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Appeal and Error -- Criminal Law -- Examination of Record for Reversible Error Upon Court's Own Motion in Capital Cases

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Appeal and Error—Criminal Law—Examination of Record for Reversible Error Upon Court's Own Motion in Capital Cases*

The general function of an appellate court is to review the rulings of a lower court for the purpose of determining whether or not reversible error has been committed.[1] Accordingly, the North Carolina Supreme Court will look into the charge of the trial judge for those errors assigned[2] and discussed[3] in the appellant's brief which were (1) reserved by timely objections during the trial,[4] and (2) some which were not objected to during the trial provided they come within certain classes, such as a misstatement of the law by the trial judge,[5] or an expression of an opinion by the trial judge,[6] or an inclusion in the judge's summation of the evidence of a material fact not properly before the court

* All capital cases appearing herein are designated by an asterisk (*).

[1] "It has . . . long been considered the law of this Court, that only those points which were ruled below and presented in the bill of exceptions can be heard here unless they appear upon the record proper." State v. Langford, 44 N. C. 436, 442 (1853).* We have repeatedly held that cases on appeal, in the nature of bills of exception, are understood to present only such errors as are assigned, and we cannot allow defects to be searched for and made grounds of complaint not contemplated in the appeal." Davis v. Council, 92 N. C. 725, 731 (1885). "No exceptions not . . . filed and made a part of the case or record shall be considered by this Court, other than exceptions to jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment." Rule 21, Rules of Practice in the Supreme Court of North Carolina, 221 N. C. 544, 558 (1942).

[2] "Those . . . exceptive assignments of error in the record . . . not brought forward . . . in the appellant's brief are deemed to be abandoned." Karpf v. Adams, 237 N. C. 106, 111, — S. E. 2d — (1953). "The . . . exception noted by the defendant during the trial was not referred to in his brief, and therefore is deemed abandoned." State v. Cox, 217 N. C. 177, 178, 7 S. E. 2d 473, 474 (1940). See also State v. Biggs, 224 N. C. 722, 728, 32 S. E. 2d 352, 356 (1944) in which the court repeated the applicable law that the exceptions not referred to in the brief are deemed abandoned "but we have examined each of these exceptions . . . and are unable to discover any exception which can be sustained . . . no error."

[3] "Assignments of error which are brought forward in the brief 'in support of which no reason or argument is stated or authority cited' are deemed to be abandoned." Karpf v. Adams, 237 N. C. 106, 111, — S. E. 2d — (1953). *Accord:* State v. Hightower, 236 N. C. 62, 64, 36 S. E. 2d 649, 650 (1945);* State v. Gibson, 221 N. C. 252, 255, 20 S. E. 2d 51, 53 (1942);* State v. Howil, 213 N. C. 782, 785, 197 S. E. 611, 613 (1938).

[4] An excellent short summation of the rule appears in State v. Lambe, 232 N. C. 570, 571, 61 S. E. 2d 608, 610 (1950);* "Under the appellate practice . . . in this jurisdiction, it is not incumbent upon a litigant to except at the trial to errors in the instructions of the judge as to the applicable law, or in the instructions of the judge as to the contentions of the parties with respect to such law. It is sufficient if he sets out his exceptions to errors in such instructions for the first time in his case on appeal. The rule is otherwise, however, where the judge misstates the evidence, or the contentions of the parties arising on the evidence. When that occurs, the litigant must call the attention of the judge to the misstatement at the time it is made."

[5] State v. Lambe, 232 N. C. 570, 571, 61 S. E. 2d 608, 610 (1950).*

[6] N. C. GEN. STAT. § 1-180 (1943, recompiled 1950) and annotations. "No judge. in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, . . . but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising therein."

either because it was excluded as improper or never presented at all.[7]

There are times, however, when our Court is not encumbered by these procedural requisites. For instance, when reversible error appears on the "record proper"[8] the Court will reverse irrespective of such requisites.[9] As to capital cases, although there is dicta to indicate that whenever reversible error appears anywhere on the entire record the Court will reverse in the same manner as if the error had met the requisites of procedure,[10] the decisions in point hold, nevertheless, that the Court will not recognize error on its own motion unless it appears on the "record proper."[11]

[7] This rule seems to have originated in the case of State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924),* wherein the lower court "after excluding the proposed testimony of a serious assault by deceased on the witness's (*sic*) [prisoner's] aged father 30 months before as being too remote, puts it to the jury . . . evidence to show the origin of the prisoner's malice and as tending to support the State's contention that this was murder done of a deliberate and settled purpose. . . . Like an expression of an opinion by the Court . . . the harmful impression could not well be effaced, and . . . should not be taken as waived because not presently excepted to." In State v. Isaac, 225 N. C. 310, 34 S. E. 2d 410 (1945);* State v. Wyont, 218 N. C. 505, 11 S. E. 2d 473 (1940);* and Smith v. Stanfield Hosiery Mill, Inc., 212 N. C. 661, 194 S. E. 83 (1937), the rule in State v. Love was followed. In Steelman v. Benfield, 228 N. C. 651, 654, 46 S. E. 2d 829, 832 (1948), the rule was distinguished as follows: "Exceptions to excerpts from the court's review of this and other testimony offered point out inaccurate statements of facts in evidence rather than statements of fact not shown in evidence. Hence . . . cases [as State v. Love] are not in point. . . . As the Court's attention was not called thereto and exceptions are not entered in apt time, they are not now tenable."

[8] The *record proper* in such a case shows: "1. The day on which the court convened. 2. The name of the judge who presided. 3. Organization and action of the grand jury. 4. The indictment (set out in full). 5. The impaneling and action of the petit jury. 6. The judgment. 7. Appeal entries. 8. Facts constituting abandonment of the appeal, or failure to prosecute it." State v. Watson, 208 N. C. 70, 71, 179 S. E. 455, 456 (1935).*

[9] ". . . where the error is manifest on the face of the record, even though it be not the subject of an exception, it is the duty of the Court to correct it, and it may do so of its own motion, . . ." Gibson v. Central Manufacturer's Mutual Insurance Co., 232 N. C. 712, 715, 62 S. E. 2d 320, 322 (1950). See also note 2 *supra*. The terms "record proper" and "face of the record" seem to be used interchangeably.

[10] "This exception and this assignment of error fall short of the requirement that 'when it is claimed that the findings of fact made by the trial judge are not supported by the evidence, the exceptions and the assignments of error in relation thereto must specifically and distinctly point out the alleged errors.' Since the petitioner's life hangs in the balance, we have nevertheless examined and weighed the evidence in this proceeding with the same meticulous and painstaking care we would have employed had he noted appropriate exceptions and assignments of error to all of the findings of fact adverse to him." Miller v. State, 237 N. C. 29, 44, — S. E. 2d — (1953).* See also State v. Biggs, 224 N. C. 722, 728, 32 S. E. 2d 352, 356 (1944).*

[11] ". . . exception . . . to a matter occurring in the array of the evidence and the statement of the contentions . . . comes within the general rule. We fully realize that we are dealing with a capital case, but the exceptive matter is not of such a character to take it out of this rule. . . . No error." State v. Hooks, 228 N. C. 689, 697, 47 S. E. 2d 234, 239-240 (1948).* Also see State v. Lambe, 232 N. C. 570, 61 S. E. 2d 608 (1950).*

In the recent capital case of *State v. McCoy*,[12] our Supreme Court found reversible error in the judge's summation of the evidence even though there was no objection at the trial, nor any mention of the error in the brief of the appellant. The Court gave as its reasons for reversing on its own motion: (1) that the error was within the class that does not require timely objection to reserve the point for consideration on appeal; and (2) that the Court will search the record and take cognizance of such prejudicial error on its own motion.

There seems to be sufficiently clear authority to support the first step[13] in the reasoning of the Court; for this was an inclusion by the trial judge of a material fact in the summation of the evidence which was not supported by the record. However, even though an error falls within the class that does not require timely objection to preserve it, ordinarily it must be presented in appellant's brief before it will be considered on appeal.[14] To overcome this normal obstruction the Court in the principal case stated that (a) it will examine the record for the ascertainment of reversible error in capital cases, and (b) if found, it then becomes the duty of the Court to act of its own motion on the error so found.

The principal case appears, however, to be the first instance in which our Court has interpreted the language "will examine the record for the ascertainment of reversible error" as authorizing the Court to act upon its own motion in recognizing such error in the charge. Granted that the language is sweeping, it seems doubtful that the Court using it heretofore meant it to be so inclusive. This rationale is borne out to some degree by the fact that similar language has been used in civil cases in which there seems little doubt that such examination is limited to the error appearing in the record proper or in a bill of exceptions.[15] Furthermore, nine out of ten cases relied upon by the Court in the principal case as supporting this general rule of examining the entire

[12] 236 N. C. 121, 71 S. E. 2d 921 (1952).*

[13] "The Court . . . told the jury that the State's evidence tended to show that the defendant 'stabbed him from the rear, whereupon the deceased fell to the ground.' And further that the State offered evidence to show that 'while the defendant was stabbing the deceased and while he was striking the deceased with the axe that the deceased's wife was begging the defendant not to kill her husband.'" The Court could find no testimony in the record "in support of the above quoted excerpts from the charge." State v. McCoy, 236 N. C. 121, 124, 71 S. E. 2d 921, 923 (1952).* This seems to be well within the class of error governed by the rule in State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924).

[14] The application of the rule in State v. Love, 187 N. C. 32, 34-35, 121 S. E. 20, 21 (1924)* has been confined to cases in which the error was adequately presented and discussed in the appellant's brief. The effect of the rule is only to say that such error is not waived "by not presently objecting." See note 7 *supra*.

[15] Livingston v. Livington, 235 N. C. 512, 515, 70 S. E. 2d 478, 480 (1952) (Civil action for personal injury: "after an examination of the entire record. . . . find no sufficient grounds to disturb the results of the trial. No error."). Also see note 2 *supra*.

record in capital cases were dismissals of incompleted appeals[16] in which nothing but the "record proper" (or "the face of the record") was before the Court. The one case cited by the Court as supporting the statement that "If upon such an examination, error is found, it then becomes the duty of the Court on its own motion to recognize and act upon the error so found"[17] said, "As is customary in capital cases, however, we have examined the record to see that no error appears upon the face thereof, such errors, if any being cognizable *sua sponte*."[18] This case was also a dismissal of an incompleted appeal and the judge's charge, not being a part of the record proper, was not before the Court.[19]

It is difficult to say what the principal case means other than that it is something definite in an area which, heretofore, was foggy. There are at least two variables which are determinative of the importance of this case. The first concerns the type of error in the charge to be considered within the realm of review by the Court on its own motion. There are several types of error that appear similar to that found in the principal case: (1) the narrow limit is error which can be classed as an erroneous inclusion of a material fact in the charge;[20] (2) more reasonably, *any* error that is not waived by failure to reserve it at the trial;[21] (3) the broad limit which includes all error in (2) above and also any error reserved but not relied upon in the appellant's brief.[22] There seems no logical reason why the broad limit is not inferable.

The second variable in the importance of the principal case exists as to the meaning of the words "if error is found it then becomes the *duty* of the Court upon its own motion to recognize and act upon the error so found." Does this really mean a duty? If it means a duty then is it not reciprocally a right of the appellant? Can the Court mean that such error is as much before it as the same error properly

[16] All cases cited on this point by the principal case affirmed the ruling of the lower court and furtherfore nine of the ten cases relied upon were petitions for dismissal of an incompleted appeal under Rule 17, Rules of Practice in the Supreme Court of North Carolina, 221 N. C. 544, 551 (1942). State v. Garner, 230 N. C. 66, 51 S. E. 2d 895 (1949);* State v. Brooks, 224 N. C. 695, 200 S. E. 426 (1938);* State v. Morrow, 220 N. C. 441, 17 S. E. 2d 507 (1941);* State v. Page, 217 N. C. 288, 7 S. E. 2d 559 (1940);* State v. Williams, 216 N. C. 740, 6 S. E. 2d 492 (1940);* State v. Moore, 216 N. C. 543, 5 S. E. 2d 719 (1939);* State v. Stovall, 214 N. C. 627, 31 S. E. 2d 754 (1944);* State v. Sermons, 212 N. C. 767, 194 S. E. 469 (1937);* and State v. Watson, 208 N. C. 70, 179 S. E. 455 (1935);* were all dismissed under Rule 17. Therefore all that appeared in these cases was the "record proper" which of course does not contain the charge and evidence of the case. State v. West, 229 N. C. 416, 50 S. E. 2d 3 (1948) is the only cited case in which there was a completed appeal and that case involved a rather summary dismissal.

[17] State v. McCoy, 236 N. C. 121, 123, 71 S. E. 2d 921, 922 (1952).*

[18] State v. Sermons, 212 N. C. 767, 768, 194 S. E. 469 (1937).*

[19] See note 9 *supra*.

[20] See note 7 *supra*.

[21] See notes 5-7 *supra*.

[22] See notes 5-7 *supra* and also note 4 *supra*.

assigned? Or does the Court, more likely, mean something less than this? A strict duty would require the Court to examine the charge as appellant's counsel, and sift out his better points. It seems questionable, at least, that the Court intends to saddle itself with such a duty, but more likely that it intends to act at its discretion in such a matter.

Even if the latter of these is the proper meaning to be attached to the principal case the solicitor is burdened with a duty heretofore unrealized—namely, to see that the evidence stated in the case on appeal supports the summation of the evidence by the trial judge with respect to all material facts in any case in which any error in the charge is urged.[23] The Court will not go beyond the record on appeal[24] and a situation in which the charge is not so supported falls within even a narrow interpretation of the principal case.

This seems of little practical significance to trial attorneys who would not conceivably rely on such in the handling of a case, and it seems academic to argue that it lessens the demand for diligence on the part of the attorney for the appellant. It is submitted, however, that the principal case is significant in that it better defines and perhaps extends the means by which the Court will reverse capital cases. It is a liberal and wise affirmance of our policy of jealously guarding the rights of persons convicted of capital felonies.

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Conflict of Laws—Divorce—Domicile of Military Personnel

Military personnel often face a perplexing problem in acquiring a divorce, because of the prerequisites which are peculiar to such a proceeding. Every state requires a statutory period of "residence" within its borders before a petition for divorce can be filed in its courts.[1] The word "residence," as used in these statutes, is interpreted as meaning "domicile,"[2] for "under our system of law, judicial power to grant a

[23] State v. White, 232 N. C. 385, 61 S. E. 2d 84 (1950). It seems wise to set out the whole charge where error as to any part is alleged since the court will construe the charge as a whole to determine if there is prejudicial error. Swinton v. Savoy Realty Co., 236 N. C. 723, 727, 73 S. E. 2d 785, 788 (1953). *But see* Upchurch v. Robertson, 127 N. C. 127, 129, 37 S. E. 157, 159 (1900).

[24] The court can "judicially know only what properly appears on the record." State v. Ravensford Lumber Co., 207 N. C. 47, 48, 175 S. E. 713, 714 (1934).

[1] See N. C. GEN. STAT. §50-5 (1943 Recomp. 1950), ("In any action for absolute divorce upon any of the grounds set forth in this section, allegations and proof that the plaintiff or defendant has resided in North Carolina for at least six months next preceding the filing of the complaint shall constitute compliance with the residence requirements for prosecuting any such action for divorce.") See also N. C. GEN. STAT. §50-6 (1943 Recomp. 1950), which provides for a residence of six months in North Carolina as a prerequisite for petitioning for a divorce on the basis of two years' separation.

[2] Caheen v. Caheen, 233 Ala. 494, 496, 172 So. 618 (1937); Ungermach v.