances on the property. *Passmore v. Woodard,* 535.

§ 8. Damages for Vendor's Breach

Where defendant vendors were unable to convey to plaintiff clear title to land pursuant to an option contract, plaintiff was entitled to recover the sum which she paid under the option agreement and could recover an amount by which improvements made by her enhanced the value of the land. *Passmore v. Woodard,* 535.

In an action for specific performance of a contract to convey land, evidence as to the cost involved in bringing the property in question into compliance with local ordinances and restrictive covenants was one factor which could be properly considered by the jury in determining damages. *Nugent v. Beckham,* 557.

Denial of interest to all parties in the discretion of the trial court in an action for specific performance was proper. *Ibid.*

WITNESSES

§ 1. Competency of Witness

Error in the trial court's denial of a motion to conduct a voir dire to determine a witness's personal knowledge of defendant's testing procedures about which he testified was harmless. *Zahren v. Maytag, Co.,* 143.

§ 8.3. Scope of Cross-Examination

A party should be allowed to cross-examine his opponent with respect to the contents of a writing upon which he relied on direct examination. *Cleary v. Cleary,* 272.

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina