NORTH CAROLINA REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM 1968

FALL TERM 1968

APPELLATE DIVISION REPORTER:
WILSON B. PARTIN, JR.

ASSISTANT APPELLATE DIVISION REPORTER:
RALPH A. WHITE, JR.

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CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all volumes of the Reports prior to 63d have been reprinted by the State, with the number of the volume instead of the name of the Reporter, counsel will cite the volumes prior to the 63 N.C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N.C.	9 Iredell Law	as	31	N.C.
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2 "	"	3	"	11 " "	"	33	"
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1 Murphey	"	5	"	13 " "	"	35	"
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1 Devereux Law	"	12	"	7 " "	"	42	"
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3 " "	"	14	"	Busbee Law	"	44	"
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1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
1 Dev. & Bat. Eq	"	21	"	6 " "	"	51	"
2 " "	"	22	"	7 " "	"	52	"
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5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
7 " "	"	29	"	6 " "	"	59	"
8 " "	"	30	"	1 and 2 Winston	"	60	"
				Phillips Law	"	61	"
				" Eq.	"	62	"

☞ In quoting from the *reprinted* Reports, counsel will cite always the marginal (*i.e.*, the original) paging.

The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

From the 7th to the 62d volumes, both inclusive, will be found the opinions of the Supreme Court, consisting of three members, for the first fifty years of its existence or from 1818 to 1868. The opinions of the Court, consisting of five members, immediately following the Civil War, are published in the volumes from the 63d to the 79th, both inclusive. From the 80th to the 101st volumes, both inclusive, will be found the opinions of the Court, consisting of three members, from 1879 to 1889. The opinions of the Court, consisting of five members, from 1889 to 1 July 1937 are published in volumes 102 to 211, both inclusive. Since 1 July 1937, and beginning with volume 212, the Court has consisted of seven members.

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THE SUPREME COURT OF NORTH CAROLINA

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JUDGES OF THE SUPERIOR COURT OF NORTH CAROLINA

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COY E. BREWER	Twelfth	Fayetteville
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CLARENCE W. HALL	Fourteenth	Durham
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FRANK W. SNEPP, JR.	Twenty-sixth	Charlotte
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HARRY C. MARTIN	Twenty-eighth	Asheville
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Emergency Judges: W. H. S. Burgwyn, Woodland; Zeb V. Nettles, Asheville, Walter J. Bone, Nashville; Hubert E. Olive, Lexington; F. Donald Phillips, Rockingham; Henry L. Stevens, Jr., Warsaw; George B. Patton, Franklin; Chester R. Morris, Coinjock; Francis O. Clarkson, Charlotte.

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WILLIAM S. PRIVOTT	First	Edenton
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CHARLES H. MANNING	Second	Williamston
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CHARLES H. WHEDBEE	Third	Greenville
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WALTER P. HENDERSON	Fourth	Trenton
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BRADFORD TILLERY	Fifth	Wilmington
GILBERT H. BURNETT	Fifth	Wilmington
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GILES R. CLARK	Thirteenth	Elizabethtown

Name	*District*	*Address*
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Thomas H. Lee	Fourteenth	Durham
Samuel O. Riley	Fourteenth	Durham
Harry Horton (Chief)	Fifteenth	Pittsboro
L. J. Phipps	Fifteenth	Chapel Hill
D. Marsh McLelland	Fifteenth	Burlington
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Byron Haworth	Eighteenth	High Point
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Buford T. Henderson	Twenty-first	Winston-Salem
Rhoda B. Billings	Twenty-first	Winston-Salem
John Clifford	Twenty-first	Winston-Salem
A. Lincoln Sherk	Twenty-first	Winston-Salem
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J. E. Holshouser, Sr.	Twenty-fourth	Boone
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Robert J. Leatherwood, III	Thirtieth	Bryson City

ATTORNEY GENERAL OF NORTH CAROLINA

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MYRON C. BANKS

SOLICITORS

Name	*District*	*Address*
HERBERT SMALL	First	Elizabeth City
ROY R. HOLDFORD, JR.	Second	Wilson
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ARCHIE TAYLOR	Fourth	Lillington
LUTHER HAMILTON, JR.	Fifth	Morehead City
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WILLIAM ALLEN COBB	Eighth	Wilmington
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JOHN B. REGAN	Ninth-A	St. Pauls
DAN K. EDWARDS	Tenth	Durham
THOMAS D. COOPER, JR.	Tenth-A	Burlington
THOMAS W. MOORE, JR.	Eleventh	Winston-Salem
CHARLES T. KIVETT	Twelfth	Greensboro
M. G. BOYETTE	Thirteenth	Carthage
HENRY M. WHITESIDES	Fourteenth	Gastonia
ELLIOTT M. SCHWARTZ	Fourteenth-A	Charlotte
ZEB A. MORRIS	Fifteenth	Concord
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CLYDE M. ROBERTS	Nineteenth	Marshall
MARCELLUS BUCHANAN	Twentieth	Sylva
CHARLES M. NEAVES	Twenty-first	Elkin

[1]Succeeded Thomas Wade Bruton, 3 January 1969.
[2]Resigned effective 31 December 1968. Succeeded by I. Beverly Lake, Jr., 1 March 1969.

SUPERIOR COURT, SPRING SESSIONS, 1969

FIRST DIVISION

First District — Judge Parker.
Camden—Apr. 7.
Chowan—Mar. 31; Apr. 28†
Currituck—Jan. 27†; Mar. 3.
Dare—Jan. 13†(2); May 26.
Gates—Mar. 24; May 19†.
Pasquotank—Jan. 6†; Feb. *(2); Mar. 17†; May 5†(2); June 2*; June 9†.
Perquimans—Feb. 3†; Mar. 10†; Apr. 14.

Second District—Judge Fountain.
Beaufort—Jan. 20*; Jan. 27; Feb. 3†; Feb. 17†(2); Mar. 17*; Apr. 14†; May 5†(2); May 26*; June 9†.
Hyde—May. 19.
Martin—Jan. 6†; Mar. 10; Apr. 7†; June 2†; June 16.
Tyrrell—Apr. 21.
Washington—Jan. 13; Feb. 10†; Apr. 28.

Third District—Judge Cowper.
Carteret—Feb. 3†(A); Mar. 10†(2); Mar. 31; Apr. 28†(A)(2); June 9.
Craven—Jan. 6(2); Feb. 3†(2); Feb. 24†(A); Mar. 10(A); Apr. 7; May 5†(2); May 26(2).
Pamlico—Jan. 20(A); Apr. 14.
Pitt—Jan. 20†; Jan. 27; Feb. 24†(2); Mar. 17(A); Mar. 24; Apr. 14†(A); Apr. 21; May 19; May 26(A); June 16(A).

Fourth District—Judge Cohoon.
Duplin—Jan. 20*; Mar. 3*(A); Mar. 10†(2); May 12*; May 19†(2).
Jones—Jan. 13†; Mar. 3.
Onslow—Jan. 6; Feb. 10†; Feb. 17(2); Mar. 24†(2); Apr. 14(A); May 19(A); June 16†.
Sampson—Jan. 27(2); Apr. 7(2); Apr. 28*; May 5†; June 2†(2).

Fifth District—Judge Peel.
New Hanover—Jan. 13*; Jan. 20†(2); Feb. 3†(A); Feb. 10†(2); Feb. 24*(2); Mar. 10†(2); Mar. 24†(A); Mar. 31*(2); Apr. 14†(2); Apr. 28†(A); May 5†(2); May 19*(A)(2); May 26†(2); June 9*; June 16†.
Pender—Jan. 6; Feb. 3†; Mar. 24(A); Apr. 28†.

Sixth District—Judge Bundy.
Bertie—Feb. 10(2); May 12(2).
Halifax—Jan. 27(2); Mar. 3†; Apr. 28; May 26†(2); June 9*.
Hertford—Feb. 24; Apr. 14(2).
Northampton—Jan. 20†; Mar. 31(2).

Seventh District—Judge Hubbard.
Edgecombe—Jan 20*(A); Feb. 10†(A); Feb. 24*(A); Apr. 21*; May 19†(2); June 9(A).
Nash—Jan. 6*; Jan. 27†; Feb. 3*; Mar. 3†(2); Mar. 31*; May 5†(2); June 2*; June 16†(A).
Wilson—Jan. 13†(2); Feb. 10*(2); Mar. 3†(A)(2); Mar. 17*(2); Apr. 7†(2); May 5*(A)(2); June 9†(2).

Eighth District—Judge Mintz.
Greene—Jan. 6†; Feb. 24; June 16(A).
Lenoir—Jan. 13*; Jan. 20†(A); Feb. 10†(2); Mar. 17(2); Apr. 14†(2); May 19†(2); June 16*.
Wayne—Jan. 20*(2); Feb. 3†(A)(2); Mar. 3†(2); Mar. 31*(2); May 5†(2); June 2†(2).

SECOND DIVISION

Ninth District—Judge Bailey.
Franklin—Feb. 3*; Feb. 24†; Apr. 21†(2); May 12*.
Granville—Jan. 20; Jan. 27†(A); Apr. 7(2).
Person—Feb. 10; Feb. 17†; Mar. 24†(2); May 19; May 26†.
Vance—Jan. 13*; Mar. 3*; Mar. 17†; June 9†; June 16*.
Warren—Jan. 6*; Jan. 27†; May 5†; June 2*.

Tenth District—Wake.
Schedule "A"—Judge Carr.
Jan. 6†(2); Jan. 20†(3); Feb. 10*(2); Feb. 24†(2); Mar. 10†(A); Mar. 17†(2); Mar. 31†(2); Apr. 14*(2); Apr. 28†(2); May 19†(2); June 2*(2); June 16†.
Schedule "B"—Judge McKinnon.
Jan. 6*(2); Jan. 20*(3); Feb. 10†(2); Feb. 24*(2); Mar. 17*(2); Mar. 24(A); Mar. 31*(2); Apr. 14†(2); Apr. 28*(2); May 19*(2); June 2†(2); June 16(A); June 16*.

Eleventh District—Judge Hobgood.
Harnett—Jan. 6*; Jan. 13†(A); Feb. 10†(A)(2); Feb. 24†; Mar. 17*; Mar. 24†(A)(2); Apr. 21†(2); May 19*; June 2†(A); June 9†(2).
Johnston—Jan. 13†(2); Jan. 27†(A)(2); Feb. 10(2); Mar. 3†(2); Mar. 31†(2); Apr. 14*(A); May 5†(2); June 2.
Lee—Jan. 27*; Feb. 3†; Mar. 3†(A); Mar. 24*; Apr. 28†(A)(2); May 26†.

Twelfth District—
Schedule "A"—Judge Bickett.
Cumberland—Jan. 6*(2); Feb. 17*(2); Mar. 3(2); Mar. 31*(2); May 19*(A)(2); June 16*.
Hoke—Jan. 27.
Schedule "B"—Judge Canaday.
Cumberland—Jan. 6†(2); Jan. 20†(2); Feb. 3*(2); Feb. 17†(2); Mar. 10*(2); Mar. 31†(2); Apr. 14*(2); May 5†(2); June 2†(2); June 16.
Hoke—Mar. 3†; Apr. 28.

Thirteenth District—Judge Braswell.
Bladen—Feb. 17; Mar. 17†; Apr. 21; May 19†.
Brunswick—Jan. 20; Feb. 24†; Apr. 28†; May 12(A); June 2†(2).
Columbus—Jan. 6†(2); Jan. 27*(2); Feb. 10†; Mar. 3†(2); Apr. 7†(2); May 5*; May 26†; June 16.

Fourteenth District—Judge Brewer.
Durham—Jan. 6†(A)(2); Jan. 6*(2); Jan. 27†(A); Jan. 27*(3); Feb. 17†(A)(2); Feb. 17*(2); Mar. 3†(2); Mar. 10*(A)(3); Mar. 24†(2); Apr. 7*(2); Apr. 21*(A)(2); Apr. 21†(2); May 5*; May 19†(2); May 26*(A); June 2*; June 9*(A)(2); June 9†(2).

Fifteenth District—Judge Clark.
Alamance—Jan. 6†(2); Jan. 20*(A)(2); Feb. 3†(2); Mar. 3*(2); Mar. 31†(A); Apr. 7*(A); Apr. 14†(2); May 5*; May 19†(2); June 9*(2).
Chatham—Feb. 17; Mar. 17†; May 12; June 2†.
Orange—Jan. 13*(A); Jan. 20†(2); Feb. 24*; Mar. 24†(2); Apr. 28*; June 9†(A)(2).

Sixteenth District—Judge Hall.
Robeson—Jan. 6*(2); Jan. 20†(2); Feb. 10*; Feb. 24*(2); Mar. 10†; Mar. 24*; Mar. 31†; Apr. 7*(2); Apr. 21†; May 5*(2); May 19†(2); June 2*(2).
Scotland—Feb.3†; Mar. 17; Apr. 28†(A); June 16.

Numericals following the dates indicate number of weeks term may hold. No numeral for one-week terms.

† For Civil Cases. * For Criminal Cases.
# Judicial Non-Jury Term.
(A) Judge to be Assigned.

THIRD DIVISION

Seventeenth District—Judge Collier.
Caswell—Feb. 24†; Mar. 24.
Rockingham—**Jan. 20*(2)**; Feb. 17†(A)(2); Mar. 10†(2); **Mar. 31*(A)(2)**; Apr. 14†(2); May 19†(2); **June 16.**
Stokes—**Feb. 3; Apr. 7.**
Surry—**Jan. 6*(2); Feb. 10†(2); Mar.** 31†; May **5*(2); June 2†(2).**

Eighteenth District—
Schedule "A"—Judge Gambill.
Greensboro—**Jan. 20†(2); Feb. 3*(2)**; Feb. 17*(2); Mar. 10†(2); Mar. 24*; Apr. 14†; Apr. 28#(A); **May 5*(2); May 19†(2)**; June 2†(2); June 16†.
High Point—Jan. 6†(2); Mar. 31†(2); Apr. 21†.
Schedule "B"—Judge Gwyn.
Greensboro—**Jan. 6*(2)**; Jan. 20*; Jan. 27; Feb. 3†(2); Mar. **3*(2)**; Mar. 24†(3); Apr. 14*(2); **Apr. 28†(2); June 2*(2).**
High Point—**Feb. 17†(2)**; May 19†(2); June 16†.
Schedule "C"—Judge Shaw.
Greensboro—**Jan. 6†(2)**; Jan. 27#; Feb. 17†; Feb. 24#; **Mar. 24#**; **Mar. 31*(2)**; Apr. 21†(2); May **26***; **June 2#; June 16*.**
High Point—**Jan. 20***; Feb. 10*; Mar. 10*; Apr. **14***; **May 12***; **June 9*.**

Nineteenth District—
Schedule "A"—Judge Lupton.
Cabarrus—**Feb. 3†(2)**; Mar. 24†; May 19.
Montgomery—**Apr. 7; May 26†.**
Randolph—**Jan. 6†(2)**; Mar. 3†(2); May 5†(2); June 2†(2).
Rowan—**Jan. 27†; June 16*.**
Schedule "B"—Judge Crissman.
Cabarrus—**Jan. 6***; **Jan. 13†**; Mar. **3†(2)**; Apr. 21(2)†; **June 9†(2).**
Montgomery—**Jan. 20.**
Randolph—Jan. 27*; **Feb. 3†(2)**; Mar. 31*(A); Apr. 7†(2).
Rowan—**Feb. 17*(2)**; **Mar. 17†(2)**; May 5(2); May **19†(2).**

Twentieth District—Judge Exum.
Anson—Jan. 13*; Mar. 3†; **Apr. 14(2)**; June 9*; **June 16†.**
Moore—Jan. 20†; Jan. 27*; Mar. 10†(A); Apr. 28*; May 19†.
Richmond—Jan. 6*; Feb. 10†; Mar. 17†(2); Apr. 7*; May 26†(2).
Stanly—Feb. 3†; Mar. 31; May 12†.
Union—Feb. 17(2); May 5(A).

Twenty-First District—Forsyth.
Schedule "A"—Judge Seay.
Jan. 6(3); Jan. 27†(3); Feb. 17†(2); Mar. 3(2); Mar. **17(A)**; **Mar. 24†(3)**; Apr. 14†(3); May 5(A); **May 12(2); May 26†(2)**; June 9†(2).
Schedule "B"—Judge Armstrong.
Jan. 6†(3); **Feb. 3(3); Feb. 24†(A)(2)**; Mar. 10†(2); **Mar. 24†(2)**; Apr. **7(2)**; Apr. 21(A); Apr. 28†(3); May 19†(2); June 2(3).

Twenty-Second District—Judge McConnell.
Alexander—Mar. 10; Apr. 14(A).
Davidson—**Jan. 6†(2); Jan. 27**; Feb. 17†(2); Mar. **10†(A)**; **Mar. 17**; Mar. **31†(2)**; Apr. 21†(A); **Apr. 28*(A)(2)**; May **12†**; May 19†(A)(2); June **2***; June 9†(2).
Davie—**Jan. 20***; Mar. **3†(A)**; Apr. 21.
Iredell—Jan. 6*(A); **Feb. 3(2)**; Mar. 17†(A); Mar. 24*; Apr. 28†(2); May 19(2).

Twenty-Third District—Judge Johnston.
Alleghany—Mar. 24; May 19.
Ashe—Mar. 31; May 26.
Wilkes—Jan 13†(2); Feb. 17*; Mar. 10†(2); Apr. **14**; **May 5†**; **June 2†(2)**; June 16*.
Yadkin—**Feb. 3(2); May 12.**

FOURTH DIVISION

Twenty-Fourth District—Judge Jackson.
Avery—Apr. **28(2).**
Madison—Feb. 24; Mar. 17†(2); May **26** (2).
Mitchell—**Apr. 7(2).**
Watauga—**Jan. 20; Mar. 31; June 9†.**
Yancey—Mar. **3(2).**

Twenty-Fifth District—Judge Bryson.
Burke—Feb. 17; Mar. 10; Mar. 17(A); Apr. 21*(A)(2); May 5†(2); June 2(2).
Caldwell—Jan. **6***(A)(2); Jan. **20†(2)**; Feb. 24(2); **Mar. 24†(2)**; May 19(2).
Catawba—Jan. 6†(2); Feb. 3(2); Mar. 17(A); Apr. 7(2); Apr. 21†(A); Apr. **28†**; June **2***(A)(2); **June 16†.**

Twenty-Sixth District—Mecklenburg.
Schedule "A"—Judge Anglin.
Jan. 6†(2); **Jan. 20†(2)**; **Feb. 3*(3)**; Mar. 3†; Mar. 10†(2); **Mar. 24†(2)**; Apr. 7†(2); Apr. 21†(2); **May 12*(3); June 2†(2)**; June 16†.
Schedule "B"—Judge Falls.
Jan. 6*(2); Jan. 20†(2); Feb. 3*(3); Feb. 24†; Mar. **10*(2); Mar. 24†(2)**; **Apr. 7*(2)**; Apr. 21†(2); **May 12*(3)**; **June 2†(2)**; **June 16*.**
Schedule "C"—Judge Ervin.
Jan. **6***(2); Jan. 20†(2); **Feb. 3†(2)**; Feb. 17†(3); Mar. **17***; **Mar. 24†(2)**; **Apr. 7*(2)**; **Apr.** 21†(2); May **5†(A)(2)**; **May 19†(2)**; June 2†(2); **June 16*.**
Schedule "D"—Judge to be Assigned.
Jan. **6***(A)(2); Jan. 6†(A)(2); **Feb. 3***(A)(3); **Feb. 3†(A)(2)**; **Feb. 17†(A)(3)**; Mar. 17†(A); Apr. 7†(A)(2); Apr. **21***(A)(2); May 5†(A)(2); May 19†(A)(2); June 2*(A)(2); June 16*(A); June 16†(A).

Twenty-Seventh District—
Schedule "A"—Judge Hasty.
Cleveland—**Feb. 17†; Apr. 28(2).**
Gaston—**Jan. 6*(2)**; **Jan. 20†(2)**; Feb. **3***(2); Feb. 24†; Mar. **3*(2)**; Mar. 17†; Mar. 31†(2); Apr. **14*(2)**; **May 26*(A)(2)**; June 9*(2).
Lincoln—**May 12(2).**
Schedule "B"—Judge Grist.
Cleveland—**Jan. 27; Mar. 24†(2).**
Gaston—Jan. 6*; Feb. **3***; Feb. **10***; Feb. 17†(2); Mar. **3*(2)**; **Apr. 7***; Apr. **14†(2)**; Apr. 28†(2); **May 12†(2)**; **May 26*(A)**; June **2†(3).**
Lincoln—**Jan. 13.**

Twenty-Eighth District—Buncombe.
Schedule "A"—Judge Snepp.
Jan. 6†(3); Jan. 20†(A)(2); Jan. 27†(3); Feb. 17†(A)(2); **Feb. 17†(A)**; **Feb. 24†(2)**; Mar. 10†(2); **Mar. 24†(A)(2)**; **Mar. 31*(2)**; Apr. 14†(2); Apr. **28†(A)(2)**; **Apr. 28†(2)**; May 12†(2); May **26†(A)(2)**; **May 26*(2)**; June 9†(2).
Schedule "B"—Judge Froneberger.
Jan. 6*(2); Jan. 20*(2); Feb. 3†(2); Feb. 17†; Feb. 24*(A); **Mar. 3*(3)**; **Mar. 24†**; Mar. 31†(2); Apr. **14*(2)**; **May 5*(2)**; **May 19†**; May 26†(2); June 9*(2).

Twenty-Ninth District—Judge McLean.
Henderson—**Feb. 10(2)**; **Mar. 17†(2)**; May **5***; **May 26†(2).**
McDowell—Jan. **6***; **Feb. 24†(2)**; Apr. 14*; June **9(2).**
Polk—**Jan. 27; Feb. 3†(A)(2).**
Rutherford—**Jan. 13†*(2)**; **Mar. 10*†**; Apr. **21*†(2)**; **May 12*†(2).**
Transylvania—**Feb. 3**; **Mar. 31**; **Apr. 7†**(A).

Thirtieth District—Judge Martin.
Cherokee—**Mar. 31(2).**
Clay—**Apr. 28.**
Graham—Mar. 17; **June 2†(2).**
Haywood—Jan. **6†(2)**; Feb. **3(2)**; May **5†** (2).
Jackson—**Feb. 17(2); May 19; June 16†.**
Macon—Apr. **14(2).**
Swain—Mar. **3(2).**

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1968.

FLOYD S. PIKE v. WACHOVIA BANK AND TRUST COMPANY; R. J. LOVILL, JR.; HENRY B. ROWE, JR.; GLADYS W. LOVILL; J. WALTER LOVILL, JR.; EDWARD F. LOVILL; AND MARGARET LOVILL MARTIN.

(Filed 14 June 1968.)

1. Joint Ventures—

Each member of a joint adventure is both an agent for his co-adventurer and a principal for himself.

2. Partnership § 1; Joint Ventures—

Although a partnership and a joint adventure are distinct relationships, a partnership ordinarily relating to a continuing action, a joint adventure is in the nature of a partnership and is governed by substantially the same rules as a partnership.

3. Guardian and Ward §§ 3, 4; Insane Persons § 4—

The title to guardianship property remains in the ward and the guardian may take no action toward the sale of the ward's property without order and approval of the court.

4. Joint Ventures—

An agreement between owners of a one-half undivided interest in realty and the guardian of the incompetent owner of the other one-half interest to sell the property, the sale being subject to court approval, does not create a joint adventure so that in an action against all the parties to the agreement evidence admissible against one defendant may be considered against the others, since each party could not direct the conduct of the others, and since there was no undertaking attended with risk by which the parties jointly sought a profit.

5. Contracts § 12—

The heart of a contract is the intention of the parties, which is ascertained from the subject matter, the language used, the purpose sought, and the situation of the parties at the time.

6. Guardian and Ward § 4; Insane Persons § 4—

In selling real property under order of court, a guardian is merely an agent of the court and the sale is not consummated until it is confirmed by the clerk when originally ordered by him, and by the resident judge or the judge regularly holding courts in the district, G.S. 1-339.28, and whether the sale will be confirmed rests in the discretion of the court.

7. Contracts § 1—

Laws in force at the time of the execution of a contract become a part thereof, including those laws which affect its validity, construction, discharge and enforcement.

8. Guardian and Ward § 7; Insane Persons § 7— Guardian held not personally liable on agreement that ward's property would be resold.

A judicial sale was held of property owned by defendant guardian's ward. After the time for filing upset bids had expired but before the sale was confirmed by the court, plaintiff and defendant guardian allegedly entered an agreement that plaintiff would be given an opportunity to purchase the property at a resale, the letter constituting the agreement showing that control of the sale was vested in the court. The court subsequently confirmed the original sale and no resale was held. *Held:* Defendant guardian may not be held personally liable upon the promise that a resale would be held since plaintiff knew defendant was acting as a guardian and is chargeable with knowledge that defendant could act only under order and direction of the court.

9. Damages § 2; Contracts § 29—

To recover compensatory damages in a contract action plaintiff must show that the damages claimed were the natural and probable result of the acts complained of, and must also show the amount of loss with reasonable certainty, and such damages may not be based on mere speculation or conjecture.

10. Damages §§ 1, 2; Contracts § 29—

In an action for breach of an agreement that plaintiff would be given the opportunity to purchase property at a judicial resale, plaintiff could recover only nominal damages since plaintiff would have had no assurance that he could purchase the property at a resale but would have had only a right to present a bid.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Lupton, J.*, 29 May 1967 Session of SURRY. This case was docketed and argued as No. 766 at Fall Term 1967.

Civil action to recover damages for breach of contract.

The title to certain real property in downtown Mt. Airy, North Carolina, known as Blue Ridge Inn property, was held as follows:

(1) Dio Clayton Lewis — ½ undivided interest.
(2) G. C. Lovill Estate — ¼ undivided interest.
(3) J. W. Lovill Estate — ¼ undivided interest.

R. J. Lovill, Jr. and Henry B. Rowe, Jr. are the co-executors and trustees of the G. C. Lovill estate. Gladys W. Lovill, J. Walter Lovill, Jr., Edward F. Lovill and Margaret Lovill Martin are co-executors and trustees of the J. W. Lovill estate.

On 31 July 1964 Wachovia Bank and Trust Company was appointed by the Clerk of Superior Court of Surry County to serve as trustee for Dio Clayton Lewis, an incompetent.

On 19 February 1965, Wachovia Bank, as trustee for Dio Clayton Lewis, filed petition in Surry County Superior Court seeking authority to conduct a judicial sale of the property. Paragraph 4 of the petition recites that after deducting taxes and other maintenance expenses from the income derived from the property, an annual loss of approximately $2443.00 resulted. Paragraph 6 recites:

> "All of the parties who have, or who may have, an interest in the real property referred to above have, subject to the approval of the Court, agreed to join with Wachovia Bank and Trust Company and to offer the property for sale at public auction subject to the following conditions:"

Pertinent conditions imposed were as follows:

> "A. Wachovia Bank and Trust Company as guardian for D. C. Lewis will join with all other parties who have, or may have an interest, in the real property owned by Blue Ridge Inn Company and will conduct a judicial sale of the real property of Blue Ridge Inn Company. . . .
>
> "D. . . . the sale shall be for cash to the highest bidder subject to confirmation by the Resident Judge of the Seventeenth Judicial District; . . .
>
> "WHEREFORE, your petitioner prays:
>
> (1) That Wachovia Bank and Trust Company be authorized to conduct a judicial sale of the property owned by Blue Ridge Inn Company, said sale to be for cash to the highest bidder;
>
> . . . .
>
> (3) That Wachovia Bank and Trust Company be authorized . . . to distribute the net proceeds one-half to itself as guardian for Dio Clayton Lewis and one-half to the other owners of the property as their interests may appear."

On 23 February 1965 Allen H. Gwyn, Resident Judge of the Seventeenth Judicial District of North Carolina, and Martha O. Comer,

Clerk of the Surry County Superior Court, signed an order authorizing Wachovia Bank and Trust Company to conduct a judicial sale of the property owned by the Blue Ridge Inn Company.

On 2 March 1965, Wachovia Bank and Trust Company, party of the first part; R. J. Lovill, Jr. and Henry B. Rowe, Jr., Gladys W. Lovill, J. Walter Lovill, Jr., Edward F. Lovill and Margaret Lovill Martin, party of the second part; and George W. Sparger, III, trading as George W. Sparger Real Estate Agency, party of the third part, entered into a written agreement, material portions of which are set forth below:

"WHEREAS, Wachovia Bank and Trust Company has petitioned the Superior Court of Surry County, North Carolina, for authority to dispose of the one-half interest of D. C. Lewis in the real estate partnership known as Blue Ridge Inn Company, a copy of which petition is attached hereto and incorporated herein by reference; and

"WHEREAS, all persons designated hereinabove as the party of the second part have agreed to submit to a sale of the real property interest previously owned by G. C. Lovill and J. W. Lovill in the Blue Ridge Inn Company; and

"WHEREAS, the party of the third part has agreed to conduct an auction of the property owned by Wachovia Bank and Trust Company, guardian for D. C. Lewis and by the parties designated hereinabove as the party of the second part.

"NOW, THEREFORE, in consideration of the premises, the parties hereto mutually agree as follows:

. . . .

"(4) The sale shall be conducted by the party of the third part on Friday, April 2 or Friday, April 9, 1965, or on such other date as shall be mutually agreeable, on the premises of Blue Ridge Inn Company in Mount Airy, North Carolina. . . .

"(5) The parties to this agreement, mutually agree that the sale of the real property of Blue Ridge Inn Company will be conducted under the statutes of the State of North Carolina applicable to the conduct of judicial sales; that all sales are subject to approval by the party of the first part, all of the parties of the second part, and Allen H. Gwyn, Resident Judge of the Seventeenth Judicial District. . . . The terms of the sale shall be for cash to the highest bidder; a deposit of ten per cent (10%) of the purchase price will be required on the date of the sale and upon payment of the balance of the purchase

price, the deed will be delivered to the purchaser within fifteen (15) days after the sale has been finally approved by the resident judge. . . .

"(6) As between the party of the first part and the party of the second part, it is agreed that all expenses of conducting the sale of the property of Blue Ridge Inn Company shall be borne equally by each.

"(7) As between the executors and trustees of the estate of G. C. Lovill and the executors and trustees of the estate of J. W. Lovill, it is agreed that each estate will share equally any expenses of sale which shall be attributable to the party of the second part.

"(8) Each of the parties to this agreement hereby consents to a disbursement of the net proceeds derived from the sale of the real property of Blue Ridge Inn Company by the payment of such funds one-half to Wachovia Bank and Trust Company, Trustee for Dio Clayton Lewis; one-fourth to R. J. Lovill, Jr., and Henry B. Rowe, Jr., co-executors and trustees of the estate of G. C. Lovill; and one-fourth to Gladys W. Lovill, J. Walter Lovill, Jr., Edward F. Lovill and Margaret Lovill Martin, co-executors and trustees of the estate of J. W. Lovill."

The sale was conducted on 9 April 1965, and United Savings & Loan Association of Mount Airy was the highest bidder at the price of $155,190.00. Report of sale was filed 12 April 1965.

Harry Joe King, Executive Vice President of Northwestern Bank, testified that after the sale he was contacted by Henry B. Rowe, Jr., with reference to obtaining a higher bid for the property. Upon objection by all defendants, Mr. King testified, admissible only against the G. C. Lovill estate, that Henry B. Rowe, Jr., called him and stated that Mr. Miller Nifong from Wachovia Bank was in his office, that they were discussing the bid, and that they were going to hold it open for twenty-four hours. This transaction occurred on 28 April, 1965.

Plaintiff, Floyd S. Pike, testified that he had a telephone conversation with Henry B. Rowe on 29 April 1965, and with Penn Sandridge, Jr., on 5 May 1965, with reference to the Blue Ridge Inn Company property. After the conversation with Mr. Rowe, Pike informed his banker, Harry Joe King, to deliver a cashier's check for $55,000.00 to Mr. Rowe, payable to Wachovia Bank and Trust Company, Trustee for Dio Clayton Lewis estate. Following his conver-

sation with Mr. Rowe, Pike received a letter from W. P. Sandridge, Jr., as set forth below:

WOMBLE, CARLYLE, SANDRIDGE & RICE
Attorneys and Counsellors at Law
Wachovia Bank Building
Winston-Salem, N. C. 27102

5 May 1965

Mr. Floyd S. Pike
Box 986
Mount Airy, North Carolina

Re: Estate of D. C. Lewis

Dear Mr. Pike:

This will confirm our telephone conversation of May 5, 1965 with regard to *your bid of $163,000.00* for the purchase of the property in downtown Mount Airy, bounded by Main Street, West Oak Street and Market Street and described particularly in *the Notice of Sale which appeared in the Mount Airy paper and which was bid in by United Savings & Loan Association* on April 9, 1965 for $155,190.00.

I talked yesterday with Judge Gwyn, the Resident Judge of your judicial district, and am informed by him that in view of your offer to purchase the above-mentioned property for $163,000.00, he will not confirm the sale to United Savings & Loan Association for the $155,190 amount. As I explained, since your bid came after the expiration of the 10-day period for filing upset bids, *the property will have to be readvertised and sold again as if there had been no original sale.*

You have deposited with Mr. Henry Rowe a cashier's check in the amount of $55,000.00 to insure Wachovia and the other owners of the downtown Mount Airy property that you will make good your offer to purchase the real estate for $163,000.00. In the event that you do not follow through with your offer to purchase, the $55,000.00 will be forfeited in full. Of course, the $55,000.00 deposit will be applied toward the purchase price when it is bid in by you at the second sale. You understand also that if, at the time of the sale, an amount is bid in excess of $163,000.00 by some third party, the $55,000.00 will be returned to you.

You may be assured that *as attorneys for Wachovia Bank and Trust Company, Trustee for Dio Clayton Lewis,* we will do everything possible to effect the sale at the earliest practical date. *As you know, the second sale will be advertised for 30 days and will remain open after the sale for a period of 10 days for the filing of upset bids.*

If this letter conforms to your understanding of the terms im-

posed on your $55,000.00 deposit, we would be grateful if you would sign a copy of this letter and return it to us in the enclosed self-addressed envelope. If, for any reason, this letter does not confirm your understanding or if you feel there are additional terms which I have failed to mention, please note any such corrections or additions on the enclosed copy and return that to me at your earliest convenience.

Upon the receipt of a copy of this letter, we will proceed to prepare the necessary papers in order to void the prior sale to United Savings & Loan Association.

Very truly yours,
/s/ W. P. Sandridge, Jr.

WPSJr:sm
enc.

cc: Mr. Miller A. Nifong
Trust Real Estate
Wachovia Bank and Trust Co.
Winston-Salem, N. C.

F. S. P. signed
and returned
5-10-65

(All emphasis in quoted letter ours)

Pike testified that he made no changes in the letter, signed it and returned it by messenger to Mr. Sandridge on 10 May 1965. He further testified that he had never received an opportunity to bid at a resale of the property.

By letter dated 10 June 1965 from James M. Gregg, Jr., Trust Officer, Wachovia Bank and Trust Company, to Floyd S. Pike, the latter was informed that Judge Gwyn, over Wachovia's objection, had confirmed the sale of the Blue Ridge Inn Company property to United Savings and Loan Association and directed that the property be conveyed to it. Further, that upon request of the executors of the G. C. Lovill and J. W. Lovill estates, and also upon motion filed by Wachovia, Judge Gwyn held a second hearing on the question of setting aside the sale. At the conclusion of the hearing, Judge Gwyn indicated that he still thought the confirmation of the sale to United Savings and Loan Association should stand. The letter further stated that "after the hearing all the owners of the property decided against pursuing the matter further, and Judge Gwyn has entered a final order dated June 8, 1965 reconfirming the prior order (copy enclosed.)" Plaintiff introduced into evidence deeds from defendants to United Savings and Loan Association conveying the subject property.

The check for $55,000.00 was returned to Floyd S. Pike, and Pike returned it to Mr. James M. Gregg, Jr., Trust Officer, Wachovia Bank and Trust Company, Winston-Salem, N. C. Pike then received

the envelope marked "Refused, James M. Gregg, Jr., 6/23/65." Pike then deposited the check in the Northwestern Bank at Mount Airy to the account of Wachovia Bank and Trust Company. This testimony as to the check was admitted only against defendant Wachovia Bank and Trust Company.

Plaintiff, in the absence of the jury, tendered evidence as to conversations he had had with Mr. Rowe in reference to his (plaintiff's) plans concerning the Blue Ridge Inn Company property. The purpose of this testimony was to show damages. Objections by all defendants were sustained as to the admission of this testimony into evidence.

At the conclusion of plaintiff's evidence, all defendants' motions for nonsuit were granted.

Plaintiff appealed.

Craige, Brawley, Horton & Graham and George K. Snow for plaintiff.

Womble, Carlyle, Sandridge & Rice for defendant Wachovia Bank and Trust Company.

Woltz and Faw for the G. C. Lovill Estate.

P. M. Sharpe and Barber, Gardner and Gardner for the J. W. Lovill Estate.

BRANCH, J. Appellant assigns as error failure of the court to admit evidence adduced as to one defendant to be considered against all defendants, on the theory that defendants were engaged in a joint adventure so as to constitute each defendant a principal and the agent of the others.

Each member of a joint adventure is both an agent for his co-adventurer and a principal for himself. *Summers v. Hoffman,* 341 Mich. 686, 69 N.W. 2d 198; 48 C.J.S., Joint Adventures, § 5, p. 827.

"The terms joint adventure and joint venture are synonymous. 48 C.J.S. Joint Adventure § 1, p. 803." *Bradbury v. Nagelhus,* 132 Mt. 417, 319 P. 2d 503.

In re Simpson, 222 F. Supp. 904 (M.D.N.C., 1963) defines and discusses the relationship of a joint venture as follows:

> "'A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.
>
> . . .

> " 'Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.'
>
> . . .
>
> " 'To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise.' "

A joint adventure is in the nature of a kind of partnership, and although a partnership and a joint adventure are distinct relationships, they are governed by substantially the same rules. *Wiley v. Wirbelauer,* 116 N.J. Eq. 391, 174 A 20; *Alexander v. Turner,* 139 Neb. 364, 297 N.W. 589; *McKee v. Capitol Dairies,* 164 Or. 1, 99 P 2d 1013; *Easter Oil Corp. v. Strauss* (Tex. Civ. App.), 52 S.W. 2d 336. The outstanding difference between a partnership and a joint adventure is that the former ordinarily relates to a continuing action. *Chisholm v. Gilmer* (C.C.A. 4th), 81 F. 2d 120; *Proctor v. Hearne,* 100 Fla. 1180, 131 So. 173; *Tidewater Constr. Co. v. Monroe County,* 107 Fla. 648, 146 So. 209; *Reinig v. Nelson,* 199 Wis. 482, 227 N.W. 14; *Schleicker v. Krier,* 218 Wis. 376, 261 N.W. 413.

It is stated in 48 C.J.S., Joint Adventures § 1, p. 806:

> "A joint adventure is distinguishable from joint ownership and tenancy in common in that the latter lacks the feature of adventure. So the mere purchase of property by two persons each of whom contributes a portion of the purchase price makes them joint owners of the property, but does not establish between them the relation of joint adventurers, . . . However, the nature of the agreement between parties purchasing land jointly in a transaction for profit may constitute it a joint adventure. *A sale of jointly owned property is in no sense a joint adventure.*" (Emphasis ours.)

In the case of *Johnson v. Watland,* 208 Ia. 1370, 227 N.W. 410, landlord Watland and tenant, Rasmussen, operated a farm under an agreement generally known as a "share crop agreement," by which the landlord furnished the land, half of the stock, and bore half of the expenses, and the tenant furnished labor, half of the expenses and half of the stock. The profits and increase in stock were shared equally. Watland and Rasmussen offered property, jointly

owned by them under the lease, for sale at public auction, which sale was advertised in both of their names. The plaintiff brought action against the maker of a note executed to Watland and Rasmussen for property purchased at the sale. The note was endorsed Watland Rasmussen by Rasmussen. The plaintiff contended that Watland and Rasmussen were liable on the theory that the note was taken in the prosecution of a joint adventure between Watland and Rasmussen. Holding that the relationship between Watland and Rasmussen was not a joint adventure, the Court stated:

> ". . . The property sold was jointly owned by appellants under the lease, and the sale, though advertised in the name of "Watland and Rasmussen," was merely a sale of their joint property for the purpose of converting it into money in closing up the tenancy. It was in no sense a venture."

We find these definitions in Black's Law Dictionary, Fourth Edition: Venture: "An undertaking attended with risk, especially one aiming at making money; business speculation." Adventure: "A hazardous and striking enterprise, a bold undertaking in which hazards are to be met and issue hangs upon unforeseen events." Joint Adventure:". . . A special combination of two or more persons, where, in some specific adventure, a profit is jointly sought, without any actual partnership or corporate designation."

A one-half undivided interest in the property constituting the subject matter of the alleged joint adventure was administered by defendant Wachovia Bank and Trust Company as trustee of the estate of Dio Clayton Lewis, an incompetent, by virtue of appointment by the Clerk of Superior Court of Surry County. The title to the property was in the ward of defendant bank, *Cross v. Craven*, 120 N.C. 331, 26 S.E. 940, and the trustee bank could take no action toward the sale of its ward's property without order and approval of the court. G.S. 33-31; *In re Edwards*, 243 N.C. 70, 89 S.E. 2d 746. Further, the contract upon which plaintiff relies to establish a joint adventure specifically provides for court approval.

The relationship of joint adventure did not exist among defendants, since each could not direct the conduct of the others. Neither was there an undertaking attended with risk by which defendants jointly sought a profit. The joint acts of defendants were merely an attempted sale by owners of undivided interests in real property for the purpose of converting a depreciating asset into money. The element of adventure was not present.

Thus evidence admissible against only one defendant was correctly held inadmissible against other defendants; neither was an

agency relationship created among defendants so as to constitute each a principal and the agent of the others.

Absent the relationship of joint adventure, it is clear that the entry of judgment of nonsuit as to defendants R. J. Lovill, Jr., Henry B. Rowe, Jr., Gladys W. Lovill, J. Walter Lovill, Jr., Edward F. Lovill and Margaret Lovill Martin, was correctly entered.

We must therefore consider whether the trial court erred in allowing motion for nonsuit as to defendant Wachovia Bank and Trust Company, Trustee for Dio Clayton Lewis.

Plaintiff relied on breach of alleged contract embodied in a letter dated May 5, 1965, from W. P. Sandridge, Jr., attorney for defendant Wachovia Bank and Trust Company. Plaintiff contends that this letter affording him an opportunity to bid at a resale of the property became a bilateral contract when he signed and returned same to Mr. Sandridge.

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. 2 N. C. Index 2d, Contracts § 12, p. 315; *Sell v. Hotchkiss,* 264 N.C. 185, 141 S.E. 2d 259; *Bank v. Courtesy Motors,* 250 N.C. 466, 109 S.E. 2d 189. There must be a meeting of the minds so that the parties assent to the same thing in the same sense. *Sprinkle v. Ponder,* 233 N.C. 312, 64 S.E. 2d 171. The facts of the instant case create substantial doubt that there was such meeting of the minds between defendant Bank and plaintiff. However, appellee, Wachovia Bank and Trust Company, contends that, in any event, it could not be responsible in damages for breach of contract to allow plaintiff to bid on property of its ward at a resale, when its trustee capacity was disclosed, so as to give notice that the sale could not be made without court proceeding.

The power of a guardian (sometimes, as here, designated trustee by authority of G.S. 33-1 when referring to the keeper of an adult) to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. *Morton v. Lumber Co.,* 178 N.C. 163, 100 S.E. 322; G.S. 1-339.28 and G.S. 33-31.

Plaintiff could not have been afforded the opportunity to bid without an upset bid and an order of resale by the court.

> "An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten percent

(10%) of the first $1000 thereof plus five percent (5%) of any excess above $1000, but in any event with a minimum increase of $25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report: . . ." G.S. 1-339.25(a), and "When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered." G.S. 1-339.27(a).

However, when a guardian of an incompetent person sells real property under order of court, he is merely an agent of the court and the sale is not consummated until it is confirmed by the resident judge or the judge regularly holding courts in the district. (When the sale is originally ordered by the clerk, his confirmation is also required.) This confirmation represents the consent of the court and is granted or refused in the discretion of the court. *Harrell v. Blythe,* 140 N.C. 415, 53 S.E. 232; G.S. 1-339.28.

In the case of *LeRoy v. Jacobosky,* 136 N.C. 443, 48 S.E. 796, H. Jacobsky and A. Jacobosky were owners of real property as tenants in common with three minors. H. Jacobosky was general guardian for the minors. H. Jacobosky entered into a written agreement to sell the entire property to plaintiff and signed the agreement as follows:

"Jacobosky Bros.
"H. Jacobosky,
"Guardian of Simon, Fannie and Sadie Weisel.
"J. H. LeRoy.
"S. H. Weisel."

Subsequently, the property was sold under proper court order to B. F. White and J. B. Flora. The sale was confirmed and the purchasers received title. Defendants refused to convey to plaintiff when he duly tendered the correct contract price. There was evidence that plaintiff knew nothing about the minors' ages, but that after the execution of the agreement H. Jacobosky informed plaintiff it would be necessary to get a court order because of the minor children. Plaintiff brought action seeking damages for the difference in contract price of the entire property and the amount for which the entire property sold. The trial judge gave peremptory instruction for damages on the interest of H. Jacobosky and A. Jacobosky. Plaintiff appealed. Holding that H. Jacobosky was not personally liable in respect to the interest of the infant wards, the Court stated:

" 'The general rule is that whenever a party assumes to act as agent for another, if he has no authority, or if he exceed his

authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having authority he misleads the other party into making the agreement. But the rule is founded upon the supposition * * * that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guaranty a ratification of the act, and when this want of authority is known, and it is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound.' . . . 'In the absence of all agreement, express or implied, to be personally bound, there can be no case, we apprehend, in which an agent has been held responsible who has not been guilty of fraud either actual or constructive.' *Fowle v. Kerchner, supra.* There can be no fraud when the person with whom the agent deals knows that he has no authority to bind his principal, or knows the character and extent of his agency."

"'If the party with whom the agent has contracted knew that the agent had no authority, or was cognizant of all the facts upon which the assumption of authority was based — as for example, when both parties labored under a mistake of law with reference to the liability of the principal — the agent is not liable either in tort or upon the contract.'"

In the case of *Joyner v. Crisp,* 158 N.C. 199, 73 S.E. 1004, the *feme* plaintiff owned certain property for her life, and after her death it belonged to her children, some of whom were minors. She entered into an option to convey the fee in the lands, which option was made subject to a decree to be obtained in court confirming the fee in her and ordering conveyance of the land to be made to the defendant. The defendant admitted in his answer that he knew that the land in fee belonged to plaintiff's children. *Feme* plaintiff and her husband brought action to set aside the option contract, and the defendant, among other things, in his answer set up a counter-claim asking for specific performance of the contract. The lower court ruled in favor of the plaintiffs and dismissed defendant's cross action. Affirming the action of the lower court, this Court said:

"The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be.

"Upon this principle it is held that a party cannot recover upon a contract wherein a guardian, who owned certain interest

in land of which his ward was part owner, agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. . . .

"For the reasons given, we think the contract is one which cannot be specifically performed, nor can the defendant recover damages for a failure on the part of the plaintiff to perform it."

Love v. Harris, 156 N.C. 88, 72 S.E. 150, is a case in which the purchaser at a valid mortgage sale refused to comply with the terms of the bid and on the same day the land was again put to sale under the mortgage without the consent of the mortgagor and after the bidders had left, and was at that time bid in by plaintiff. The first purchaser subsequently agreed to take the land according to the original sale and deed was made to him. Plaintiff brought action to recover damages of defendant mortgagee for failure to comply with the second bid. At the close of the evidence the judge allowed defendant's motion for nonsuit. Affirming the action of the lower court, this Court stated:

"The plaintiff cannot recover upon the ground that the mortgagee assumed to exercise a power to sell which he did not have and that he was thereby misled or deceived to his injury, for the simple reason that he bought with full knowledge of all the facts, and as he is presumed to know the law, he was fixed with notice of the fact that the mortgagee did not have the power to sell under the circumstances, and, therefore, he was in no sense defrauded.

". . . Ruffin, J., in *Fowle v. Kerchner,* says: 'The general rule is that whenever a party assumes to act as agent for another, if he has no authority, or if he exceeds his authority, he will be held to be personally liable to the party with whom he deals, for the reason that by holding himself out as having authority, he misleads the other party into making the agreement. But the rule is founded upon the supposition . . . that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act, and when this want of authority is known, and it is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound.' "

LeRoy v. Jacobosky, supra, and *Joyner v. Crisp, supra,* were cited with approval in the case of *Griffin v. Turner,* 248 N.C. 678, 104 S.E. 2d 829. There, the administrator of an estate authorized an agent to sell certain land belonging to the estate. The agent entered

into agreement to sell the land and executed a receipt for deposit of good faith money on purchase to one Griffin. The receipt was signed by the agent, as agent for G. L. Turner and Willie E. Turner, administrators of E. F. Turner Estate. Plaintiff brought action alleging defendants refused to comply with the alleged authorized contract. The heirs of E. F. Turner, deceased, denied any authority on the part of the codefendants to bind them. The trial judge allowed defendants' motion for nonsuit at the end of the evidence. This Court reversed the decision of the lower court as to the defendants W. E. Turner and G. L. Turner, and affirmed the lower court as to the remaining defendants, and stated:

"Title to real estate, upon the death of an owner, vests in the heirs and not in the administrators. The personal representative has no power as such to convey. *Parker v. Porter,* 208 N.C. 31, 179 S.E. 28; *Floyd v. Herring,* 64 N.C. 409. Plaintiff was aware of this fact when he paid his ten dollars to Webb. The receipt given by Webb calls for payment of the balance of the purchase price when good and sufficient deed was tendered by the heirs at law and not by the administrators for whom Webb acted.

"Plaintiff does not assert that any express warranty of authority existed to bind the heirs. His position is that when one contracts as an agent to convey land, the law will imply a warranty of authority to act. The law does imply a warranty when the party with whom the contract is made does not know the true facts and does not know that in truth and in fact the person sought to be bound is lacking in authority. When, however, the person who claims to be protected knows that the person in whose name and behalf the contract is made in fact has no authority to act, the law will not imply a warranty to act. It would be palpably unjust to create a fiction for the benefit of one who acted with knowledge of facts which are at complete variance with the proposed fiction. Hence, we have heretofore held that when one contracts as administrator to convey land, who has no personal right therein, he is not liable on an implied warranty because the heirs at law are not bound by the contract. *Hedgecock v. Tate,* 168 N.C. 660, 85 S.E. 34; Ann. Cas. 1916D 449. For the same reason a guardian who contracts to convey the property of his ward is not liable on an implied warranty of authority. *Leroy v. Jacobosky,* 136 N.C. 443, 67 L.R.A. 977. These cases but illustrate the principle which finds full support in numerous other cases. *Joyner v. Crisp,* 158 N.C. 199, 73 S.E. 1004; *Love v. Harris,* 156 N.C. 88, 72 S.E. 150; *Hite v. Goodman,* 21 N.C. 364; *Potts v. Lazarus,* 4 N.C. 180; *Fuller v.*

Melko, 76 A. 2d 683 (N.J.); 3 C.J.S. 117 and 118; 2 Am. Jur. 249."

It is a well recognized principle of law in this jurisdiction that the laws in force at the time of the execution of a contract become a part of the contract. This embraces laws which affect the contract's validity, construction, discharge and enforcement. *Spearman v. Burial Association,* 225 N.C. 185, 33 S.E. 2d 895; *Bateman v. Sterrett,* 201 N.C. 59, 159 S.E. 14.

Harris v. Trust Co., 205 N.C. 526, 172 S.E. 325, poses the question: "Is a letter written by the attorneys for the executors of an estate, authorizing a real estate agent to sell land belonging to an estate, sufficient evidence of agency to bind the estate in the absence of proof of either express or implied authority conferred upon the executors to sell and convey real property?" Holding that the estate was not bound, the Court stated:

> "At the outset the plaintiff knew that he was dealing with the representatives of a dead man, and consequently the law imposed upon him the duty of ascertaining the extent of the authority of the parties to dispose of the real estate. The power of personal representatives to contract with respect to real property of decedent is limited and fenced in both by statute and the decisions."

This case differs from the instant case in that in the former specific performance is sought and the action is against executors in their representative capacity; however, the holding as to notice of the representative capacity of defendants is pertinent to decision in the instant case.

Appellant cites and relies on the case of *Warren v. Dail,* 170 N.C. 406, 87 S.E. 126, to distinguish the holding in the case of *Joyner v. Crisp, supra.* In *Warren v. Dail,* it is said:

> "In *Joyner v. Crisp* it was held that the obligations of the contract, the subject-matter of litigation, were to be performed as an entirety, and the parties were relieved of same, and of all liability thereunder because it appeared on the face of the contract itself that, in substantial and material features, there was an inability to perform. The portions of the opinion as to the effect of notice must be understood in reference to the conditions there presented, and are not applicable to the facts of this record."
>
> "If a complaint states facts constituting a cause of action for specific performance, and also one for damages for a breach

of contract, a failure of the first will not prevent his recovery on the second, whatever may have been the prayer for relief, citing *Sternburger v. McGowan,* 12-20 and 21. And, assuredly, in the absence of any facts tending to show fraud or imposition, avoiding the contract or creating an estoppel, damages for wrongful breach of contract to convey are not now denied merely because the party seeking relief was aware, at the time of the contract, or before suit, that the other had no title. It is well understood that many contracts of this kind are entered into under just these circumstances, the parties believing they could obtain the title, and being allowed till the time of trial to procure and tender it. . . ."

Warren v. Dail and *Joyner v. Crisp* are distinguishable factually in that in *Warren* the facts do not show that the remaindermen are minors so as to require legal action as a condition precedent to sale of the entire interest of the property, as was true in the case of *Joyner v. Crisp.* It is also clear that *Warren v. Dail* does not overrule *Joyner v. Crisp.* Plaintiff correctly states that the rules laid down in *Joyner v. Crisp* and *LeRoy v. Jacobosky* exclude cases where the agent receives the consideration for the contract, as in the cases of *Russell v. Koonce,* 104 N.C. 237, 10 S.E. 256, and *Delius v. Cawthorn,* 13 N.C. 90. Here, defendant Wachovia Bank and Trust Company received no part of the consideration.

Plaintiff must have known that defendant Bank, as trustee, was acting in a capacity in which it could only deliver a perfect title under order and direction of the court. Had defendant Bank tendered plaintiff a deed without court confirmation, plaintiff would not have been obliged to accept it. The letter clearly shows that control of the sale was already vested in the court, and the writer of the letter recognized that it must there remain.

The record reveals that Wachovia Bank and Trust Company exhausted every means to properly obtain a resale of the property, except to prosecute an appeal to this Court. The action of the resident judge relating to confirmation of the sale was discretionary, *Harrell v. Blythe, supra,* and appellant has failed to show abuse of discretion on the part of the resident judge.

The existing law became a part of the contract, and plaintiff was clearly charged with notice that defendant Wachovia Bank had no authority to act without order, direction and confirmation of the court. The facts do not disclose that defendant Bank undertook to guarantee a ratification of any of its acts.

In order to recover compensatory damages in a contract action, plaintiff must show that the damages were the natural and probable

result of the acts complained of and must show loss with a reasonable certainty, and damages may not be based upon mere speculation or conjecture. *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658; *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425.

Here, if plaintiff technically had a good cause of action, he could only recover nominal damages. If defendant Bank had successfully prevailed on the court to order a resale, plaintiff would have had no assurance that he could purchase the property. He would, at most, have had a right to *bid* at public sale. G.S. 1-339.27. There could have been no compensatory damages as a consequence of the failure of defendant Bank to obtain an order of resale.

We have carefully examined all of plaintiff's remaining exceptions and assignments of error and find no prejudicial error.

Affirmed.

HUSKINS, J., took no part in the consideration or decision of this case.

MAX C. GREENE, ADMINISTRATOR OF THE ESTATE OF MAXINE GREENE NICHOLS, DECEASED, v. GEORGE NICHOLS, ADMINISTRATOR OF THE ESTATE OF THOMAS LEE NICHOLS, DECEASED.

(Filed 14 June 1968.)

1. Automobiles § 66—

There is no presumption that the owner of an automobile who was in the vehicle at the time of a collision was the driver.

2. Same—

The identity of the driver may be established by evidence, direct or circumstantial, or by a combination of both.

3. Same—

Evidence that at the beginning of the trip the owner was seen driving his automobile, that a passenger was in the back seat and the owner's wife, who had no driver's license, was in the front seat on the passenger side, that five minutes later at the scene of the fatal accident the passengers were in their original position and the owner was on the ground beside the open door on the left side of the car, is sufficient to support a finding that the owner was the driver of the automobile at the time of the accident.

4. Negligence § 29—

Negligence need not be established by direct evidence but may be inferred from the attendant facts and circumstances, and if the facts proved establish the more reasonable probability that defendant has been guilty

of actionable negligence, the case cannot be withdrawn from the jury even though the possibility of accident may also arise on the evidence.

5. Automobiles § 44—

When an automobile leaves the highway without apparent cause and inflicts injury or damage, an inference of the driver's actionable negligence arises which will take the case to the jury, the doctrine of *res ipsa loquitur* being applicable.

6. Same— Res ipsa loquitur raises inference of driver's negligence.

Evidence tending to show that the driver of the automobile while attempting to negotiate a sharp curve to the right ran off the left side of the highway and collided head-on with a tree, killing himself and two passengers therein, and that the night was clear and the asphalt and gravel road was dry, *is held* sufficient to make out a *prima facie* case for the jury on the issue of the driver's negligence, the doctrine of *res ipsa loquitur* being applicable, even though there was no evidence negating the possibility of defects in the highway or the automobile, or that another person was negligent, or that the driver was in bad health.

7. Same; Negligence § 6—

Under the doctrine of *res ipsa loquitur*, the nature of the occurrence itself furnishes circumstantial evidence of driver-negligence.

8. Death § 7—

The wrongful death statute, G.S. 28-173, -174, does not allow nominal damages or permit the assessment of punitive damages.

9. Same—

Where plaintiff in a wrongful death action fails to show that his intestate had any earning capacity or that her untimely death resulted in a net pecuniary loss to her estate, judgment of nonsuit is properly entered.

10. Same—

Although it is not essential that direct, specific evidence be offered with reference to decedent's earning capacity, plaintiff does have the burden to offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support.

PARKER, C.J., dissenting.

HIGGINS, J., joins in dissenting opinion.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *Campbell, J.*, January 1967 Session of CALDWELL, docketed and argued at the Fall Term 1967 as Case No. 363.

Action for wrongful death.

Plaintiff's evidence tended to show: Plaintiff's intestate, Maxine Greene Nichols, was the 15-year-old wife of defendant's intestate,

Thomas Lee Nichols, a young man in his late teens or early twenties. Maxine had spent Saturday, 2 April 1966, at the home of her father in Valmead, Caldwell County. About 6 miles west of Valmead is Collettsville. Connecting the two communities is North Carolina Highway No. 90, an old road of asphalt and gravel — 18 feet wide. "This is a very crooked road, a lot of hills up and down, and some very sharp curves located in it." The speed limit for automobiles is 55 MPH.

At 12:35 a.m. on 3 April 1966, accompanied by Robert Wilson, a young man about his own age, Nichols came to the Greene home for Maxine in his 1957 2-door Chevrolet automobile. When they left at 12:40 a.m. to take Wilson to his home on Highway No. 90 toward Collettsville, Nichols was driving. Maxine, who did not have a driver's license, was in the front seat on the right, and Wilson was in the back seat.

At 12:45 a.m., Cecil Vines, traveling west on No. 90, rounded a sharp curve to the right and came upon the Nichols' wrecked Chevrolet, which was off the highway to his left. Vines had entered the old Collettsville Road from an intersection at Huffman's store, six-tenths of a mile from the scene of the accident. Just after he had made his turn at Huffman's store, an automobile, also going west, passed him. Thereafter he encountered no other traffic from either direction.

The Nichols' car had failed to make the curve. Approaching the curve, the road is slightly upgrade. The shoulder on the north is four feet wide; on the south, two feet. Head-on, the automobile struck the east side of a poplar tree, 24-30 inches in diameter, which was growing in the curve on the slope of the south bank of the road. The damage to the tree was severe; it began one foot from the ground and extended four feet up the trunk. The tree was about five feet from the hard surface, and its base was 2½-3 feet lower than the road. The car was about six feet below the tree and "it was tore all to pieces." Wilson was in the back seat. Maxine was in the front seat "on the passenger side about a foot from the door, which was closed." Nichols was on the ground between the car and the tree on the driver's side of the car. His head faced west; the car faced east. The door on the driver's side was open. The photographs introduced in evidence to illustrate the testimony show the automobile as a complete wreck — a tangled mass of parts, broken and shattered glass, its top bowed, and its body and frame bent and broken beyond repair. (Injury to the front tires is not apparent from the photographs.)

The wreck occurred 2.2 miles west of Lenoir, approximately 2½

miles east of Wilson's home and about 3½ miles from the Greene residence. At 12:50 a.m., Highway Patrolman L. E. Woods was called to investigate the accident, and he arrived at the scene at 1:10 a.m. The weather was clear and the road dry. Just east of the curve on which the car left the road was a yellow and black highway sign which warned of the curve. The officer found the Chevrolet about 15 feet from the edge of the road. There were no marks on the highway and none on the shoulder. The only impressions he saw were some slight scuff marks in the sand and dirt on the south edge of the road. These led toward the tree. The front end of the car was caved in backwards 1½-2 feet from the bumper. "[I]t was damaged from the center post forward, all parts of the windshield broken out, headlights broken out, grille caved in and inside of it the dashboard damaged, seats torn loose, a complete total loss." The patrolman "believed" both front tires were damaged. Nichols and Wilson had been removed from the car when the patrolman arrived. Maxine, who was dead, was still in the front seat on the right about a foot from the door.

The coroner of Caldwell County, Doctor Paul Moss, received notice of the wreck about 12:45 a.m. He went immediately to the emergency room of the Caldwell Memorial Hospital. There he found the occupants of the Nichols car. He examined the body of Maxine, which had been severely broken up. Her skull was fractured in numerous places. Her face was cut, bruised and out of shape; the lower jawbone was broken loose. Her abdomen was torn as if from a severe blow; there were deep bruises about the front part of the chest and numerous abrasions and bruises over the front of the body. Her pelvis and both legs were broken. The large leg bones between her knee and hip were protruding through the major part of the flesh in front of each leg. In the opinion of Doctor Moss, both Maxine and Wilson had died instantly. Wilson's body showed a deep bruise on the head; his left cheek was bruised and the abdomen full of fluid. Nichols was still alive when Doctor Moss arrived at the emergency room, but he died about an hour later from severe head and chest injuries.

In his complaint, plaintiff alleges Nichols' actionable negligence both generally and specifically. Plaintiff's specifications of negligence are that Nichols was operating the automobile without keeping a proper lookout, without having it under control, at a speed which was excessive in view of highway conditions, and on his left side of the highway. With reference to damages, plaintiff alleged only that his intestate "was a young woman 15 years of age enjoying excellent health and with a long life expectancy."

At the close of plaintiff's evidence, defendant's motion for nonsuit was granted. From judgment dismissing the action, plaintiff appeals.

L. H. Wall and A. R. Crisp for plaintiff appellant.
Townsend and Todd for defendant appellee.

SHARP, J. In considering defendant's motion for nonsuit three questions arise: Was plaintiff's evidence sufficient to support a finding (1) that Nichols was the driver of the automobile in which plaintiff's intestate met her death; (2) if so, that he operated the vehicle negligently, in the manner alleged in the complaint, thereby causing the death of his intestate; (3) that her death resulted in a pecuniary loss to her estate?

With reference to the first question, the evidence tended to show: Just before the fatal accident Nichols, driving his automobile, left the home of his father-in-law. Wilson was in the back seat, and Maxine, who had no driver's license, was sitting in the front seat on the passenger side. Five minutes later and 3½ miles away, when Vines came upon the wrecked automobile, Wilson and Maxine, both dead, were in the same positions in which they had begun the trip. Nichols was on the ground beside the open door on the left side of the car.

There is no presumption that the owner of an automobile who was in the vehicle at the time of a collision was the driver. *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258. However, direct evidence as to who was driving the automobile at the time it was wrecked is not required. The identity of the driver may be established by circumstantial evidence or by combination of direct and circumstantial evidence. *King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32; *Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. Clearly, the jury could find from plaintiff's evidence that Nichols was operating his automobile at the time it left the highway and collided with the poplar tree. *Barefoot v. Holmes,* 267 N.C. 242, 147 S.E. 2d 883; *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728; *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Bridges v. Graham, supra.* The answer to the first question is YES.

The more difficult question is whether the physical facts at the scene of the collision provide sufficient circumstantial evidence to support plaintiff's allegations that Nichols' negligence as alleged in the complaint proximately caused the death of plaintiff's intestate. Direct evidence of negligence is not required; it may be inferred from the attendant facts and circumstances. "[I]f the facts proved

establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Etheridge v. Etheridge,* 222 N.C. 616, 618, 24 S.E. 2d 477, 479; *Yates v. Chappell, supra.*

Plaintiff's evidence discloses these facts: The night was clear; the road was dry. The speed limit was 55 MPH, but the road was very crooked and hilly with very sharp curves. A highway sign warned Nichols, who was traveling west, that he was approaching a sharp curve. Furthermore, it is a fair inference from the evidence that Nichols was familiar with the road. On that curve, after crossing the eastbound lane and the south shoulder, he left the highway to collide head-on with a poplar tree five feet from the pavement. The automobile left no marks on the pavement or the shoulder. After the collision, the car spun around and came to rest 15 feet from the edge of the road. The tree was severely damaged; the vehicle demolished. The two passengers were killed instantly; the driver died soon thereafter.

In cases where a guest passenger (or his personal representative) has sued to recover damages sustained when the defendant's car left the highway for an unknown cause, the adjudications of this Court on the question of nonsuit have not been consistent, although each opinion states the same principles which purportedly governed decision. See 44 N. C. L. Rev. 1039 (1966). Almost invariably there is included an avowal that in North Carolina the doctrine of *res ipsa loquitur* is not applicable to automobile accidents.

In *Yates v. Chappell,* 263 N.C. 461, 139 S.E. 2d 728, the plaintiff's intestate was killed when the automobile in which he was a passenger collided with a bridge abutment on the shoulder of the road and stopped there. The abutment was cracked and the car "damaged all over." Approaching the bridge the road was downhill and curving to a point 250 feet from the bridge, from which it was straight and level. The speed limit there was 35 MPH. The pavement was dry, and there was no other traffic. The car left no tire marks on the pavement or shoulder. In reversing a judgment of nonsuit, the Court said that the doctrine of *res ipsa loquitur* did "not apply in tort cases involving the operation of motor vehicles" but that from the foregoing facts the jury could infer that at the time of the accident the driver was operating the automobile without keeping a proper lookout, without exercising proper control and at a speed which was excessive under the circumstances, and that his conduct was the proximate cause of the intestate's death. The court pointed out that there was *no evidence* of any object or imperfection in the highway,

of any mechanical failure of the car, or of any puncture or blowout of tires. Thus, the *absence of evidence* of these possible causes was considered as bolstering the probability of driver-negligence.

In *Whaley v. Marshburn,* 262 N.C. 623, 138 S.E. 2d 291, when the defendant-driver reached a curve to the left on a rural paved road as it approached a bridge over a creek, he failed to follow the curve, hit the shoulder, jumped the creek to the right of the bridge, and collided with a tree on the bank. This evidence was held sufficient to take the issue of the defendant's actionable negligence to the jury.

In *Lane v. Dorney,* the plaintiff's evidence tended to show: The driver was in good health, his automobile in good mechanical condition, and the highway was dry and free of defects. There was no other traffic on the road. Notwithstanding, in traveling downhill on a long sweeping curve to the left, the defendant's intestate failed to make the curve and ran off the road to the right. After leaving 22 feet of tire marks on the shoulder, the automobile hit a concrete bridge abutment, jumped a stream, and landed on its top completely demolished. Upon first consideration, a majority of this Court was of the opinion that the plaintiff had not made out a case because the doctrine of *res ipsa loquitur* was not applicable to automobile mishaps. The decision was that the trial court's judgment of nonsuit should be sustained. *Lane v. Dorney,* 250 N.C. 15, 108 S.E. 2d 55. The plaintiff's petition to rehear, however, was granted and the judgment of nonsuit reversed, although the Court still disavowed the applicability of *res ipsa loquitur. Lane v. Dorney,* 252 N.C. 90, 113 S.E. 2d 33.

Other cases holding that, without applying the doctrine of *res ipsa loquitur,* the attendant circumstances and physical facts at the scene were sufficient to establish driver-negligence when the automobile left the highway are: *Trust Co. v. Snowden,* 267 N.C. 749, 148 S.E. 2d 833; *Barefoot v. Holmes,* 267 N.C. 242, 147 S.E. 2d 883; *King v. Bonardi,* 267 N.C. 221, 148 S.E. 2d 32; *Drumwright v. Wood,* 266 N.C. 198, 146 S.E. 2d 1; *Rector v. Roberts,* 264 N.C. 324, 141 S.E. 2d 482; *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755; *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115; *Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492. See also *Randall v. Rogers,* 262 N.C. 544, 138 S.E. 2d 248.

The following cases held the evidence insufficient to establish driver-negligence:

In *Ivey v. Rollins,* 250 N.C. 89, 108 S.E. 2d 63 (petition to rehear denied, 251 N.C. 345, 111 S.E. 2d 194), a 14-year-old boy, driving a car with sensitive power steering at 30-35 MPH on a straight, dry

road on a clear day, suddenly veered to his right and collided head-on with a bridge abutment. There were no skid marks and no noise except the sound of the impact. The occupants of the car — the driver, his mother, father, 4-year-old brother and the family dog — died in the collision. The trial judge's judgment of nonsuit was affirmed. Thereafter the petition to rehear was denied on the ground that "under our decisions the doctrine of *res ipsa loquitur* is not applicable in this case." *Ivey v. Rollins,* 251 N.C. 345, 111 S.E. 2d 194. It is noted that the opinions in *Lane v. Dorney* and *Ivey v. Rollins* were filed on the same day, 8 April 1959. The petition to rehear *Ivey* was denied 2 December 1959; the petition to rehear *Lane* was granted 2 March 1960.

In an attempt to distinguish *Ivey v. Rollins* from *Lane v. Dorney,* the Court said in *Lane* that in *Ivey* there was "nothing from the inside of the car, or from the outside of the car for that matter, from which we may ascertain what occurred at the time of the accident." *Lane v. Dorney,* 252 N.C. 90, 94, 113 S.E. 2d 33, 36.

In *Fuller v. Fuller,* 253 N.C. 288, 116 S.E. 2d 776, the defendant's intestate was operating the pickup truck on a straight, dry road in the daytime at a speed of 35-40 MPH. The truck gradually veered to the left, ran off the pavement and onto the shoulder for 75 feet before proceeding into a field about 2 feet below the highway. It continued in a straight line for about 150 feet and struck a cedar tree. The truck was demolished; the plaintiff, a passenger, was injured and the driver killed. In affirming the judgment of nonsuit upon the authority of *Ivey v. Rollins, supra,* the Court said: "The cause of the accident rests in the realm of speculation and conjecture." *Id.* at 289, 116 S.E. 2d at 777.

In *Privette v. Clemmons,* 265 N.C. 727, 145 S.E. 2d 13, the plaintiff was a guest passenger in the defendant's automobile. She fell asleep and awoke when the car ran onto the right shoulder and then into the ditch, where it went approximately 23 yards before stopping. The road was straight and level at the place the car left the pavement. Before the plaintiff fell asleep the car was running at a moderate speed, about 55 MPH. The defendant's motion for nonsuit was sustained under the authority of *Fuller v. Fuller* and *Ivey v. Rollins, supra.*

Had plaintiff offered evidence in this case that on the night of the collision Nichols' car was in good mechanical condition and that Nichols was in good health with no history of sudden seizures, it might be said — as the Court did in *Lane v. Dorney, supra* at 94, 113 S.E. 2d at 36 — that plaintiff's evidence "tends to remove everything that might have influenced the movement of the car, causing it

to leave the road, save and except the hands of the man at the wheel." Plaintiff, however, offered no evidence on either of these points. The great damage to the tree, the destruction of the car, and the nature of the injuries which killed the occupants are certainly consistent with excessive speed. However, great damage to person and property can be expected when an automobile collides with a stationary object such as a large tree or a bridge abutment at a lawful rate of speed. The damage here was not materially different from that shown in *Ivey v. Rollins, supra,* and is comparable to that in *Fuller v. Fuller, supra.*

If the decisions in *Ivey v. Rollins, Fuller v. Fuller,* and *Privette v. Clemmons, supra,* continue authoritative, affirmance of the trial court's judgment of nonsuit is here required. The principal difference between this case and those three is that in the cited cases the road was straight. It cannot be said, however, that when a motorist runs off a straight road no inference of driver-negligence arises but that when he leaves the highway on a curve such an inference does arise.

We think that the decisions of *Ivey v. Rollins, Fuller v. Fuller, Privette v. Clemmons, supra,* are inconsistent with common experience. It is generally accepted that an automobile which has been traveling on the highway, following "the thread of the road," does not suddenly leave it if the driver uses proper care. Such an occurrence is an unusual event when the one in control is keeping a proper lookout and driving at a speed which is reasonable under existing highway and weather conditions. An automobile being operated with due care and circumspection "in the absence of some explainable cause, will remain upright and on the traveled portion of the highway." *Etheridge v. Etheridge,* 222 N.C. 616, 621, 24 S.E. 2d 477, 481. The inference of driver-negligence from such a departure is not based upon mere speculation or conjecture; it is based upon collective experience, which has shown it to be the "more reasonable probability." Highway defects or the negligence of another could cause a car to leave the road. The presence of either of these causes, however, would ordinarily be apparent. Mechanical defects in the vehicle or driver-illness could cause an automobile to leave the road, but these possible causes occur comparatively infrequently and their probability can ordinarily be negated. "Vast improvements have been made in automotive machinery since the days of the gasoline buggy with regard to reliability and uniformity of performance. Meantime, the factors of human conduct have remained substantially the same." *Boone v. Matheny,* 224 N.C. 250, 253, 29 S.E. 2d 687, 689.

When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations. *Prima facie,*

it may accept the normal and probable one of driver-negligence and leave it to the jury to determine the true cause after considering all the evidence — that of defendant as well as plaintiff.

Under this rationale, which we adopt, plaintiff made out a *prima facie* case of actionable negligence, and the answer to question 2 is YES. In giving an affirmative answer to this question we have applied the doctrine of *res ipsa loquitur,* which simply means that the nature of the occurrence itself furnishes circumstantial evidence of driver-negligence. *Young v. Anchor Co.,* 239 N.C. 288, 79 S.E. 2d 785; *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251; *Ridge v. R. R.,* 167 N.C. 510, 83 S.E. 762. See *Kekelis v. Machine Works,* 273 N.C. 439, 160 S.E. 2d 320. Defendant's intestate was in control of the vehicle which left the highway on a curve. It is unusual for an automobile to leave the highway. When it does so without apparent cause and inflicts injury or damage, an inference of the driver's actionable negligence arises, which will take the case to the jury. The inference of negligence does not arise from the mere fact of injury; it arises from the manner in which it occurred. *Hebert v. Allen,* 241 Iowa 684, 41 N.W. 2d 240.

The application of the doctrine of *res ipsa loquitur* to this factual situation is the general rule. See Annot: Applicability of *res ipsa loquitur* doctrine where motor vehicle leaves road, 79 A.L.R. 2d 6 (1961), in which the cases are collected and wherein it is said: "Automobile accidents . . . happen under a large variety of circumstances which as a rule involve the fault of more than one person and the cases are rare in which only one inference may be drawn from the happening as being more plausible than others. Consequently, automobile accidents, taken as a group, do not represent the typical occurrence to which the *res ipsa loquitur* doctrine applies. However, there is no doubt but that the doctrine may be applied to an automobile accident if a proper case is presented. In other words, the mere fact that the occurrence is an automobile accident does not *ipso facto* exclude the availability of the doctrine. . . . Among the various types of automobile accidents there is at least one in which the *res ipsa loquitur* doctrine has been applied with appreciable consistency. Where a motor vehicle leaves the roadway without a prior collision and thereby causes injury or damage, the courts, as a general rule, are prepared to draw an inference of negligence from the occurrence, assuming, of course, that all the other conditions of applicability are met." *Id.* at 18. See 8 Am. Jur. 2d *Automobiles and Highway Traffic* §§ 921-924 (1963) for a discussion of the situations in which *res ipsa loquitur* has been applied in motor-vehicle-accident cases.

As pointed out in Prosser, Torts 218-19 (3d ed. 1964): The requirement for the application of the doctrine of *res ipsa loquitur* "that the occurrence be one which ordinarily does not happen without negligence is of course only another way of stating an obvious principle of circumstantial evidence: that the event must be such that in the light of ordinary experience it gives rise to an inference that some one must have been negligent. On this basis *res ipsa loquitur* has been applied to a wide variety of situations, and its range is as broad as the possible events which reasonably justify such a conclusion. It finds common application, for example, in . . . some kinds of automobile accidents, such as a car suddenly leaving the highway and going into the ditch or colliding with a stationary object, or starting down hill not long after it has been parked at the curb."

Although we hold that plaintiff's evidence is sufficient to take the case to the jury on the issue of Nichols' actionable negligence, the judgment of nonsuit must be sustained because the answer to the third question is No. Plaintiff failed to show that his intestate had any earning capacity or that her untimely death resulted in a net pecuniary loss to her estate. Plaintiff's evidence tended to show only that Maxine was 15 years old, married, and able to travel by automobile. Plaintiff offered no evidence with reference to her health, intelligence, training, education, aptitudes, or habits. No doubt, however, such evidence was available.

Our wrongful death statute, G.S. 28-173, -174, does not allow nominal damages or permit the assessment of punitive damages. *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793. The burden is on plaintiff to prove that the estate of his intestate suffered a net pecuniary loss as a result of her death. *Scriven v. McDonald,* 264 N.C. 727, 142 S.E. 2d 585; *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49. See also *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425.

In *Hines v. Frink,* 257 N.C. 723, 127 S.E. 2d 509, an action for wrongful death in which this Court sustained a judgment of nonsuit, it was said that no discussion of negligence or proximate cause was necessary because plaintiff had offered no evidence as to the age, health, habits, or earning capacity of his intestate. Had the issue of negligence been submitted in that case, the judge would have been required to instruct the jury that plaintiff "had offered no evidence tending to show any pecuniary loss resulting to the estate of [intestate] from his death, and that it should answer the issue of damages, on which he had the burden of proof, NOTHING. Hence, the judgment of nonsuit was proper." *Id.* at 728, 127 S.E. 2d at 513. *Accord, Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497; *Spruill v.*

Insurance Co., 120 N.C. 141, 148, 27 S.E. 39, 42. See *Roberts v. Freight Carriers, Inc.*, 273 N.C. 600, 160 S.E. 2d 712; McIntosh, N. C. Practice and Procedure § 1516 (2d ed. 1956 and 1964 Supp.). Even in *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191, a case in which the recovery of $1,000.00 for the death of a five-month-old boy was affirmed, evidence was offered that the child "had never been sick."

Although it is not essential that direct, specific evidence be offered with reference to decedent's earning capacity, *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529; *Hicks v. Love*, 201 N.C. 773, 161 S.E. 394, it is required that plaintiff offer some evidence tending to show that intestate was potentially capable of earning money in excess of that which would be required for her support. See also *Cox v. Shaw*, 263 N.C. 361, 139 S.E. 2d 676; *In re Estate of Ives*, 248 N.C. 176, 102 S.E. 2d 807; *Davenport v. Patrick*, 227 N.C. 686, 44 S.E. 2d 203.

The judgment of nonsuit is

Affirmed.

HUSKINS, J., took no part in the decision or consideration of this case.

PARKER, C.J., dissenting: The common law recognizes no right of action for wrongful death. A right of action for wrongful death exists in this State by virtue of G.S. 28-173 *et seq.* This Court, in *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529, stated: "Nor is it essential that direct evidence of the earnings of a deceased adult be offered in order for there to be recovery of damages. Evidence of his health, age, industry, means and business are competent to show pecuniary loss." The evidence shows that Maxine Greene Nichols, at the time of her death, was a 15-year-old wife. There is nothing to show that she was in bad health. "Soundness of mind is the natural and normal condition of men, and therefore everyone is presumed to be sane until the contrary is made to appear." *S. v. Harris*, 223 N.C. 697, 28 S.E. 2d 232. Nothing in the record shows that Maxine Greene Harris at the time of her death was not of sound mind.

The realistic trend of the modern decisions recognizes the fact that a wife, as an individual, has a personal right to work and earn money, whether she is gainfully employed or not at the time or engaged merely in the performance of household duties; and, where a 15-year-old wife has been wrongfully killed, her estate has suffered a definite, substantial pecuniary loss. This is particularly true in view of the fact that married women in increasing numbers are engaging in business pursuits and employments as do men, and, like men, whether so employed or not, have a potential capacity to la-

bor and earn money. *Johnson v. Lewis,* 251 N.C. 797, 112 S.E. 2d 512; Annot. 151 A.L.R. 511.

In *Russell v. Steamboat Co.,* 126 N.C. 961, 36 S.E. 191, the Court sustained a verdict of $1,000 damages for the wrongful death of a child five-months old. The Court in its opinion said:

> "There is another view of the question that forces itself upon our minds which perhaps we are not called on to consider, but unless forced to do so by the overwhelming weight of authority or the inexorable logic of legal conclusion, we would be reluctant to admit that a human life, however lowly or feeble, had no value in the contemplation of a common carrier. Even a newborn colt or calf has an actual value entirely dependent upon its future usefulness or salability. It is a matter of common knowledge that during the days of slavery a healthy negro child, even at the breast, was considered as worth at least $100. Let us consider the contrast. A helpless negro baby, lying upon the floor along which he could not crawl, and born to a state of hopeless bondage, was worth to the owner at least $100 as a chattel; and yet another baby, with generations of inherent qualities behind him and the magnificent possibilities of American citizenship before him, is not worth to himself, or to the country whose destinies he might one day have shaped, even the penny necessary to carry the cost. This view is entirely too incongrous to strike our fancy.
>
> "Upon the greater and better weight of authority, as well as our own convictions of natural justice and of public policy, we are constrained to hold that the plaintiff can recover substantial damages in the case at bar."

In *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, 69 A.L.R. 2d 620, the Court by a divided vote denied recovery. In that case plaintiff's complaint alleged that his deceased intestate at the time of her death was 80 years of age.

In *Scriven v. McDonald,* 264 N.C. 727, 142 S.E. 2d 585, the recovery was denied for the wrongful death of an eleven-year-old boy. Plaintiff's evidence and other portions of Dr. Mangum's testimony not in conflict therewith showed that the boy, from birth until death, was mentally retarded and thereby severely handicapped. He could not fasten buttons. He could put on his shoes but could not tie them. In closing its opinion, the Court used this language:

> ". . . Absent substantial evidence, medical or otherwise, tending to show a reasonable probability Anthony could or might overcome his handicap, the only reasonable conclusion to

be drawn from the evidence is that he would continue to be a dependent person rather than a person capable of earning a livelihood. The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of Anthony's death. In our view, plaintiff's evidence negatives rather than shows such pecuniary loss."

The case of *Stetson v. Easterling,* 274 N.C. 152, 161 S.E. 2d 531, filed this date, is an action for damages for wrongful death. A demurrer to the complaint was sustained on the ground that plaintiff's allegations were insufficient to show that the estate of his intestate has suffered pecuniary loss on account of the death of his intestate. Plaintiff alleged: "John Edward Stetson could not swallow and therefore had to be fed by the use of a tube. That a thick mucus formed in and about the mouth and nose and had to be removed by the use of a suction device, and the baby had no eye blink." That decision is sound.

In an endeavor to distinguish this case from *Russell v. Steamboat Co., supra,* the majority opinion says that the plaintiff offered evidence that this five-months-old boy "had never been sick." In my opinion there is a reasonable inference of fact that a 15-year-old woman who marries is in good health. It would be unrealistic to believe that a man would marry a 15-year-old girl who was a bedridden invalid.

The majority opinion states this: "In *Hines v. Frink,* 257 N.C. 723, 127 S.E. 2d 509, an action for wrongful death in which this Court sustained a judgment of nonsuit, it was said that no discussion of negligence or proximate cause was necessary because plaintiff had offered no evidence as to the *age,* health, habits, or earning capacity of his intestate." (Emphasis mine.) In the instant case we have proof that Maxine Greene Nichols was 15 years of age.

The majority opinion cites in support of its position *Nunn v. Smith,* 270 N.C. 374, 154 S.E. 2d 497. As I read that case, it was not an action for damages for wrongful death and is not remotely relevant to this case.

The majority opinion cites *Spruill v. Insurance Co.,* 120 N.C. 141, 148, 27 S.E. 39, 42. That was an action to recover the amount of a life insurance policy and the question of suicide was involved. As I read the case, the principles of law there laid down have no relevancy with the instant case.

The majority opinion cites *Roberts v. Freight Carriers, Inc.,* 273 N.C. 600, 160 S.E. 2d 712. That case involved an action for property damages arising out of a collision between plaintiff's dump truck

and defendant's tractor-trailer. As I read the case, it has no relevancy whatever in respect to the instant case.

2 McIntosh, N. C. Practice and Procedure, § 1516, cited in the majority opinion, is in respect to directing a verdict.

The majority opinion states that plaintiff has offered sufficient evidence to carry the case to the jury that Nichols was the driver of the automobile in which plaintiff's intestate met her death, and that Nichols was guilty of actionable negligence in causing her death. In the instant case, considering plaintiff's evidence in the light most favorable to him and giving to him every reasonable inference of fact to be drawn therefrom, it would permit a jury to find that defendant's actionable negligence in operating an automobile wrongfully and unlawfully killed a 15-year-old married woman; that, nothing appearing to the contrary, she was presumed to be sound of mind, and that under the conditions of modern society with most women working a reasonable inference of fact could be found by the jury that she was healthy and capable of earning money. In my opinion, the plaintiff offered sufficient evidence tending to show that his intestate was potentially capable of earning money in excess of that which would be required for her support, and I vote to send the case to the jury.

The defendant has won a Pyrrhic victory for the simple reason that all the plaintiff has to do to carry his case to the jury is to institute in apt time another suit and sufficiently allege and prove on the trial that his intestate was in good health and able to earn money.

HIGGINS, J., joins in the dissenting opinion.

BERTHA C. PRICE v. SEABOARD AIR LINE RAILROAD CO.

AND

BROOKS M. PRICE v. SEABOARD AIR LINE RAILROAD CO.

AND

LINDA CAROL PRICE, BY HER NEXT FRIEND, BROOKS M. PRICE, v. SEABOARD AIR LINE RAILROAD CO.

AND

JANICE MARIE PRICE, BY HER NEXT FRIEND, BROOKS M. PRICE, v. SEABOARD AIR LINE RAILROAD CO.

(Filed 14 June 1968.)

1. Railroads § 5—

A railroad is under a duty to exercise reasonable care to maintain its crossings over public highways in a reasonably safe condition so as to permit safe and convenient passage over them.

2. Same—

A railroad company is only liable for a defect or condition on its right of way over a public crossing which is caused by its negligence and which renders a crossing unnecessarily dangerous and unsafe to persons using it.

3. Same—

Plaintiff's evidence tending to show that her automobile stalled on defendant railroad's grade crossing when it ran into a hole in the asphalt between the tracks and was struck by defendant's train *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in maintaining its crossing.

4. Same—

A railroad grade crossing is in itself a warning of danger.

5. Same—

Though a traveler and the railroad have equal rights to cross at a grade crossing, the traveler must yield the right of way to the railway company in the ordinary course of its business.

6. Same—

In approaching a grade crossing both trainmen and travelers upon the highway are under a reciprocal duty to keep a proper lookout and to exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing.

7. Same—

A railroad company is under a duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury.

8. Same—

Plaintiff's evidence tending to show that in approaching a grade crossing with which she was thoroughly familiar she had an unobstructed view of the crossing for over 400 feet, but that her view down the track to her left was partially obstructed by a bank and vegetation, that she was traveling 30 to 35 miles per hour, that she saw the top of the approaching train over the bank about 300 feet down the track, that she immediately applied her brakes but was unable to stop her automobile before it went on the railroad where it stalled and was struck by the train, *is held* to show contributory negligence on the part of plaintiff as a matter of law.

9. Automobiles § 108—

Contributory negligence of the wife while driving her husband's family purpose automobile bars the husband's right to recover against a third person for damage to his automobile.

10. Parent and Child § 5—

The parent is liable for medical expenses incurred in the necessary treatment of his minor unemancipated child injured in an automobile collision, and the right of action to recover for such expenses lies in the parent and not the child.

11. Same; Automobiles § 108—

Contributory negligence of the wife while driving her husband's family purpose automobile bars the husband's right to recover against a third person for expenses incurred in the necessary treatment of his unemancipated children injured in the collision.

12. Railroads § 7; Automobiles § 95—

Where a passenger in a car is injured in a collision at a grade crossing and the passenger has no control over the driver in the operation of the car, and the parties are not engaged in a joint enterprise, the negligence of the driver will not be imputed to the passenger and will not bar recovery against the railroad for the passenger's injury or death unless the negligence of the driver is the sole proximate cause of the accident or unless it constitutes intervening negligence insulating the negligence of the railroad company as a matter of law.

13. Negligence § 8—

Negligence of one party cannot be insulated by the negligence of another so long as the negligence of the first continues to be a proximate cause of the injury.

14. Railroads § 7; Negligence § 8; Automobiles § 93—

In an action by automobile passengers against a railroad, where plaintiffs' evidence tends to show negligence by the driver of the automobile and by the railroad as proximate causes of the injuries complained of, the driver's negligence not being imputed to the passengers since they had no control over the driving of the automobile and the parties were not engaged in a joint enterprise, nonsuit is improper since the railroad may be exonerated from liability only if the total proximate cause of the injury is attributable to another.

15. Railroads § 6—

In an action to recover for a grade crossing accident, an allegation that there were no electrically controlled signals at the crossing is properly stricken upon defendant's motion where there is no showing that the crossing was so dangerous that persons could not use it with safety unless extraordinary protective means were used, there being no statutory requirement that the railroad maintain such signals. The interpretation of G.S. 136-20 in *R. R. v. Motor Lines*, 242 N.C. 676, is disapproved.

16. Same—

In an action to recover for a grade crossing accident, an allegation that there were no stop signs at the railroad track is properly stricken upon defendant's motion where there is no allegation that the road governing body has designated the grade crossing in question as a place where vehicles are required to stop pursuant to G.S. 20-143.

17. Railroads § 5; Negligence § 27—

In an action to recover for a grade crossing accident, allegations that after the accident the railroad repaired holes in the crossing and removed an embankment which obstructed the view of defendant's tracks are properly stricken upon the defendant's motion, the making of repairs or taking precautions to prevent recurrence of injury being inadmissible to show antecedent negligence or as an admission of previous negligence.

PRICE *v.* RAILROAD.

APPEAL by plaintiffs from *Copeland, S.J.*, September 1967 Special Civil Session of UNION.

These are four civil actions which, by consent of all parties, were consolidated for trial and tried together. The first civil action was to recover damages for personal injuries to Bertha C. Price, the wife of Brooks M. Price, resulting from a collision between an automobile driven by Bertha C. Price and defendant's train at a grade crossing on rural paved road #1315 in Union County. The second action was instituted by Brooks M. Price to recover damages for the demolition of his automobile resulting from the said collision between plaintiff's automobile and defendant's train and to recover for medical expenses incurred in the necessary treatment of his two minor, unemancipated children injured in the collision. The third and fourth actions were to recover damages for personal injuries to Linda Carol Price, age 15 years, and Janice Marie Price, age 12 years, daughters of Bertha C. Price and Brooks M. Price, sustained by them in said collision while riding as passengers in the automobile driven by their mother.

From a judgment of compulsory nonsuit of all four actions entered at the close of plaintiffs' evidence, all the plaintiffs appealed.

Coble Funderburk for plaintiff appellants.

Richardson & Dawkins and Cansler & Lockhart for defendant appellee.

PARKER, C.J. The collision out of which these cases rise occurred about 10:45 a.m. on Saturday, 23 January 1965, a clear and dry day, at a grade crossing over the tracks of the Seaboard Air Line Railroad Company at rural paved road #1315 called the New Town Road. The scene of the collision was situate in a rural section of Union County about one and one-quarter miles southwest of the city limits of Monroe, North Carolina. Rural paved road #1315 is a two-lane secondary asphalt paved road about 16 feet wide and runs in a general east-west direction, and the railroad tracks at the crossing run in a general northeast-southwest direction. There was a double yellow line in the center of rural paved road # 1315 on both sides of the railroad crossing.

The automobile involved in the collision was owned by plaintiff Brooks M. Price and driven by his wife, plaintiff Bertha C. Price. Brooks M. Price was not in the automobile at the time of the collision.

At a pretrial conference the parties stipulated "that the plaintiff Bertha Price, as his agent and servant, she being the wife of Brooks

Price, and that on this occasion her operation of the automobile was within the scope of such agency as this was a family automobile."

At the time of the collision Linda Carol Price, a 15-year-old daughter of plaintiff Bertha C. Price, was riding in the front seat with her mother. Janice Marie Price, a 12-year-old daughter of plaintiff Bertha C. Price, was riding in the back seat as a passenger in the automobile with her mother. In the back seat with her was a cousin, David Couick, about three years old. There is nothing in the evidence tending to show that the two infant passengers had any control over their mother's operation of the automobile.

Bertha C. Price and her two infant children were going from her brother's house to her sister-in-law's house, and the nearest and shortest way to go there was to cross the railroad tracks. The collision between her automobile and the train occurred about a mile from her brother's house. She was proceeding in a generally easterly direction towards Monroe. The highway at that place runs along more or less parallel with the track of the railroad for about a mile before the curve. After the curve, rural paved road #1315 is straight on to the railroad track. Plaintiff Brooks M. Price, husband of Bertha C. Price, went to the scene of the collision on the afternoon that it occurred. He testified on cross-examination: "When I rounded the curve back west of the crossing, I had a clear, unobstructed view of the crossing for some 400 feet." His wife, Bertha C. Price, testified that she did not know how far the road was straight after she rounded the curve. After the road passes the curve, there is an unobstructed view of the crossing for 500 feet.

Harold Couick is the next friend of his son David Couick, who has a suit against the railroad for injuries received by him in the crossing accident, and testified as follows on cross-examination.

> "After you turn the curve, heading toward the crossing, you have an unobstructed view of the crossing. I wouldn't say the distance, but you can see the crossing. All the way from the time you pass the curve, you can see the crossing. You can see the cross-bucks on both sides of the crossing if you are looking for them. I am sure you could. If you were looking straight ahead, you would probably see them, but it might not register that they were there. They are there, though, and they were there then, and they were plainly visible. I believe that back west of the crossing in the eastbound lane of rural road #1315 there was on January 23, 1965, a great big white painted railroad X in the eastbound lane."

Coming to the railroad crossing from a westerly direction on the left-hand side of the road was a bank around four and one-half

feet high with a growth of weeds on it about four feet high or maybe a little more. This bank with the weeds reached back up the railroad track for about 200 feet.

Plaintiff Bertha C. Price testified as follows:

"As I came toward Monroe, near the intersection of this crossing, I was traveling about 30 — 35 miles per hour. I was familiar with this road. I had been over it before, and I knew there was a railroad track up there. I cannot say that I definitely remember seeing yellow lines in the road at that time. It was a two-way road. As I came close to the intersection of this road, I looked to my right. I saw nothing. As I looked to the left, I could see the bank on the side of the road, to my left, as I approached. This bank was situated to my left, running along the side of the track, the railroad track. The bank itself was about four feet or more, and there were weeds growing that were four feet and under. Some of them were at least four feet high. I could see nothing beyond those weeds.

"Well, as I came close to the track I must have been 30 - 40 feet from the track. I remember seeing the white cross-arm sign and immediately I saw the train down the track, the top of the train, and my daughter said, 'Mother, look out!' The train was coming from my left. It was, I would say, 300 feet down the track. I saw just the top part of the weeds. I was about 30 - 40 feet, I would say, 40 feet from the track at that time. I immediately applied my brakes and came to a full stop just over the first rail of the track. My right front wheel was over the track.

"Well, the train was at that time about 200 feet down the track. I put the car in reverse and had tried to get off the track. It moved back slightly, but then it stalled. It just wouldn't go back.

"Q. Well, did the engine continue to run?
"A. I don't think it did.

"COURT:

"Did I understand you to say that the engine to your automobile was not running at that time?
"A. I don't think it was running. I think it choked.

"As I came up to track and applied my brakes and stopped, the front of my car seemed to drop down.

"Q. When you put it in reverse, what did you do?

"A. For just a thought, the car moved back. Just for a thought, slightly it moved back.

"It stopped. The train at that time was about 200 feet down the track. I don't know anything else after that. I don't know if I was knocked unconscious or not, I probably was. I came to at the scene of the accident. I do not remember the train hitting the car."

Plaintiff Bertha C. Price further testified that just before the collision occurred she did not hear any whistle or horn or anything. All she says is that she did not hear anything; she is not testifying it was not blowing.

Jim Clontz, a deputy sheriff of Union County, went to the scene of the collision. He thus described the condition of the road between the railroad tracks at that time: "On the right-hand lane of travel, traveling east, the pavement was broken. There was about five to six inches drop-off between the tracks between the railroad tracks. That is on the right-hand lane of travel."

Frank Fowler, a deputy sheriff of Union County, lives close to where the collision occurred. He heard the collision and went to see it. He testified on direct examination as follows: "I observed the condition of the railroad track at the crossing. It had beaten out holes between the tracks at the crossing. In the right-hand lane of travel heading toward Monroe it had beaten out bad, in my opinion, from 4 to 6 inch holes. You could see the crossties in a place or two. The right-hand lane was beaten out and in holes approximately four to six inches deep." He testified on cross-examination: "The asphalt is beaten out in holes. They range from the size of a five-gallon bucket to a tin tub."

In the collision complained of plaintiff Mrs. Bertha C. Price and her two infant children received serious injuries, and the automobile of her husband, Brooks M. Price, was demolished and had no value except for junk.

Plaintiff's allege negligence on the railroad's part, *inter alia*, as follows:

"a. It failed to maintain said crossing in a reasonable and safe condition, but on the contrary allowed the said crossing between its railroad tracks to become broken, chipped and deteriorated until a hole approximately six (6) inches deep had been allowed to accumulate and remain.

"b. That it allowed said crossing to become and remain in said dangerous and defective condition and in such a condition

as to cause vehicles to choke down or stall while being driven over said crossing."

A railroad is under a duty to exercise reasonable care to maintain its crossings over a public highway in a reasonably safe condition so as to permit safe and convenient passage over them by persons exercising ordinary care in the use thereof. A railroad company is not an insurer of the safety of travelers, and it is not required to maintain a foolproof crossing or a crossing where no injury is possible. In general, a railroad company is only liable for a defect or condition on its right of way over a public crossing which is caused by its negligence and which renders crossing unnecessarily unsafe and dangerous to persons having occasion to use the crossing, while in the exercise of reasonable care; and such negligence is a proximate cause of the injuries complained of. *Parrish v. R. R.*, 221 N.C. 292, 20 S.E. 2d 299; *Moore v. R. R.*, 201 N.C. 26, 158 S.E. 556; *Campbell v. R. R.*, 201 N.C. 102, 159 S.E. 327; *Stone v. R. R.*, 197 N.C. 429, 149 S.E. 399; 74 C.J.S. Railroads § 719.

In *Goforth v. R. R.*, 144 N.C. 569, 57 S.E. 209, it is said: "It is just that crossings necessitated by the construction and operation of a railroad should be kept in a safe condition by it." In *Stone v. R. R., supra,* it is said: "As the crossing is on the railroad company's right of way, no one except the company has the right to enter upon the crossing for the purpose of repairing the same."

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road, whether public or private, is well settled. The duty is prescribed by statute, G.S. 62-224, and has been recognized and enforced by this Court in numerous decisions. *Stone v. R. R., supra.*

Considering plaintiffs' evidence in the light most favorable to them and giving them every reasonable inference to be drawn therefrom, 4 Strong, N. C. Index, Trial, § 21, it would permit a jury to find that the defective condition of the railroad crossing where the accident occurred was occasioned by the negligence of the railroad company and such negligence continued to exist up to the very moment of the collision of the railroad's train with the automobile driven by Mrs. Bertha C. Price which was owned by her husband and in which at the time her two infant daughters were riding, and such negligence was a proximate cause of the injuries to Mrs. Price and her two infant daughters and the destruction of her husband's automobile except for junk, and was sufficient to establish actionable negligence on the part of defendant railroad.

Defendant in its answer denies negligence and pleads contribu-

tory negligence of plaintiff Bertha C. Price as a bar to any recovery on her part.

The evidence offered by plaintiffs presents substantially the following situation: Mrs. Bertha C. Price driving an automobile approaches a grade crossing on a public highway over defendant's track with which she was thoroughly familiar. Upon rounding a curve in the road she had a clear and unobstructed view of the crossing for over 400 feet. She was traveling about 30 - 35 miles an hour. Traveling at that speed, she looked to the right and saw nothing. She looked to the left and saw a bank about four feet high and weeds of about that height growing on the bank. She saw a white cross arm railroad signal and the top part of an approaching train above the weeds about 300 feet down the track to her left. She immediately applied her brakes and was unable to stop her automobile before it went on the railroad tracks where it stalled and was struck by the train.

A railroad grade crossing is in itself a warning of danger. *Ramey v. R. R.*, 262 N.C. 230, 136 S.E. 2d 638; *Bennett v. R. R.*, 233 N.C. 212, 63 S.E. 2d 181; *Coleman v. R. R.*, 153 N.C. 322, 69 S.E. 251; 75 C.J.S. Railroads § 768a.

Where a railroad track crosses a public highway, though a traveler and a railroad have equal rights to cross, the traveler must yield the right of way to the railroad company in the ordinary course of its business. *Arvin v. McClintock*, 253 N.C. 679, 118 S.E. 2d 129; *Gray v. R. R.*, 243 N.C. 107, 89 S.E. 2d 807; *Johnson v. R. R.*, 163 N.C. 431, 79 S.E. 690.

In *Godwin v. R. R.*, 220 N.C. 281, 17 S.E. 2d 137, the Court held, as correctly summarized in headnotes 4 and 5, in our Reports:

> "In approaching a grade crossing, both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing.
>
> "A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury."

In *Irby v. R. R.*, 246 N.C. 384, 98 S.E. 2d 349, it is said:

> "In the instant case plaintiff knew that he was approaching a railroad, and he knew he was entering a zone of danger. He

was required before entering upon the track to look and listen to ascertain whether a train was approaching."

Northern Pacific R. R. v. Freeman, 174 U.S. 379, 43 L. Ed. 1014, is apposite. That case had facts somewhat similar to the instant case. In that case it is said in the syllabus: "Where a person approached a railway crossing well known to him, when a coming train was in full view, and he could have seen it while 40 feet distant from the track if he had used his senses, but did not look, or took the chance of crossing the track before the train reached him, and was killed, he was guilty of contributory negligence."

Mrs. Bertha C. Price was thoroughly familiar with this crossing and that a grade crossing over the railroad tracks was there. In not decreasing her speed from 30 or 35 miles per hour as she approached the railroad tracks with her view partially obscured, and when traveling at such a rate of speed that when she saw the train, above the bank and weeds 300 feet away down the tracks, she could not stop, she failed to exercise ordinary care for her own safety. Under the circumstances, she took a chance when she entered a known zone of danger thinking that she could pass over in safety, and lost. Considering her evidence in the light most favorable to her, it affirmatively shows contributory negligence on her part so clearly that no other conclusion can be reasonably drawn therefrom. It must not appear that Mrs. Price's negligence was the sole proximate cause of her injuries, as this would exclude any idea of negligence on the part of the defendant. *Godwin v. R. R., supra.* It is enough if it is contributory to the injury. *Wright v. Grocery Co.,* 210 N.C. 462, 187 S.E. 564. The very term "contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury. *Fulcher v. Lumber Co.,* 191 N.C. 408, 132 S.E. 9. Our opinion is that Mrs. Price was guilty of contributory negligence and her action against the railroad should have been nonsuited. Our view is supported by our following decisions: *Ramey v. R. R., supra; Medlin v. Seaboard,* 261 N.C. 484, 135 S.E. 2d 52; *Jenkins v. R. R.,* 258 N.C. 58, 127 S.E. 2d 778; *Carter v. R. R.,* 256 N.C. 545, 124 S.E. 2d 561; *Irby v. R. R., supra; Herndon v. R. R.,* 234 N.C. 9, 65 S.E. 2d 320; *Bennett v. R. R., supra; Bailey v. R. R.,* 223 N.C. 244; 25 S.E. 2d 833; *Godwin v. R. R., supra; Harrison v. R. R.,* 194 N.C. 656, 140 S.E. 598; *Coleman v. R. R., supra.*

Defendant in its answer denies negligence and pleads contributory negligence of plaintiff Bertha C. Price as a bar to any recovery on her part, and it also pleads that her negligence was imputed to her husband, Brooks M. Price, and bars any recovery by him for damage to his automobile, and any recovery by him for medical

expenses incurred in the necessary treatment of his two minor, unemancipated children injured in the collision.

The parties at the pretrial conference stipulated in substance that the plaintiff Bertha Price was the wife of Brooks Price, that she was his agent and servant, and that on the occasion complained of her operation of the automobile was within the scope of such agency as this was a family automobile.

Under the above stipulation by the parties, Bertha Price's legal contributory negligence was attributable to her husband, bars any recovery by him for demolition of his automobile, and his case was correctly nonsuited in the trial court. *Russell v. Hamlett,* 261 N.C. 603, 135 S.E. 2d 547; *Dowdy v. R. R.,* 237 N.C. 519, 75 S.E. 2d 639; 65A C.J.S. Negligence § 168 (11), p. 245. It is a generally accepted rule of law that the negligence of a servant acting within the scope of his employment will be imputed to the master, on the familiar doctrine of *respondeat superior.* 5 Strong, N. C. Index 2d, Master and Servant, § 33.

Brooks M. Price also sues to recover for medical expenses incurred by him in the necessary treatment of his two minor, unemancipated children injured in the collision. The liability to pay these expenses is the liability of the father, and not of his two minor children. G.S. 44-49 does not change the common law rule so as to permit the recovery of medical expenses as a part of the minors' cause of action. *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925.

This is said in *Kleibor v. Rogers,* 265 N.C. 304, 144 S.E. 2d 27:

> "Where an unemancipated minor child is injured by the negligence of another, two causes of action arise: (1) An action on behalf of the child to recover damages for pain and suffering, permanent injury and impairment of earning capacity after attaining majority; and (2) an action by the parent, ordinarily the father, for (a) loss of the services and earnings of the child during minority and (b) expenses incurred for necessary medical treatment for the child's injuries. *Shipp v. Stage Lines,* 192 N.C. 475, 479, 135 S.E. 339; *White v. Comrs. of Johnston,* 217 N.C. 329, 333, 7 S.E. 2d 825; *Ellington v. Bradford,* 242 N.C. 159, 86 S.E. 2d 925; 3 Lee, North Carolina Family Law § 241, p. 105, note 1.
>
> "With reference to the two causes of action now under consideration, the prior action in behalf of the minor and the present action by the father, the parties are different and the causes of action are different. *Ellington v. Bradford, supra.* An attempt to combine the two actions in one suit would constitute

a misjoinder of parties and causes of action and such suit would be subject to dismissal if defendant demurred on that ground. *Thigpen v. Cotton Mills,* 151 N.C. 97, 65 S.E. 750; *Campbell v. Power Co.,* 166 N.C. 488, 82 S.E. 842; *Ellington v. Bradford, supra.*"

The action of the father here to recover for medical expenses incurred in the necessary treatment of his two minor, unemancipated children is a different cause of action from the actions of his daughters here. We have hereafter ruled that in the two actions of his daughters they are entitled to go to the jury. Under the stipulation here we have ruled that Bertha Price's legal contributory negligence was attributable to her husband, Brooks M. Price, and bars any recovery by him for the demolition of his automobile. In principle we can see no difference in Brooks M. Price's action to recover damages for the demolition of his automobile and his action to recover medical expenses incurred in the necessary treatment of his two minor, unemancipated children injured in the collision, and we hold that his action to recover such medical expenses incurred in the treatment of the injuries of his two minor, unemancipated daughters is barred. This rule does not impair in any way the actions of Linda Carol Price and Janice Marie Price, his two infant daughters, to recover damages as laid down in *Kleibor v. Rogers, supra.*

Defendant did not plead contributory negligence as a bar to recovery by the infant plaintiffs. They were age 15 years and 12 years, were passengers in the automobile driven by their mother, and had no control over the driving of the automobile.

This is said in 4 Strong, N. C. Index, Railroads, § 6:

"Where a passenger in a car is injured in a collision at a grade crossing, and the passenger has no control over the driver in the operation of the car, and the parties are not engaged in a joint enterprise, the negligence of the driver will not be imputed to the passenger, and will not bar recovery for the passenger's injury or death unless the negligence of the driver is the sole proximate cause of the accident or unless it constitutes intervening negligence insulating the negligence of the railroad company as a matter of law.

"However, when the passenger is in control of the operation of the car by the driver, the driver's negligence will be imputed to the passenger and will bar recovery for injury to the passenger."

There is no evidence to show that the two infant plaintiffs were engaged in a joint enterprise. *Jernigan v. Jernigan,* 207 N.C. 831,

178 S.E. 587. From what has been said above, it is manifest that the negligence of Bertha Price was not the sole proximate cause of the accident.

Defendant railroad as held above was guilty of negligence. Its negligence was not insulated by the negligence of Bertha C. Price because the original negligence of the railroad played a substantial and proximate part in the damage to the two infant plaintiffs, which original negligence of the railroad existed up to the very moment of impact. *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879; *Davis v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440; *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1; *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. 2d 241, 81 A.L.R. 2d 239; *Shepard v. Mfg. Co.*, 251 N.C. 751, 112 S.E. 2d 380; *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876; *Harton v. Telephone Co.*, 141 N.C. 455, 54 S.E. 299. If the negligence of the defendant railroad continued to be a proximate cause up to the moment of injury, it cannot be insulated by the negligence of Bertha C. Price. *Watters v. Parrish, supra; Lamm v. Gardner*, 250 N.C. 540, 108 S.E. 2d 847; *Graham v. R. R.*, 240 N.C. 338, 82 S.E. 2d 346; *Yandell v. Fireproofing Corp.*, 239 N.C. 1, 79 S.E. 2d 223; *Lancaster v. Greyhound Corp.*, 219 N.C. 679, 14 S.E. 2d 820.

It is well-settled law in North Carolina that each person whose negligence is a proximate cause or one of the proximate causes of injury may be held liable, severally or as a joint tort feasor. If a person's negligence is in any degree a proximate cause of the injury, he may be held liable, since he may be exonorated from liability only if the total proximate cause of the injury is attributable to another or others. 3 Strong, N. C. Index, Negligence, § 8. Considering the evidence of the two infant plaintiffs in the light most favorable to them and giving them the benefit of every reasonable inference to be drawn therefrom, they have presented sufficient evidence to carry their cases to the jury against the railroad defendant, and the court committed prejudicial error in nonsuiting their cases.

Plaintiffs assign as error the action of the trial court in striking from all the plaintiffs' complaints in paragraph 5 the following words: "That there were no electrically controlled signals at the crossing of Rural Paved Road No. 1315 and the defendant's railroad track; that there were no Stop signs at the said railroad track." In paragraph 5 of plaintiffs' complaint it is alleged that the accident occurred at defendant's railroad crossing on rural road # 1315, which is a paved county road. It is further alleged in their complaint "that to the west of the said railroad track, approximately one hundred and fifty (150) feet from the track was a round, yellow sign with black cross-marks and two letters 'RR' in black, across

the said sign erected on a wooden post, said sign being about seven (7) feet from the ground, and facing west on Rural Paved Road No. 1315; that, standing on the right of way of the defendant's railroad track, facing west and on the south side of the Rural Paved Road No. 1315, was a white, wooden cross-arm with 'Railroad Crossing' written on the cross-arm, and this was erected on a post and was situated about ten (10) feet above the ground."

Harold Couick testified as follows on cross-examination: "After you turn the curve, heading toward the crossing, you have an unobstructed view of the crossing. I wouldn't say the distance, but you can see the crossing. All the way from the time you pass the curve, you can see the crossing. You can see the cross-bucks on both sides of the crossing if you are looking for them. . . . I believe that back west of the crossing in the eastbound lane of rural road #1315 there was on January 23, 1965, a great big white painted railroad X in the eastbound lane." Plaintiff Bertha C. Price testified in part: "Well, as I came close to the track I must have been 30 - 40 feet from the track. I remember seeing the white cross-arm sign and immediately I saw the train down the track, the top of the train, and my daughter said, 'Mother, look out!' The train was coming from my left. It was, I would say, 300 feet down the track. I saw just the top part over the weeds." Plaintiff Brooks M. Price, husband of Bertha C. Price, went to the scene of the collision on the afternoon that it occurred. He testified on cross-examination: "When I rounded the curve back west of the crossing, I had a clear, unobstructed view of the crossing for some 400 feet."

In *Cox v. Gallamore,* 267 N.C. 537, 148 S.E. 2d 616, Lake, J., said for the Court:

> "G.S. 136-20, which empowers the State Highway Commission, under certain circumstances, to require a railroad company to install gates, alarm signals or other safety devises at a crossing, does not relieve the railroad from its common law duty to give users of a highway adequate warning of the existence of a grade crossing at which the Commission has not required such devices to be installed. *Highway Commission v. R. R.,* 260 N.C. 274, 132 S.E. 2d 595.
>
> "A railroad crossing is, in itself, a warning of danger to a driver who knows of it or who, by keeping a reasonable lookout as he drives along a highway, could discover its existence in time to stop his vehicle before entering the path of a train proceeding over the crossing. *Ramey v. R. R.,* 262 N.C. 230, 136 S.E. 2d 638; *Stevens v. R. R.,* 237 N.C. 412, 75 S.E. 2d 232. On the other hand, one driving upon a highway is not required to as-

sume that he will come upon an unknown, unmarked railroad crossing at grade level which is not discoverable by keeping a reasonable lookout in the direction of his travel. It is the duty of the railroad to give to users of the highway warning, appropriate to the location and circumstances, that a railroad crossing lies ahead."

This is said in 74 C.J.S. Railroads § 727a:

". . . However, a railroad company ordinarily is not negligent in failing to maintain an automatic alarm, in the absence of statutory requirement, when the crossing is not more than ordinarily hazardous, as where the view at the crossing is unobstructed. In other words, mechanical warnings ordinarily are required only at crossings so dangerous that prudent persons cannot use them with safety unless extraordinary protective means are used."

Defendant relies upon the interpretation of G.S. 136-20 in *Southern Ry. v. Akers Motor Lines,* 242 N.C. 676, 89 S.E. 2d 392. We disapprove the interpretation of that statute in the *Akers* case. See 41 N. C. L. R. 296.

There is no statute in North Carolina obliging a railroad to maintain electrically controlled signals at the crossing of rural paved road #1315 where the accident occurred under the facts here.

There is nothing in the record in this case to show that the grade crossing on rural paved road #1315 is more than ordinarily hazardous, and according to plaintiffs' evidence there was a plain and unobstructed view of the crossing 400 feet away in the direction plaintiff Bertha C. Price was traveling. There is nothing to show that this crossing over this rural road was so dangerous that persons could not use it with safety unless extraordinary protective means were used. Plaintiff Bertha C. Price was thoroughly familiar with this road. She had been over it before and knew that the railroad track was ahead of her. The trial judge correctly struck from the complaints the following language: "That there were no electrically controlled signals at the crossing of Rural Paved Road No. 1315 and the defendant's railroad track."

The trial court struck from the complaint the following: "(T)hat there were no stop signs at the said railroad track."

G.S. 20-143 reads as follows:

"The road governing body (whether State or county) is hereby authorized to designate grade crossings of steam or interurban railways by State and county highways, at which vehicles are required to stop, respectively, and such railways are required

to erect signs thereat notifying drivers of vehicles upon any such highway to come to a complete stop before crossing such railway tracks, and whenever any such crossing is so designated and sign-posted it shall be unlawful for the driver of any vehicle to fail to stop within fifty feet, but not closer than ten feet, from such railway tracks before traversing such crossing. No failure so to stop, however, shall be considered contributory negligence *per se* in any action against the railroad or interurban company for injury to person or property. . . ."

The complaint has no allegation that the road governing body (whether State or county) had designated grade crossing #1315 as a place where vehicles are required to stop. Consequently, there was no legal duty on the railroad to put a stop sign at said railroad grade crossing. The trial court correctly struck from the complaint the language: "(T)hat there were no stop signs at said railroad track."

Paragraph 7 in the complaints in all four cases is identical and reads as follows:

"That at the time hereinafter alleged, the said crossing was in a defective condition and bad state of repair; that the cement in the eastbound lane of travel of Rural Paved Highway No. 1315 had been broken and chipped and shelled away until there had been a depression or chipping off of the cement in the right-hand side of the crossing for eastbound traffic until a sink or depression between the said railroad tracks had been allowed to deteriorate until it was approximately six (6) inches below the level of the top of the railroad tracks; this was repaired by the defendants January 28, 1965, five days after the accident."

Plaintiffs assign as error the striking from paragraph 7 of the complaints the following language: "(T)his was repaired by the defendants January 28, 1965, five days after the accident."

Paragraph 8 of the complaint in all four cases reads:

"That the defendant had allowed a bank to remain at the intersection of the said Rural Paved Road and its tracks on its right of way in the northwest corner of the said intersection and this bank reached a peak of approximately four and one-half (4½) feet at the said intersection and sloped back gradually down for approximately seventy-five (75) feet before it came near to the level of the bed of the defendant's tracks; that, upon this bank and on back to the east, there had been allowed to accumulate and grow upon this bank thick weeds, these weeds having grown to the height of approximately three to four feet and this bank was within eight (8) feet of the defendant's railroad tracks; that the defendant had permitted this condition to

remain which blocked the view of anyone coming in an easterly direction to the said crossing from seeing a train heading in a southwesterly direction on the defendant's tracks and that this condition remained at the time of the collision hereinbefore referred to; this bank was removed by the defendant on May 6, 1965."

Plaintiffs assign as error the striking from this paragraph of the complaint: "(T)his bank was removed by the defendant on May 6, 1965."

It is manifest that the parts of the complaints stricken were inserted by the pleader to show antecedent negligence or an admission of negligence on the part of defendant railroad.

". . . *(T)he making of repairs* or taking added precautions after an accident is not admissible as an admission of previous negligence." Stansbury, N. C. Evidence, 2d Ed., § 180, p. 472, where many of our cases are cited in support of the statement in the text.

This is said in 65A C.J.S. Negligence § 225a:

> "While there is some authority to the contrary, it is the general rule that, where a dangerous, defective, or improper place, method, or appliance is alleged to have resulted in an injury for which damages are sought to be recovered, evidence that, subsequent to the accident or injury complained of, changes or repairs thereof or thereto were made by the person charged, or precautions to prevent recurrence of injury were taken by him, is inadmissible to show antecedent negligence or as an admission of negligence on the particular occasion in question, or to show that the conditions previously existing were in violation of statutory regulations."

To the general rule, as set forth in the quoted sections from Stansbury and C.J.S., established by overwhelming authority, there are some exceptions which are set forth in *Shelton v. R. R.*, 193 N.C. 670, 139 S.E. 232, and also in 65A C.J.S. Negligence § 225. In the light of the admissions in defendant's answers in all four cases, the stricken allegations do not fall within any of the exceptions and were correctly stricken out, but if they do fall within any of the exceptions, which we do not concede, we are of opinion that the striking out of these fragmentary parts in all the complaints does not show prejudicial error.

One judgment was entered in all four cases which were consolidated for trial. The result is this: The judgment of compulsory nonsuit in the cases of Bertha C. Price and Brooks M. Price is affirmed. The judgment of compulsory nonsuit in the cases of Linda Carol Price and Janice Marie Price is reversed.

DR. S. J. POTTS, PLAINTIFF, v. JAMES E. HOWSER, T/A HOWSER BOAT COMPANY, DEFENDANT AND JACK R. HARRIS, ADDITIONAL DEFENDANT.

(Filed 14 June 1968.)

1. Damages § 3—

Where there is evidence from which the jury could find that plaintiff's diseased condition was active prior to the accident and that its severity was increased and aggravated as a result of defendant's negligence, defendant is liable only to the extent that his wrongful act proximately and naturally aggravated plaintiff's condition.

2. Damages § 16—

Evidence tending to show that the injuries received by plaintiff in the accident aggravated plaintiff's pre-existing infirmity of fibrositis is a substantial feature of the case, and the court should have instructed the jury as to the legal significance of defendant's negligent acts which aggravated the pre-existing condition, G.S. 1-180, a general instruction on the measure of damages being insufficient.

3. Appeal and Error § 24—

Exceptions relating to a single question of law are properly grouped under one assignment of error.

4. Evidence §§ 33, 50—

Testimony elicited from a witness other than the author of a medical report is incompetent as hearsay to prove the truth of the contents of the report.

5. Same—

Testimony elicited from a physician on cross-examination concerning the results of a radiologist's report *is held* competent when it appears that the physician was not reading the report before the jury but was merely stating that he had reviewed the report and had an opinion satisfactory to himself as to what it showed.

6. Appeal and Error § 47—

Error by the court in defendant's favor does not entitle plaintiff to similar benefits.

7. Witness § 8—

Plaintiff in a personal injury action, who had been married six times, could not be prejudiced by question on cross-examination as to whether he had complained to his fifth wife about tenseness in his wrist prior to the accident.

8. Same—

Cross-examination may not be used to take unfair advantage or to discredit a witness by questions tending merely to prejudice him in the eyes of the jury without a rational basis affecting his credibility.

9. Same; Damages § 13—

In an inquiry to determine damages for personal injuries sustained by plaintiff as a result of defendant's negligence in operating a motor boat, it is incompetent to ask the plaintiff on cross-examination if he got a Mexican divorce from his fifth wife while on a trip to that country shortly after the accident, or if he failed to report on his income tax return collections from delinquent accounts.

10. Damages § 13—

In an inquiry to determine damages for personal injuries sustained by plaintiff as a result of defendant's negligence in operating a motor boat,

it is competent to ask plaintiff on cross-examination (1) if he took a pleasure trip to Mexico shortly after the accident, (2) if he drank at all, (3) if plaintiff rented a fishing boat for eleven days immediately following the accident, (4) if plaintiff was involved in a subsequent accident which resulted in injury and disability, (5) if plaintiff suffered from a service-connected disability.

11. Same—

Evidence of pre-existing injuries, diseases or infirmities is competent in diminution of damages allegedly attributable to the injury in suit if such prior conditions bear a causal relation to the disabling injuries for which damages are sought.

12. Evidence § 44—

Testimony of plaintiff's former wife concerning plaintiff's physical condition and his complaints as to matters of health prior to an accident is competent.

13. Judgments § 15—

Plaintiff's right to recover at least nominal damages and costs on a judgment by default and inquiry is a substantive right, and it is incumbent upon the court to instruct the jury with reference thereto even in the absence of a special request.

14. Same—

On a determination of damages under a judgment by default and inquiry, the most the defendant can accomplish by his evidence on the inquiry is to reduce the recovery to nominal damages.

15. Damages § 1—

What is meant by nominal damages is a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage.

APPEAL by plaintiff from *Gambill, J.*, at the 25 September 1967 Mixed Session, ALEXANDER Superior Court.

Civil action to recover damages for personal injuries sustained by reason of original defendant's alleged negligent operation of a motor boat.

This case was before the Court on a former appeal by the original defendant. It is reported in 267 N.C. 484, 148 S.E. 2d 836. As a result of that appeal the additional defendant Jack R. Harris was eliminated as a party; judgment by default and inquiry against original defendant James E. Howser was upheld; and the case was returned to the Superior Court of Alexander County for inquiry before a jury on the issue of damages.

At the 25 September 1967 Mixed Session a jury was duly empaneled to make the inquiry.

Plaintiff testified that he practiced dentistry in Taylorsville, Alexander County, for ten years, returning to his home county of Columbus in 1964, where he has since followed his profession.

He stated that on April 11, 1962, at about 7:15 p.m., he was injured in a boat accident just off Taylorsville Beach when defendant's cabin cruiser struck his boat, knocking him into the water. He came

up under the cabin cruiser twice trying to surface. His hand hit the propellor or some part of the boat. His left wrist, little finger on left hand, and his neck were injured. He went to Alexander County Hospital the following morning and saw Dr. Alex Moffett, the chief resident surgeon. He was sore, bruised, and had a pain in his neck and left wrist.

After treatment for several months by Dr. Moffett, he went to Miller Clinic in Charlotte and saw Dr. Jacobs who treated him "off and on" for two years. The pain continued in his right shoulder and radiated down the right side of his back and "of course into my hands too." Since that time he has had a limited motion in his neck when turning his head to the right. He had no such limitation prior to the accident.

At the time of his injury his earnings averaged $75 to $100 per day for five and a half days per week. He lost full time for four months and half time for twelve to eighteen months, all due to pain in his neck and back and, at times, a limitation of motion in the little finger of his left hand.

He spent $1,221.50 for medicine and drugs and was still under the care of a doctor at the time of the trial.

On cross examination, plaintiff admitted over objection that he was drawing a disability benefit of $21 per month from the U. S. Air Force for a "suspected stomach ulcer"; that prior to the boat accident he consulted Dr. Jacobs "to find out what was wrong with my hands." He stated that he had experienced trouble with his right wrist since 1955 and that Dr. Moffett had x-rayed his spine or wrist several years ago.

Plaintiff further admitted that he rented a boat and motor for fishing purposes for eleven days immediately following the accident in suit, using a rod and reel on those occasions.

Over objection, plaintiff said he spent ten days in Acapulco, Mexico, following this accident because Dr. Jacobs thought he could recuperate better in the sunshine.

Plaintiff was also cross examined, over objection, concerning a rear-end auto collision near Wilmington some time following the boat accident and stated that he authorized Dr. Floyd to render a medical report.

Dr. Alex Moffett testified that plaintiff came to his office on April 12, 1962, and made a statement to his secretary, who x-rayed plaintiff. The history given was that of an accident "while fishing in my boat . . . I was rammed broadside and knocked from my boat into the lake . . . and sustained injuries to left wrist and ring finger and upon arising this morning felt as if was developing a cold and had soreness in wrist."

Dr. Moffett personally saw plaintiff on May 28, 1962. At that time plaintiff stated that ever since his accident on April 11 he had felt a burning type pain in the left shoulder blade region and in the mornings he had pain lower down in his back on the right side. "He told me his left wrist and ring finger had recovered completely. . . ." Dr. Moffett continued, "In reviewing his past history he has had pain . . . thought to be due to a cervical disc disease. That's a disc disease in the neck. On one occasion, he had tenosynovitis, that's a type of rheumatism in his wrist, and I stated that I believe that this man has a tendency toward fibrositis and that the accident, with the exposure to cold water and possibly also with muscular skeletal strain, predisposed to his present fibrositis. Fibrositis is a general term that we use to cover pain in the muscles and about the joints, and it covers such things as a crick in the neck and lumbago and a catch in the back. In this case, since he was still having this pain in his back, I thought that this was another flare-up of rheumatism in and about the muscles and I thought it had been aggravated by his accident. . . . The next time I saw him professionally was January 17, 1963, at which time he was having pain in his neck, right hip and right wrist. Dr. Jacobs was treating him at the time and he came by my office after having had a treatment from Dr. Jacobs that same day. He was having a good deal of pain at the time in the wrist. I put a splint on his wrist and advised him to rest and elevate his wrist and continue the treatment that Dr. Jacobs had prescribed. . . . I thought that this was another flare-up of his fibrositis and also connected with this condition in his neck. I believe they frequently go together. I have an opinion satisfactory to myself that the injuries that I have just described could cause some permanent effects."

Dr. Moffett further stated, in answer to a hypothetical question on cross examination, that being immersed in cold water might have produced the conditions which he found on the May 28 examination of the plaintiff; or, the findings on that date could have been a normal flare-up of his condition prior to the accident.

Defendant's evidence: Cromer Spencer testified that he saw the accident; that plaintiff was in the water three or four minutes; that plaintiff came to the shore on defendant's boat, put on dry clothes, and stayed at Spencer's house for a period of thirty minutes to two hours during which time he made no complaints about being hurt; that the water temperature was 50 or 60 degrees. This witness further testified that plaintiff rented a boat from him while his own was being repaired and continued to fish during the days immediately following the accident.

Mary Helen Marshall testified that she worked for the plaintiff

as a dental assistant for four years before her marriage to him and four years afterwards; that he complained of his wrists, shoulder and back before and after the accident; that he saw various doctors about his ailments; that his complaints before and after the accident were about the same; that on the night of the accident she took him dry clothes to put on and doesn't recall any complaints of pain at that time; that plaintiff divorced her.

Defendant James Howser testified that after the accident he brought plaintiff ashore and saw him an hour later at the boat house; that plaintiff made no mention of being hurt.

Following the charge, the case was submitted to the jury upon the following issue which was answered as shown:

"1. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: None."

Judgment was signed accordingly, and plaintiff appealed.

McElwee & Hall by Jerone C. Herring and John E. Hall, Attorneys for plaintiff appellant.

Smathers & Hufstader by James C. Smathers; Larry W. Pitts, Attorneys for defendant appellee.

HUSKINS, J. Plaintiff preserves four assignments, to wit: (1) the court erred in failing to instruct the jury concerning plaintiff's right to recover damages for aggravation of a pre-existing physical condition; (2) the court erred in admitting hearsay evidence of a medical report by a doctor not present in court; (3) the court erred in admitting prejudicial evidence which was irrelevant and immaterial, to wit: (a) evidence of plaintiff's bad character, (b) evidence relating to negligence, (c) evidence of a subsequent accident, and (d) remote medical evidence; and (4) the court erred in failing to enter judgment in favor of plaintiff for at least nominal damages and court costs. These assignments will be discussed in that order. All other assignments are deemed abandoned under Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810.

"The general rule is that where the result of the accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the defendant is liable for the entire damages which ensue, for it cannot be said that the development of the disease as a result of the injury was not the consequence which might naturally or ordinarily follow as a result of the injury, and therefore, the negligent person may be held liable therefor." 22 Am. Jur. 2d, Damages § 123. In *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E. 2d 541, 546, it was held that if defendant's misconduct "amounted to a breach of duty to a person of ordinary susceptibility,

he is liable for all damages suffered by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility."

All the evidence tends to show that Dr. Potts was suffering from a pre-existing condition (variously described as fibrositis, arthritis, tenosynovitis and rheumatism), which was not activated from a dormant state by the accident. Rather, there is evidence from which the jury could find that plaintiff's diseased condition was active prior to the accident, and its severity was increased and aggravated as a result of defendant's negligence. This calls for application of legal principles aptly stated in 25 C.J.S., Damages § 21, p. 661, as follows:

> "On the other hand, where the wrongful act does not cause a diseased condition but only aggravates and increases the severity of a condition existing at the time of the injury, the injured person may recover only for such increased or augmented sufferings as are the natural and proximate result of the wrongful act, or, as otherwise stated, where a pre-existing disease is aggravated by the wrongful act of another person, the victim's recovery in damages is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing disease, running its normal course, would itself have caused if there had been no aggravation by the wrongful injury."

An injured person is entitled to recover all damages proximately caused by the defendant's negligence. Even so, when his injuries are aggravated or activated by a pre-existing physical or mental condition, defendant is liable only to the extent that his wrongful act proximately and naturally aggravated or activated plaintiff's condition. "The defendant is not liable for damages . . . attributable solely to the original condition." 22 Am. Jur. 2d, Damages § 124. Plaintiff is confined to those damages due to its enhancement or aggravation. *Louisville Taxi Cab and Transfer Co. v. Hill,* 304 Ky. 565, 201 S.W. 2d 731; *Sterrett v. East Texas Motor Freight Lines,* 150 Tex. 12, 236 S.W. 2d 776. Compare *Anderson v. Motor Co.,* 233 N.C. 372, 64 S.E. 2d 265.

It was held in *Mourison v. Hansen,* 128 Conn. 62, 20 A. 2d 84, 136 A.L.R. 413, that one injured by the negligence of another is entitled to full compensation for all damage proximately resulting from the negligence, "even though the injuries are more serious than they would otherwise have been because of a pre-existing arthritic condition." Plaintiff "was entitled to damages to the extent that the jury found her condition was so aggravated by the defendant's wrongful act."

In the case before us, the court twice made reference in the charge to plaintiff's pre-existing condition, each time in the form of a contention as follows:

> "Now, the defendant argues and contends otherwise. He argues and contends that this plaintiff had certain conditions, pre-existing conditions, and that he had not suffered any substantial injury, if any, to his person because of this collision, that he may have been thrown into the water, and that if there is any damage, it would be damage to his pre-existing condition, and that he did not suffer any substantial injury or damage because of the negligence on the part of the defendant."
>
> Again, "Now, the defendant argues and contends otherwise. He argues and contends that the plaintiff was not hurt on this occasion, that mostly he was thrown out into the water and that if he was suffering any injuries, that it was a re-occurrence or flare-up of the pre-existing condition and that that was not a substantial injury or damage to this plaintiff."

In each instance the court was stating contentions of the defendant following a statement of plaintiff's contentions. No instruction of law was given with reference to these contentions, and the inference is left that if the jury should find that plaintiff's pain and suffering, loss of earnings and medical expenses were attributable to a pre-existing disease or infirmity plaintiff could not recover. The legal significance of negligent acts on the part of the defendant which aggravated or accelerated a pre-existing condition was not explained. This was a substantive feature of the controversy and it was incumbent upon the court to instruct the jury with reference to it even in the absence of a specific request. G.S. 1-180. It was so held in *Harris v. Greyhound Corp.*, 243 N.C. 346, 90 S.E. 2d 710. See also *Saunders v. Warren*, 267 N.C. 735, 149 S.E. 2d 19; *Westmoreland v. Gregory*, 255 N.C. 172, 120 S.E. 2d 523; *Byrnes v. Ryck*, 254 N.C. 496, 119 S.E. 2d 391; *Whiteside v. McCarson*, 250 N.C. 673, 110 S.E. 2d 295; *Glenn v. Raleigh*, 246 N.C. 469, 98 S.E. 2d 913; *Lewis v. Watson*, 229 N.C. 20, 47 S.E. 2d 484. The court's general instruction on the measure of damages was insufficient to satisfy this requirement. Plaintiff's first assignment of error must therefore be sustained.

Plaintiff's second assignment of error is based on alleged violations of the Hearsay Rule. The following cross examination of plaintiff concerning a medical report by Dr. Floyd was permitted over objection:

> "Q. And I'll ask you if it didn't contain this: Under paragraph One-A, entitled: 'Diagnosis and Concurrent Conditions' —I'll ask you if it didn't contain this statement: 'Multiple

contusions, left arm, left shoulder and upper back and neck from auto accident'?

"A. That's right.

"Q. And I'll ask you if it didn't contain this statement, in answer to paragraph six, subsection B, 'If Yes, estimated date of termination and cost of further treatment'? The date was given as '15 November 1966'?

"A. That's right."

Dr. Floyd was not in court and did not testify. The foregoing represents plaintiff's Exceptions Nos. 18, 19 and 20.

Dr. Alex Moffett, a witness for plaintiff, was cross examined over plaintiff's objection in the following fashion:

"Q. Did you get a radiologist's report on that?

"A. Yes, sir.

"Q. Do you have it with you?

"A. Yes.

"Q. Have you reviewed it yesterday or this morning?

"A. Yes, I have.

"Q. Did you look at the x-rays?

"A. Yes, I did.

"Q. Do you have an opinion satisfactory to yourself as to what they showed? Objection. Overruled.

"A. They did not show any evidence or pattern of joint change except for one change that the radiologist noted that he apparently did not consider of any importance."

This is plaintiff's Exception No. 31.

Plaintiff attempted to offer in his own behalf a letter written by Dr. Jacobs of the Miller Clinic in Charlotte to the plaintiff purporting to show that Dr. Jacobs advised plaintiff he could recuperate better in New Mexico, Arizona or Mexico because of the sunshine. Defendant's objection was sustained, and this constitutes plaintiff's Exception No. 24.

Plaintiff's exceptions to the admission and exclusion of the foregoing testimony are grouped under one assignment of error, and properly so, since they all relate to a single question of law; namely, whether such evidence violated the Hearsay Rule and was therefore incompetent. *Dobias v. White,* 240 N.C. 680, 83 S.E. 2d 785.

"Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *King v. Bynum,* 137 N.C. 491, 495, 49 S.E. 955, 956; quoted with approval in *Chandler v. Jones,* 173 N.C. 427, 92 S.E. 145. "Expressed differently, whenever the assertion of any person,

other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay." Stansbury, N. C. Evidence, Hearsay, § 138.

Defendant's cross examination of plaintiff concerning Dr. Floyd's medical report was for the purpose of showing that plaintiff had been injured and disabled in the Wilmington accident and could not claim damages against defendant for that period of disability. Defendant was not merely seeking to establish the fact that Dr. Floyd rendered a medical report. Rather, he was seeking to establish the *truth* of what the report *said* and was placing its contents before the jury without introducing it. He was doing indirectly what he could not do directly. The medical report itself was clearly hearsay. Dr. Floyd was not in court and subject to cross examination. It therefore follows that plaintiff's Exceptions Nos. 18, 19 and 20 should have been sustained.

The cross examination of Dr. Moffett concerning the report of the radiologist is competent. It does not appear that Dr. Moffett was merely reading the report before the jury. Rather, he stated that he had reviewed the report himself and had an opinion satisfactory to himself as to what it showed. Nothing affecting his competency to testify about it appears in the record. Exception No. 31 is overruled.

Plaintiff is in no position to insist on his Exception No. 24 for the simple reason that error by the court in defendant's favor does not entitle plaintiff to similar benefits.

Over objection, defendant was permitted to question plaintiff as follows:

"Q. As a matter of fact, your fifth wife was employed in your office at the time this accident occurred, and you complained to her about it [tense wrists], didn't you?

"A. I don't recall. My wife had no routine or anything as to massaging my neck and the upper part of my back and my wrist prior to this accident. She did it every now and then; I think everyone does. It was because I bent over in such a position that my back and neck hurt and that's the reason she massaged it.

[Plaintiff's Exception No. 6.]

"Q. How long did you stay in Mexico?

"A. Ten days or two weeks.

"Q. And while you were there, you filed for a Mexican divorce from your fifth wife?

"A. I did not.

"Q. Your wife was served with papers from a Mexican court, wasn't she?

[No answer.]

"Q. And you got a Mexican divorce, didn't you?

[No answer.]

"Q. You got a Mexican divorce, did you, Doctor, from this Miss Mary Helen Marshall?

"A. Not at the time. It had nothing to do with that trip. It was years later that I got that divorce. I got a Mexican divorce, and it was not at Acapulco. It was not during that time. It was not.

[Plaintiff's Exception's Nos. 13, 14 and 15.]

"Q. Do you drink at all?

"A. I never have drank enough to affect my work. I've never drank to affect my work."

[Plaintiff's Exception No. 21A.]

After plaintiff testified he filed income tax returns with reference to his earnings, he was asked:

"Q. Then I'll ask you if, after the filing of the income tax return, or after you had taken credit for bad debts on the books, when somebody did happen to come by and pay you, you stuck the money in your pocket, didn't you?

"A. Not to my knowledge."

[Plaintiff's Exception No. 16.]

Mary Helen Marshall, testifying on direct examination as a defense witness, was asked over plaintiff's objection:

"Q. What about his bad accounts?

"A. Well, he usually turned them over to a credit bureau or whatever you want to call it, or collection agency.

"Q. What about people — did you keep a list of what he called his bad accounts?

"A. Well, there was a list there in the office. He usually had an accountant to fill out the things and when the taxes were — yearly taxes were fixed, I just signed them and I didn't know what was what."

[Plaintiff's Exceptions Nos. 39 and 40.]

Plaintiff contends the foregoing exceptions, which are grouped for discussion in the brief under his third assignment of error, were irrelevant and immaterial to the issue being tried, were intended as evidence of his bad character, and were very prejudicial.

The question and answer embraced in Exception No. 6 was harmless. Plaintiff was asked on cross examination if he had not com-

plained about tenseness in his wrists to his fifth wife who was employed in his office prior to the accident in suit. The question identifies the wife to which the complaints were allegedly made. Obviously, a man who has had six wives could not be asked if he complained to his wife. The question would be too vague and indefinite.

Exceptions Nos. 13, 14 and 15 relate to plaintiff's trip to Mexico shortly after the accident and whether he got a Mexican divorce while there. It is entirely proper for defendant to show, if he can, that plaintiff was not so severely injured that he could not make a pleasure trip to Mexico shortly after the accident. Even so, notwithstanding the wide range permissible, "cross-examination for purposes of impeachment must stay within reason, and cannot be used to bring out purely prejudicial matters. . . ." Stansbury, N. C. Evidence, Witnesses § 42. Cross examination may not be used to take unfair advantage nor to discredit a witness by questions "tending merely to prejudice him in the eyes of the jury without rational basis as affecting his credibility." *Foxman v. Hanes,* 218 N.C. 722, 725, 12 S.E. 2d 258, 260. We think the questions concerning the Mexican divorce come within this category as do those questions concerning plaintiff's income tax returns and method of handling his delinquent accounts. The inquiry about plaintiff's drinking habits was permissible as bearing upon the cause of his alleged loss of earnings.

Exceptions Nos. 39 and 40 are sustained for the reason that plaintiff's handling of his bad accounts, even if a proper subject for cross examination of plaintiff, is a collateral matter. His answer was conclusive and cannot be contradicted by other testimony. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297, and cases there cited.

Defendant was permitted to elicit from plaintiff on cross examination an admission that plaintiff rented a fishing boat for eleven days immediately following the accident. Plaintiff's Exceptions Nos. 9, 10 and 11 assigned this as error for the reason that property damage was not included in plaintiff's suit. These exceptions are without merit and are overruled. The stated purpose of the evidence was to show lack of injury and to show that plaintiff was able to carry on his usual fishing pursuits.

Plaintiff's Exceptions Nos. 36 and 37 are addressed to the action of the court in permitting defendant to elicit from his witness Cromer Spencer testimony to the effect that defendant's boat was traveling at a speed of 3, 4, 5 or 10 miles per hour. "Couldn't have been over ten." Again, this evidence was not offered to show lack of negligence but as bearing upon the lack of force upon impact and to minimize the injuries likely to ensue therefrom. Its admission was harmless and plaintiff's exceptions are overruled.

Plaintiff excepts to the admission of evidence concerning a subsequent accident in which plaintiff was involved, contending it was improper to admit evidence of a rear-end auto collision on the highway near Wilmington because it was in no way similar to the boating accident and because there was no competent evidence that the injuries plaintiff received as a result of the collision related in any way to the injuries received in the case at bar. This is plaintiff's Exception No. 17.

In view of plaintiff's contention that he has sustained permanent injuries from the boating accident, defendant may show by competent evidence, if he can, that plaintiff was involved in a subsequent accident resulting in injury and disability. Defendant may further show the nature and extent of such injury and disability by the testimony or deposition of Dr. Floyd or by any other competent evidence. Plaintiff's Exception No. 17 is well taken on the present record because no competent medical evidence was offered to show what injuries plaintiff sustained in the Wilmington accident or what disabilities he suffered by reason thereof. Defendant will have an opportunity to mend his licks at the next trial.

Plaintiff's Exceptions Nos. 1, 2, 3, 4, 7, 8, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35 and 38 relate to medical evidence, some allegedly too remote, some too conjectural, and some rendered by a non-expert. These exceptions are all overruled. Evidence of pre-existing injuries, diseases or infirmities is competent in diminution of damages allegedly attributable to the injury in suit if such prior conditions bear a causal relation to the disabling injuries for which damages are sought. Plaintiff's medical evidence, and his own testimony as well, tends to show a history of pain due to arthritis, rheumatism, tenosynovitis and fibrositis. His complaints since the boat accident relate to pain in his fingers, wrists, shoulder, neck and back — conditions which could result from arthritis, rheumatism, tenosynovitis or fibrositis. Furthermore, the testimony of plaintiff's former wife concerning his physical condition and complaints prior to the accident was competent. "A nonexpert witness may testify from his knowledge and observation of the physical condition of a person as to such person's ability to engage in work or follow a gainful occupation. Such witness may also testify as to a person's health, including an opinion about his present state of health and ability to work." 3 Strong's N. C. Index 2d, Evidence § 44. See also *Gasque v. Asheville*, 207 N.C. 821, 178 S.E. 848.

Defendant was entitled to cross examine plaintiff concerning a disability benefit of $21 monthly received by plaintiff from the U. S. Air Force on account of a service-connected disability to ascertain the nature of such disability and whether or not it contributed

to his alleged disabilities for which damages are sought in this case.

We consider next the effect of a judgment by default and inquiry. "A judgment by default and inquiry is an interlocutory judgment which transfers the cause by operation of law to the Superior Court for further hearing in term. It has been held that a judgment by default and inquiry determines the right of plaintiff to recover at least nominal damages and costs and precludes defendant from offering evidence on the inquiry to show that plaintiff has no right of action." 5 Strong's N. C. Index 2d, Judgments § 15. See also *Rich v. Railroad,* 244 N.C. 175, 92 S.E. 2d 768; *DeHoff v. Black,* 206 N.C. 687, 175 S.E. 179.

The most defendant can accomplish by his evidence on the inquiry is to reduce the recovery to nominal damages. *Garrard v. Dollar,* 49 N.C. 175. This rule was recognized in this case on a former appeal [*Potts v. Howser,* 267 N.C. 484, 494, 148 S.E. 2d 836, 844] where Parker, C.J., speaking for the Court, said:

> "It is true that defendant's answer has been stricken, and that plaintiff's cause of action and right to recover at least nominal damages have been established. However, defendant is entitled to a trial on inquiry before a jury on the issue of damages. G.S. 1-212; *Wilson v. Chandler,* 238 N.C. 401, 78 S.E. 2d 155. In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages. 30A Am. Jur., Judgments, § 219."

"Nominal damages, consisting of some trifling amount, are those recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation. They have been described as 'a peg on which to hang the costs.' *Hutton v. Cook,* 173 N.C. 496, 92 S.E. 355; 15 Am. Jur. 390. 'What is meant by nominal damages is a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage.' " *Hairston v. Greyhound Corp.,* 220 N.C. 642, 644, 18 S.E. 2d 166, 168.

Plaintiff's right to recover at least nominal damages and costs was a substantive right and it was incumbent upon the court to instruct the jury with reference to it even in the absence of a special request. The jury's verdict was reached under a misapprehension of the law.

Plaintiff is entitled to a

New trial.

STATE v. DONALD LEROY PROPST.

(Filed 14 June 1968.)

1. Criminal Law § 29—

Ordinarily, it is for the court in its discretion to determine if the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense.

2. Same—

Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment, and the practice of submitting to the jury an issue as to the present mental capacity of defendant simultaneously with the issue of his guilt or innocence of the offense charged is expressly disapproved by the Supreme Court.

3. Criminal Law § 5—

At the trial, in passing upon a defendant's plea of not guilty because legally insane when the alleged crime was committed, the test of mental responsibility is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation.

4. Criminal Law § 29—

Upon defendant's arraignment to plead to the offense of murder in the first degree as charged in the indictment, the trial court had the duty to conduct a hearing into defendant's capacity to stand trial upon defense counsel's suggestion that defendant was incompetent to plead to the indictment or to assist counsel in his defense, when there had been previous findings upon medical expert testimony within the past year that defendant was without sufficient mental capacity to stand trial, and even though counsel stated that he had no evidence concerning defendant's mental condition since the last hearing thereon.

5. Homicide § 14—

Defendant's plea of not guilty puts in issue every essential element of the crime of first degree murder, and the State must satisfy the jury from the evidence beyond a reasonable doubt that defendant unlawfully killed the deceased with malice and in execution of an actual, specific intent to kill formed after premeditation and deliberation.

6. Same—

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased with a pistol and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice, constituting the offense of murder in the second degree.

7. Same—

The presumptions arising from a killing proximately caused by the intentional use of a deadly weapon does not relieve the State of the burden to establish beyond a reasonable doubt the additional elements of premeditation and deliberation which are necessary to constitute murder in the first degree.

8. Same; Homicide § 4—

A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and the intentional

use of a deadly weapon as a weapon is necessary to give rise to presumptions of unlawfulness and of malice.

9. Criminal Law § 6—

It is well settled that voluntary drunkenness is not a legal excuse for crime; but where a specific intent, or premeditation and deliberation, is essential to constitute a crime or a degree of a crime, the fact of intoxication may negative its existence.

10. Homicide § 25—

Although evidence of defendant's intoxication in this prosecution for first degree murder was insufficient to support a jury finding that defendant was utterly unable to form a specific intent to kill after premeditation and deliberation or to form a specific intent to shoot the deceased with a deadly weapon, there was sufficient evidence of defendant's intoxication to warrant its submission to the jury for their consideration, and the trial court's failure to refer to such evidence and apply the law thereto is prejudicial.

APPEAL by defendant from *Campbell, J.*, May 30, 1967 Session of BURKE.

At March Session 1966, defendant was indicted for the first degree murder of Ralph Henderson Taylor on February 21, 1966.

On March 10, 1966, on motion of Simpson and Simpson, defendant's court-appointed counsel, Judge Froneberger entered an order transferring defendant to the Dorothea Dix Hospital in Raleigh, N. C., "for observation, study and examination in order that reports as to his mental condition might be obtained."

On May 3, 1966, a report from said hospital, signed by Dr. Walter A. Sikes, Superintendent, after "Clinical Notes," concluded: "The Medical Staff made the following diagnosis and recommendations: *Diagnosis:* Paranoid state. *Recommendations:* (1) Donald Propst is unable to plead to the bill of indictment and he is unable to understand the charges against him. (2) Donald Propst should be committed to the Dorothea Dix Hospital under the provisions of G.S. 122-91 and G.S. 122-83." (Note: The report identified defendant as a "29 year old white divorced male" who "customarily weighed around 400 or over pounds," and was unable to "maintain any type of regular employment due to his size," and who had been "financially sustained by his brother, Frank, over the last 8 or 10 years.")

On October 10, 1966, a second report from said hospital, signed by Dr. A. L. Laczko, Director of Criminal Unit, after "Clinical Notes," concluded: "The Medical Staff made the following diagnosis and recommendations. *Diagnosis:* Without Psychosis (Not Insane). *Recommendations:* (1) Donald Propst is able to plead to the Bill of Indictment and he is able to understand the charges against him. (2) Donald Propst does know the difference between right and wrong. (3) Return to Court."

The case was calendared for trial at the November 1966 Session. On Monday, November 21, 1966, the first day of said two-week session, defendant's counsel moved that the case be removed to another county for trial, or that a special venire of jurors from another county be ordered. The record is silent as to rulings, if any, with reference to these motions.

On November 28, 1966, according to the agreed case on appeal, "after six jurors were selected," defendant's counsel made a motion under G.S. 122-84 "that a determination be made by the Court concerning the capacity of the defendant to stand trial," and that "a hearing was held for this purpose" by Judge Clarkson, the presiding judge. Dr. Walter A. Sikes, Dr. James T. Nunnally, III, Dr. Andrew Laczko, and Dr. Archie M. Rayburn, testified at said hearing.

After hearing said testimony, Judge Clarkson entered an order which, after recitals, concluded as follows:

"After hearing the testimony, as appears in the record, the Court was of the opinion that Defendant was not, because of his mental condition, able to stand trial at this time; and therefore, the Court in accordance with the provisions of General Statutes 122-34 *(sic)* found that the Defendant was without sufficient mental capacity to undertake his defense or to receive sentence after conviction.

"AT THIS TIME IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the case be continued and further that the Defendant be sent back to Dorothea Dix Hospital, taken by the Sheriff of Burke County, for further observation and treatment; a copy of this Order to accompany this Defendant to Dorothea Dix Hospital in Raleigh; and that authorities of said hospital shall report to the Superior Court of Burke County at what time in the future it is the opinion of the Superintendent and the medical staff that the Defendant does have sufficient mental capacity to undertake his defense.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the testimony taken before the Court in this inquiry be transcribed by the Court Reporter and the transcript filed with the court papers in this case; the transcript to be at the expense of Burke County."

On February 14, 1967, a third report from said hospital, signed by Dr. A. L. Laczko, Director of Criminal Unit, after "Clinical Notes," concluded: "The Medical Staff made the following diagnosis and recommendations. *Diagnosis:* Without Psychosis (Not Insane). *Recommendations:* (1) Mr. Donald LeRoy Propst is able to plead to the Bill of Indictment and he is able to understand the charges against him. (2) Mr. Donald LeRoy Propst does know the difference between right and wrong. (3) Return to Court."

According to the case on appeal, "defendant was returned for trial at the June 1967 Term of Burke County Superior Court"; that,

"when asked how he pleaded," defendant's counsel informed the court "he did not feel the defendant is competent at the present time to plead to a bill of indictment, nor to assist counsel in preparing the defense of this case." Defendant's counsel tendered to the court a transcript (now on file in this Court) of the testimony of said doctors taken before Judge Clarkson on November 21, 1966. The case on appeal states: "The defendant then, through his counsel, entered a plea of not guilty; attorneys for the defendant then objected to an arraignment on the basis of incompetency of the defendant to stand trial, and to plead to the bill and to assist counsel in the defense of his case. Upon inquiry by the Court, counsel for defendant informed the Court that defendant's plea of the offense charged was not guilty, by reason of incompetency at the present time, and not guilty on grounds of insanity at the time of charging the defendant with the murder of Ralph Henderson Taylor."

After reciting the facts substantially as stated above, Judge Campbell, the presiding judge, "then called upon counsel for the defendant to submit any evidence that the defendant had as to anything that transpired since February 14, 1967, pertaining to the defendant's mental condition." Defendant's counsel announced "that he had nothing that had transpired since February 14, 1967, concerning the defendant's mental condition." Thereupon, according to the record, the court proceeded with the selection of jurors.

After the jury was selected, sworn and impaneled, the court proceeded with the trial of defendant for murder as charged in the indictment.

Evidence was offered by the State and *in behalf* of defendant.

Uncontroverted evidence tends to show: On February 21, 1966, and prior thereto, defendant (Donald), twenty-nine, and his brother, Frank, forty-two, lived in a trailer, by themselves, "several miles" from the Taylor Hosiery Mill, owned by Ralph Henderson Taylor, where Frank was employed. Taylor died from wounds inflicted by bullets from a .38-caliber pistol fired by defendant.

The State offered three witnesses. Dr. John C. Reece testified Taylor's death was caused by described bullet wounds. Charlie Polk and J. D. Hoyle, employees of said hosiery mill, testified in substance, except where quoted, as set out below.

CHARLIE POLK: On February 21, 1966, about 3:00 p.m., the door of the plant "was slammed open" and defendant came in, hollering, "Hey, Ralph; where is Ralph?" and "Where is Ralph Taylor, the s.o.b. . . . I come to kill him." Defendant "hauled loose" and hit Polk, saying, "Don't you go for a knife," and "(i)f you do, you s.o.b., I'll kill you." Polk, saying he had no knife, struck defendant and "staggered him back." At that time, Taylor came through the

office door into the plant and said, "Donald, we can't have that going on here; you will have to get out of my place of business." Defendant shoved Taylor into the tool room. Two shots were fired. J. D. Hoyle was in the tool room. Taylor was "lying there" in the tool room with a machine hammer near his head. Frank (who had entered the mill with Donald) came and looked into the tool room. Defendant and Frank Propst were "laughing as they went out of the door."

J. D. HOYLE: Hoyle was in the tool room. He first saw defendant when defendant was passing the tool room door. When he next saw defendant, defendant had a gun in his hand. Taylor, in the tool room, was facing the door. He was two or three feet from defendant. Two shots were fired. He saw Taylor's right arm or hand, apparently with an object in it, "come down on the gun" about the time the first shot was fired. After the shots were fired, a hammer was near Taylor's body. After the second shot, Frank stuck his head into the door and said, "Oh, no, Ralph," or something to that effect. He "did not hear (Frank) laugh." His hearing is impaired "about 50 per cent."

Defendant did not testify. Frank Propst, Wade McGalliard, Dr. Walter A. Sikes and Dr. James T. Nunnally, III, were offered as witnesses for defendant.

With reference to what occurred immediately prior to the shooting, Frank Propst testified as follows:

"Instead of going to the laundry Donald stopped at Ralph's hosiery mill. I said to him don't go in there; he said I'm going in to see Charlie. When Donald went in the hosiery mill, I was four or five feet behind him; J. D. was in the tool room and I spoke to him; Donald went on down to where Charlie Polk was. I seen Donald slap Charlie; Ralph came out and I said Ralph, Donald is drunk, and Ralph said I don't give a damn what he is; and he grabbed Donald and Donald shoved Ralph; whenever Ralph staggered, he caught his footing again and ran into the tool room and went inside; Donald went up there close to the tool room door; I was within two or three feet of Donald and the door then; I was standing directly at the tool room door and Donald was just a little ways on the other side.

"I seen Ralph turn from his tool box with the hammer in his hand; Ralph came back to the door and I heard Donald say: Ralph, put that hammer down; and at that time when Donald first seen the hammer, Donald had the gun out. Ralph stood there in the entrance to the tool room door and kind of looked around and when he done that, he came down with the hammer onto Donald's right hand and I heard a shot. I heard two shots. After the first shot, there was another. Ralph hit Donald on the hand with the hammer; he hit

Donald's right hand between the thumb and forefinger and that is when I heard the first shot. I later observed Donald's hand and it had a black spot between the thumb and forefinger. After the shots, I looked into the tool room and said, 'Oh, God, no, Ralph.' Donald said come on, Frank, let's go; and we left. Donald went out the door first and I was second.

"Donald went out to the truck; we backed out into the highway and went down by Curley's Fish Camp and went back to the trailer. There was no laughter; I didn't laugh and Donald didn't laugh. Donald drove on back to the trailer."

With reference to defendant's actions on February 21, 1966, prior to defendant's arrival at the hosiery mill about 3:00 p.m., Frank Propst testified in substance, except where quoted, as narrated below.

Frank and Donald got up "between 9:00 and 10:00 o'clock" and went over to the hosiery mill (at Hildebran) and got Frank's check. After getting the check cashed, they went to Smith's Barbecue in Longview and ate breakfast. After breakfast, they got some groceries and took them to their trailer-home. Afterwards, en route to Newton, they "stopped at a whiskey store and bought one fifth of whiskey down at Sky City." The whiskey was opened and Donald "drank some of it, . . . about an inch or so." Leaving the whiskey store, they went to Newton where they paid a bill at a cold storage plant. While in Newton, Donald drank "some" of the whiskey. Upon their return to their trailer-home, Donald drank "the rest of the whiskey" — "practically all of the fifth" — "all of the whiskey except about one inch that is still in the bottle" — "before going to the laundry." Frank drank none of the whiskey. Instead of going to the laundry, defendant stopped at the hosiery mill.

Frank did not have a driver's license. In going from place to place as set out in the preceding paragraph, defendant was driving his truck. "He had difficulty with his driving that morning; he acted like he didn't know where we were going, although we had lived around Newton for awhile and Donald had been to the cold storage place about 15 times. . . . Donald had difficulty finding his way back home; he made several wrong turns on the way and I (Frank) had to tell him which way to go. . . . He (Donald) acted like he was awfully nervous and he took a great big drink of it; he had really been tore up for the past several days; a bad case of nerves. He took a box of aspirin between the time we got up and the time we left to go to Newton. He was complaining with his head."

Wade McGalliard, a deputy sheriff, testified in substance, except where quoted, as follows: He arrested defendant at his trailer home about 3:30 p.m. He located the hammer. There was a bruise or grease

spot on the section of defendant's hand between his thumb and index finger on his right hand. He "didn't smell anything unusual" about defendant. About 7:35 p.m., at the sheriff's office, Frank stated "he saw Taylor when he hit Donald's hand which held the gun and that the gun fired," and that "Taylor grabbed his side and that Donald fired again." Frank identified the pistol as belonging to defendant and said defendant "had beat him badly on several occasions."

Dr. Sikes testified in his opinion defendant "did not know on February 21, 1966, the difference between right and wrong." He testified: "It is my opinion that the defendant is suffering from schizophrenic reaction chronic undifferentiated type. In laymen's words, he has lost contact with reality and has false ideas; they have difficulty distinguishing between what is real and what is not real; they at times hear voices and people talking to them that are not there; they develop ideas that are of various nature; people are against them; they have unusual powers. They are being persecuted."

Dr. Nunnally gave testimony relating to defendant's mental condition on February 21, 1966, and on May 3, 1966.

The jury returned a verdict of guilty of murder in the first degree with a recommendation of life imprisonment; and judgment that defendant be confined in the State's Prison for the term of his natural life was pronounced.

Defendant excepted and appealed.

Attorney General Bruton and Deputy Attorney General Moody for the State.

Simpson & Simpson for defendant appellant.

BOBBITT, J. Ordinarily, it is for the court, in its discretion, to determine whether the circumstances brought to its attention are sufficient to call for a formal inquiry to determine whether defendant has sufficient mental capacity to plead to the indictment and conduct a rational defense. *State v. Sullivan,* 229 N.C. 251, 258, 49 S.E. 2d 458, 462; *State v. Khoury,* 149 N.C. 454, 62 S.E. 638; 21 Am. Jur. 2d, Criminal Law § 65. See Annotation, "Investigation of present sanity to determine whether accused should be put, or continue, on trial," 142 A.L.R. 961, at 972-992.

At November 1966 Session, the conflicting diagnoses and recommendations in the hospital reports of May 3, 1966, and of October 10, 1966, were amply sufficient to justify Judge Clarkson's decision to conduct a formal inquiry to determine whether defendant had sufficient mental capacity to plead to the indictment and conduct a rational defense. In *State v. Sullivan, supra,* where our prior cases are reviewed, it was held that, by virtue of the statutes now codified

as G.S. 122-83 and G.S. 122-84, such determination may be made by the court with or without the aid of a jury. Judge Clarkson heard the evidence, made his findings of fact and entered his order of November 29, 1966.

Subsequently, the report of February 14, 1967, signed by Dr. Laczko, was made. The "Clinical Notes," diagnosis and recommendations set forth therein, which relate to defendant's condition as of February 14, 1967, are in all material respects the same as those set forth in the report of October 10, 1966, relating to defendant's condition as of October 10, 1966. Although at May 30, 1967 Session defendant's counsel stated "he had nothing that had transpired since February 14, 1967, concerning the defendant's mental condition," we are of opinion, and so decide, that the report of May 3, 1966, made by Dr. Sikes, and the testimony of Dr. Sikes at the hearing before Judge Clarkson at November 1966 Session, and Judge Clarkson's findings of fact on November 29, 1966, made it necessary that a further hearing be conducted at or prior to the May 30, 1967 Session to determine whether defendant then had sufficient mental capacity to plead to the indictment and conduct a rational defense before defendant could be placed on trial for murder as charged in the indictment. So far as the record discloses, no further hearing was conducted and no findings of fact or determinations were made in respect of defendant's mental capacity.

Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment. In *State v. Haywood,* 94 N.C. 847, at 854, Smith, C.J., states: "(T)he defendant's capacity to enter upon a trial, should be determined before he is put upon the trial; for the trial would amount to nothing if the defendant has not the required capacity to defend himself against the charge. The very requirement to answer, prejudges the case adversely to the prisoner, and must have an unfavorable influence upon the jury, in passing upon the issue. Besides, the blending of the inquiries, by allowing evidence pertinent to one, and incompetent to the other, notwithstanding the caution the Judge may give as to its consideration, may tend to confuse the minds of the jury, and to do injustice to the defendant." Although this Court, in *State v. Haywood, supra,* in *State v. Sandlin,* 156 N.C. 624, 72 S.E. 203, and in *State v. Sullivan, supra,* held permissible the submission of an issue as to a defendant's present mental capacity to plead to the indictment and to conduct a rational defense simultaneously with an issue as to whether defendant is guilty or not guilty of the crime charged in the indictment, this procedure is not approved. See 30 N.C.L.R. 4, 20-21, and 27 N.C.L.R. 258.

"In determining a defendant's capacity to stand trial, the test 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 co-operate with his counsel to the end that any available defense may be interposed." 21 Am. Jur. 2d, Criminal Law § 63. This is in accord with *State v. Harris,* 53 N.C. 136, where it was determined that the defendant, a deaf-mute, could not be put on trial for the murder charged in the indictment. The basis of decision, as stated by Battle, J., was that "a deaf and dumb prisoner, whose faculties have not been improved by the arts of education, and who, in consequence thereof, cannot be made to understand the nature and incidents of a trial, ought not to be compelled to go through, what must be to him, the senseless forms of such a trial." At trial, in passing upon a defendant's plea of not guilty because legally insane when the alleged crime was committed, "(t)he test of mental responsibility is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation." 2 Strong, N. C. Index 2d, Criminal Law § 5; *State v. Spence,* 271 N.C. 23, 38, 155 S.E. 2d 802, 813.

Although for the reasons stated, the verdict and judgment must be vacated and the cause remanded for further proceedings, it seems appropriate to consider an assignment of error relating to the trial itself.

The court instructed the jury as to the law applicable to the asserted defense that defendant was legally insane when the alleged crime was committed.

In charging the jury, the court did not state any of the evidence bearing upon whether defendant was intoxicated on February 21, 1966, when the shooting occurred, and did not state any contention of defendant or give any instruction relating to the evidence as to defendant's intoxication. Defendant assigns as error this asserted deficiency in the charge.

In order to convict of *murder in the first degree,* the State was required to satisfy the jury from the evidence beyond a reasonable doubt that defendant unlawfully killed Taylor with malice, and that he did so in execution of *an actual, specific intent to kill, formed after premeditation and deliberation.* The plea of not guilty put in issue every essential element of the crime of first degree murder. *State v. Jackson,* 270 N.C. 773, 155 S.E. 2d 236, and cases cited.

If and when the State satisfied the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot Taylor with a .38 pistol and thereby proximately caused Taylor's death,

two presumptions arose: (1) that the killing was unlawful, and (2) that it was done with malice. Nothing else appearing, the defendant would be guilty of murder in the second degree. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322; *State v. Adams,* 241 N.C. 559, 85 S.E. 2d 918; *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83; *State v. Revis,* 253 N.C. 50, 116 S.E. 2d 171; *State v. Phillips,* 264 N.C. 508, 515, 142 S.E. 2d 337, 340; *State v. Price,* 271 N.C. 521, 525, 157 S.E. 2d 127, 129-130; *State v. Cooper,* 273 N.C. 51, 57, 159 S.E. 2d 305, 309. "The presumptions do not arise if an instrument, which is *per se* or may be a deadly weapon, is not intentionally used as a weapon, *e.g.,* from an accidental discharge of a shotgun." *State v. Gordon, supra.* The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, must be established beyond a reasonable doubt, and found by the jury, before the verdict of guilty of murder in the first degree can be returned; and the burden of so establishing these additional elements of premeditation and deliberation rests and remains on the State. *State v. Miller,* 197 N.C. 445, 448, 149 S.E. 590, 592; *State v. Payne,* 213 N.C. 719, 729, 197 S.E. 573, 579; *State v. Bowser,* 214 N.C. 249, 253, 199 S.E. 31, 33; *State v. Hawkins,* 214 N.C. 326, 334, 199 S.E. 284, 289; *State v. Chavis,* 231 N.C. 307, 311, 56 S.E. 2d 678, 681; *State v. Lamm,* 232 N.C. 402, 406, 61 S.E. 2d 188, 190; *State v. Faust,* 254 N.C. 101, 106, 118 S.E. 2d 769, 772.

A *specific intent to kill* is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and the intentional use of a deadly weapon as a weapon is necessary to give rise to said presumptions of unlawfulness and of malice. *State v. Gordon, supra.*

It is well settled that voluntary drunkenness is not a legal excuse for crime. In *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075, Hoke, J. (later C.J.), states: "The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.' Accordingly, since the statute (now codified as G.S. 14-17) dividing the crime of murder into two degrees and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder, 'a purpose to kill previously formed after weighing the matter' (*S. v. Banks,* 143 N.C. 658; *S. v. Dowden,* 118 N.C.

1148), a mental process, embodying a specific, definite intent, and if it be shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense." Later decisions in accord include the following: *State v. English,* 164 N.C. 497, 511, 80 S.E. 72, 77; *State v. Foster,* 172 N.C. 960, 965-966, 90 S.E. 785, 788; *State v. Hammonds,* 216 N.C. 67, 3 S.E. 2d 439; *State v. McManus,* 217 N.C. 445, 8 S.E. 2d 251; *State v. Cureton,* 218 N.C. 491, 495, 11 S.E. 2d 469, 471. Also, see dissenting opinion of Barnhill, J., (later C.J.) in *State v. Creech,* 229 N.C. 662, 675, 51 S.E. 2d 348, 358.

As stated by Walker, J., in *State v. Foster, supra:* "(W)here a specific intent is essential to the criminality of the act, or there must be premeditation or deliberation, or some mental process of the kind in order to determine the degree of the crime, it is proper to consider the prisoner's mental condition at the time the alleged offense was committed."

Decisions in other jurisdictions relating to intoxication as a defense to a "specific intent crime" are collected and reviewed in Annotation, "Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge," 8 A.L.R. 3d 1236, at 1246-1262.

The evidence most favorable to defendant tended to show he was looking for Polk when he entered the hosiery mill; that he found Polk and slapped him; that Taylor intervened, grabbed defendant and ordered him to leave; that Taylor got a machine hammer and was advancing on defendant; and that the first shot occurred when Taylor was striking defendant with the hammer.

In our view, the evidence as to defendant's intoxication is insufficient to support a finding that he was so drunk that he was *utterly unable* to form an actual, specific intent to kill, after premeditation and deliberation, and was insufficient to support a finding that defendant was *utterly unable* to form a specific intent to shoot Taylor. Even so, when considered in connection with the testimony referred to in the preceding paragraph, and in connection with the testimony as to defendant's mental status and nervous condition, we think the testimony relating to his intoxication was competent *for consideration* as bearing upon whether the State had satisfied the jury from the evidence beyond a reasonable doubt that defendant had unlawfully killed Taylor in the execution of *an actual, specific intent to kill, formed after premeditation and deliberation,* and for consideration as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonable doubt that defendant *intentionally* shot Taylor and thereby proximately caused his death. In our view, the court, in charging the jury, should have

referred to the evidence relating to defendant's intoxication and should have given instructions as to how it should be considered.

Although other assignments of error present serious questions, it is improbable they will recur at another trial. Discussion thereof in the context of the record now before us is unnecessary and inappropriate.

Error and remanded.

REBECCA GRIFFIN HAYES v. HARTFORD ACCIDENT AND INDEMNITY COMPANY.

(Filed 14 June 1968.)

1. Insurance § 95—

The insured in an assigned risk automobile liability policy may authorize another to act for him in exercising his right to cancel the policy.

2. Same—

Under a provision of an assigned risk automobile liability policy giving the insured the right to cancel the policy by mailing to the insurer written notice stating when thereafter cancellation should be effective, where the insured has constituted the loan company which financed the insurance premium his attorney-in-fact to cancel the policy, the mailing by the loan company of notice requesting "immediate cancellation" was equivalent to cancellation by the insured and effected cancellation *ipso facto* without any affirmative action being taken by the insurer, and nothing which the insurer did or failed to do thereafter affected the cancellation.

3. Same—

Failure of the insurer to notify the Commissioner of Motor Vehicles within 15 days after the effective date of cancellation that the policy had been terminated as formerly required by G.S. 20-310 did not affect the validity of the cancellation.

4. Same; Insurance §§ 106, 108— Evidence held foreign to the issues and prejudicial to insurer in action upon automobile liability policy.

In an action by a judgment creditor to compel an insurance company to pay a judgment rendered against an alleged insured under an assigned risk automobile policy, defendant contending that the policy was cancelled prior to the accident by a premium finance company acting under a power of attorney executed by the insured, and the only issues in the case being whether the insured executed the power of attorney and whether the finance company mailed to defendant prior to the accident a notice requesting immediate cancellation of the policy, evidence and jury argument that the finance company and not the insured mailed the request for cancellation, that blanks in the documents which insured signed to secure the premium financing were unfilled when the insured signed them, that the

insurer figured the unearned premium refund on a pro rata cancellation rather than a short rate method, and that the unearned premium refund was not made until after the date of the accident, are foreign to the issues and are prejudicial to defendant.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *McLean, J.,* 9 January 1967 Civil Session of GASTON, docketed and argued as Case No. 191 at the Fall Term 1967.

Action by judgment creditor to compel defendant Indemnity Company to pay a judgment recovered against an alleged insured.

The following facts are admitted or stipulated for the purpose of this trial: Under the North Carolina Assigned Risk Plan, on 27 February 1961, in consideration of a premium of $33.00, defendant issued to Mildred Jackson Sadler (Sadler) its automobile liability policy No. 20 AZ 225614 on a certain Mercury automobile. It obligated defendant until 26 February 1962 to pay on behalf of Sadler (within the policy limits) all personal injury and property damages for which she might become legally obligated as a result of the operation of the specified automobile. On 15 July 1961, the automobile was involved in a collision in which plaintiff was injured. Thereafter, in the Superior Court of Gaston County, she obtained a judgment against Sadler for $3,500.00 and the costs of the action. Execution issued on this judgment was returned unsatisfied by reason of Sadler's insolvency.

The policy in suit contained the following provision with reference to cancellation:

"18. Cancelation: This policy may be canceled by the named insured by surrender thereof to the company or any of its authorized agents or by mailing to the company written notice stating when thereafter the cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

"If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancelation is effected or as soon as practicable after cancelation be-

comes effective, but payment or tender of unearned premium is not a condition of cancelation."

Defendant denies liability upon the ground that the policy had been canceled prior to 15 July 1961. It alleged that when Sadler obtained the insurance she paid only a portion of the premium to Terry Insurance Agency in cash; that the balance was payable in installments to Insurance Premium Discount Company of Statesville, N. C. (IPD); that Sadler executed and delivered to IPD a power of attorney which authorized it to cancel the insurance upon her failure to pay any installments; that Sadler defaulted and IPD canceled the insurance, the cancellation date being 30 June 1961.

The trial judge ruled that the stipulations and admissions *prima facie* established defendant's liability to plaintiff, and he directed defendant to proceed with the evidence. Defendant offered evidence tending to show: Sadler, a junior high-school teacher, applied to Terry Insurance Company (the producer of record) for a policy of liability insurance under the North Carolina Automobile Assigned Risk Plan. She paid a portion of the premium to Terry and "the rest was to be financed." Under the rules of the assigned risk plan it was required that this premium of $33.00 be paid in full in advance to the insurer. Sadler signed the papers "in connection with that arrangement." *Inter alia,* she signed and delivered to IPD the following instrument, which was introduced in evidence as defendant's Exhibit No. 1:

"POWER OF ATTORNEY

"That certain note given in exchange for the issuance of a certain insurance policy and that certain note having been discounted by the agent issuing the said insurance with the Insurance Premium Discount Company, the insured hereby appoints Insurance Premium Discount Company his (its) attorney-in-fact to cancel and give notice of cancellation of said insurance policy, and said insurance company is hereby authorized and directed to cancel said policy and to pay Insurance Premium Discount Company the unearned or return premiums thereon without proof of default or of the amount owing to the Insurance Premium Discount Company. Said insurance company is hereby authorized to rely upon all statements made by Insurance Premium Discount Company as to the occurrence or continuance of default, the amount owing to it, and as to every other matter pertaining to this contract and said policies.

"And further the said Insurance Premium Discount Company is hereby authorized to endorse any and all checks drawn to it or to the undersigned for all earned and return premiums on the insurance policy with the understanding that any balance over and above the

balance due the Insurance Premium Discount Company will be refunded to assured."

IPD was engaged in the business of financing insurance premiums through the assigned risk plan by purchasing note contracts from insurance agents, the producers of record. It paid the agent for the note and the agent paid the insurer in full. IPD set up an account in the name of the insured. If an installment was not paid when due, a delinquent notice was sent to the insured. Thereafter if it "was not paid within a certain period of time," under the authority of the power of attorney given it by the insured, IPD requested the insurer to cancel the policy and refund the unearned premium to it. With the refund it paid any sums due on the account and remitted the balance to the insurance agent. Terry Insurance Agency was one of its customers and it had Sadler's account.

On 9 June 1961, defendant received in its Atlanta office a letter from IPD requesting "immediate cancellation" of Sadler's policy. The reason given was that her monthly payment of $4.50, due 25 May 1961, had not been made although "due notice thereof" had been given her. (Plaintiff had made a down payment of $13.50 and financed the balance due, which, including IPD's financing charge, was $27.00.) Attached to the cancellation request was a thermofax copy of the foregoing power of attorney (Defendant's Exhibits 6 and 7).

C. E. Stapp, defendant's underwriting supervisor for assigned risk policies in North Carolina, testified: "When I received this (the request for cancellation), I canceled the policy. I received this on the 9th day of June and I canceled the policy on the 9th of June. The procedure to cancel the policy was undertaken as of June 9." Thereafter, he testified over objection that while the "cancellation procedure" was undertaken on June 9th because of "some red tape involved" in getting the refund check authorized and issued, the effective date of cancellation was 30 June 1961. The records of IPD showed that it received defendant's refund check on 18 July 1961.

Sadler testified that on 14 July 1961, the day before the accident, she received a notice from the North Carolina Department of Motor Vehicles that her insurance had ended as of 30 June 1961 and that it was unlawful for her to operate an uninsured motor vehicle. (Defendant offered no evidence as to when it notified the Commissioner that Sadler's insurance had been canceled.) Sadler also testified that she executed the power of attorney (Defendant's Exhibit No. 1).

Plaintiff offered no evidence.

Issues were submitted to the jury and answered as follows: "1. Did Mrs. Mildred Jackson Sadler execute the Power of Attorney

which has been offered in evidence as Defendant's Exhibit No. 1? ANSWER: Yes. 2. Was the policy of insurance, the subject of this action, cancelled before the 15th day of July 1961? ANSWER: No."

The court denied defendant's motion to set aside the verdict and entered judgment that plaintiff recover the sum of $3,500.00 with interest from 6 December 1962 and the costs of the action. Defendant appealed.

Horace M. Dubose, III, for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman and J. Donnell Lassiter for defendant appellant.

SHARP, J. This appeal from the fourth trial is the third time this case has been before us. See *Griffin v. Indemnity Co.*, 264 N.C. 212, 141 S.E. 2d 300; *Griffin v. Indemnity Co.*, 265 N.C. 443, 144 S.E. 2d 201.

In apt time defendant tendered to the court two prayers for special instructions. The first prayer was that the court charge the jury that if they found that Sadler executed the power of attorney (Defendant's Exhibit 1) and that IPD mailed it to defendant Indemnity Company before 15 July 1961 with a request for cancellation (Defendant's Exhibit 7), they would answer the second issue YES. In the event its first prayer should be denied, defendant's second was that the jury be peremptorily instructed to answer both the first and second issues YES.

The judge declined to give either of the requested instructions. Instead, he charged the jury that if Sadler, through IPD, requested defendant to cancel the policy "then it became the duty of the defendant to cancel the policy and the defendant had no right to ignore the direction given it by Sadler acting through her duly authorized agent, the Insurance Premium Discount Company. . . . [I]f the Insurance Discount Company wrote to the defendant insurance company to cancel the policy, then it became the duty of the defendant company to cancel the policy and to return the premium." The judge's final mandate was that if, on or about 9 June 1961, IPD requested defendant to cancel the policy and return the premium and at that time defendant "put in motion the cancellation of the policy and did cancel it on or about the 30th day of June, then it would be your duty to answer this second issue YES; otherwise, you will answer it No. . . ."

Inter alia, defendant assigns as error (1) the foregoing portions of the charge; (2) the failure of the judge to give the requested special instruction; and (3) his failure to charge the jury that if defendant received the cancellation notice from IPD on or about 9

June 1961, "the policy was canceled upon the receipt of the request for cancellation without further action by the defendant," and it would be their duty to answer the second issue YES.

The assignments of error to the charge present these questions: (1) Was the policy canceled by the insured Sadler or by defendant insurer? (2) If canceled by the insured, was the policy canceled *ipso facto* when the request was mailed, or was some additional action by defendant insurer required to effect cancellation?

Plaintiff's contention is that defendant did not cancel the policy on June 9th, the day on which the request was received, but delayed cancellation until June 30th; that, because of the delay, the cancellation was by defendant and not by the insured Sadler; that defendant failed to give the 10-day notice of cancellation required by § 18 of the policy or the 15-day notice which G.S. 20-310 required when the insurer cancels, and for that reason the policy remained in full force and effect.

We consider first the policy requirements. Section 18 of the policy gave insured the absolute right to cancel at any time by either of two methods: (1) by surrendering the policy to the company or any of its authorized agents, or (2) by mailing to the company written notice stating when thereafter the cancellation shall be effective. Furthermore, Sadler could exercise that right personally or she could authorize another to act for her. *Griffin v. Indemnity Co.*, 264 N.C. 212, 141 S.E. 2d 300; *Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314. By a duly executed power of attorney she gave IPD blanket authority to cancel the policy. It exercised that authority on 8 June 1961 by method (2) when it mailed defendant a request for "immediate cancellation." Thereafter, on an undisclosed date, defendant notified the Department of Motor Vehicles that the policy had been canceled as of 30 June 1961.

The cancellation was instigated by Sadler's agent, IPD, and not by defendant, which had received the first annual premium in full as required by Rules 11 and 14 of the North Carolina Automobile Assigned Risk Plan. Defendant had given no notice and taken no steps leading to cancellation prior to receiving the notice from IPD. Absent any additional requirements in the Vehicle Financial Responsibility Act of 1957, the mailing of the notice requesting *immediate* cancellation of the policy effected cancellation without any affirmative action whatever being taken by defendant Indemnity Company. The rule is stated in 29 Am. Jur. *Insurance* § 401 (1959):

"Where an insurance policy provides that the policy shall be canceled at any time on the request of the insured . . . and that if the policy is canceled, the unearned portion of the premium shall be

returned on surrender of the policy, the company retaining the customary short rate, a written request for cancellation by the insured effects a cancellation at once and without any action by the insurer even though the policy is not surrendered and the unearned portion of the premium is not returned, since these are not conditions precedent to a cancellation by the insured. After cancellation and upon demand by the policyholder, the insurance company is liable to pay to him the unearned premium. However, whether or not such unearned premium is paid in no way delays or affects the cancellation of the policy." See Annot., Construction, application, and effect of clause that liability insurance policy may be canceled by insured by mailing to insurer written notice stating when thereafter such cancellation shall be effective, 8 A.L.R. 2d 203 (1949).

In *Nobile v. Travelers Indemnity Co. of Hartford, Conn.*, 4 N.Y. 2d 536, 176 N.Y.S. 2d 585, 152 N.E. 2d 33 (Ct. App.), on 16 September 1955, the defendant issued to the plaintiff an automobile liability policy. On 10 October he requested his broker to cancel the policy, which he surrendered on October 12th or 13th. On the 14th, a clerk stamped across the face of the policy "Cancel 10/14/55" and mailed it to the defendant. The defendant received the policy at 9:00 a.m. on 17 October. At 12:45 a.m. on the same day, the plaintiff had been involved in a collision. He brought suit to determine whether the policy was in effect at the time of the accident. The policy provision with reference to cancellation was identical with Section 18 of the policy in suit. In holding that the policy was canceled on 14 October, Desmond, Judge, speaking for the court, said:

"[T]he parties . . . agreed that the policy 'might be cancelled' by the mailing to the company of a written notice stating a cancellation date. It is impossible to read such a provision as having any meaning other than that such a mailing will produce the result that cancellation is and must be accomplished on the date fixed in the notice. . . .

"We think that [the word *hereafter*] means no more than that the policyholder may not select a cancellation date prior to the date on which he sends in the notice (see *State Farm Mut. Automobile Ins. Co. v. Pederson,* 185 Va. 941, 952, 41 S.E. 2d 64). Here, the letter and policy were put in the mail on October 14th and consistently with the meaning and purpose of the cancellation clause the notice indorsed by the broker on the policy gave that same date of October 14th as the date for cancellation. Cancellation under such a notice could not take effect earlier or later than October 14th." *Id.* at 541-42, 176 N.Y.S. 2d at 588-89, 152 N.E. 2d at 35.

The Virginia decision of *State Farm Mut. Automobile Ins. Co. v. Pederson,* 185 Va. 941, 41 S.E. 2d 64 (referred to in *Nobile, supra*) also involved a cancellation provision identical with the one we consider here. By a letter, dated 23 May 1945 and mailed 25 May 1945, the insured requested the insurance company to cancel his policy "as of today." The company received the letter on 28 May and acknowledged it on 29 May. On 4 June the company's local agent mailed the insured a form labeled "Policyholder's Request For Cancellation," and asked that he sign it. Therein it was stated that the policy had been canceled "effective May 25, 1945." On 5 June 1945, insured was involved in an automobile accident in which the plaintiff was injured. Thereafter she recovered judgment against him. The plaintiff contended (1) that the policy had not been canceled because the notice to the company "did not fix a date 'thereafter' when the cancelation was to become effective, but undertook to make the cancelation effective at once"; (2) that the company did not treat the letter as having terminated the policy; and (3) that return of the unearned premium was a condition of cancellation and the amount paid would have kept the policy in force on the day of the accident.

The Virginia court found no merit in any of these contentions. As to the first it said: "[T]he notice, dated May 23, 1945, requesting that the policy be canceled effective 'as of today,' was sufficient to cancel the policy on the date that it was received by the Insurance Company, namely, May 28, if not on May 25, the date the notice was mailed. *Either of these dates is after the date of the notice. Id.* at 952, 41 S.E. 2d at 68. (Emphasis added.)

"The purpose of the provision in the policy requiring that the notice from the insured shall state 'when *thereafter* such cancelation shall be effective,' is, we think, merely to forestall a retroactive notice. That purpose is, of course, accomplished here when the notice, dated May 23, is treated as effective on May 25, two days later." *Id.* at 952, 41 S.E. 2d at 68. *Accord, State Farm Mut. Auto Ins. Co. v. Miller,* 194 Va. 589, 74 S.E. 2d 145.

As to the plaintiff's second contention in *Pederson, supra,* the court pointed out that insured had in no way "relied on or been misled" by any acts of defendant which indicated that the policy was in force. As to the third contention, the court held that the insured's request for cancellation was not conditioned upon the return of the premium. His request that the unearned premium be returned did not indicate that cancellation was to be ineffective until he had received the refund.

In *Hardware Mutual Casualty Company v. Beals,* 21 Ill. App.

2d 477, 158 N.E. 2d 778 (a case in which a request for cancellation was held ineffectual because made by an unauthorized person), the Appellate Court of Illinois said: "[W]hen cancellation is made by the insured the company may sit back and do nothing. It need not go through the physical motion of actually cancelling the policy; it need not reply; it need not acknowledge receipt of the notice; it need not even return the unearned premium except upon demand since all contractual relations are at an end, with only a debtor-creditor relation existing for return of the unearned premium." *Id.* at 485, 158 N.E. 2d at 782.

In *Johnson v. Insurance Co.*, 174 N.C. 201, 93 S.E. 735 (tornado insurance) and *Manufacturing Co. v. Assurance Co.*, 161 N.C. 88, 76 S.E. 865 (fire insurance), each policy provided for cancellation at the request of the insured. In each case, after the plaintiff-insured had requested cancellation, he suffered a loss and sued on the policy. In both cases, this Court held that the request operated as a cancellation the instant it was made — even if the insurer absolutely refused to cancel. In *Johnson, supra* at 203, 93 S.E. at 736, it is said: "And if this request was made, there would be no significance in the fact that after the loss occurred, the company, in making a remittance for the unearned premium, retained an amount sufficient, at the annual rate, to have carried the policy beyond the date of the loss. . . . Even if the amount retained by the company was too much, this would only be a matter of adjustment between them as the sum actually due and would have no effect on the continued existence of the policy." *Accord, Farmers' Store v. Delaware Farmers' Mut. Fire Ins. Co.*, 240 Minn. 170, 59 N.W. 2d 889; *Gately-Haire Co. v. Niagara Fire Ins. Co.*, 221 N.Y. 162, 116 N.E. 1015.

In the first appeal in this case, Rodman, J., speaking for the Court, made it quite clear that, by the express provisions of the policy, the validity of cancellation was not dependent upon the return of the unearned portion of the premium and that defendant, when directed to cancel, was under no obligation to ascertain what sum, if any, Sadler owed IPD. The opinion, although not spelling it out in identical terms, laid down the rule quoted above from 29 Am. Jur. *Insurance* § 401 (1959) and followed the rationale of the New York and Virginia cases. *Griffin v. Indemnity Co.*, 264 N.C. 212, 141 S.E. 2d 300.

Clearly, the policy in suit was canceled by the insured. Therefore, defendant was under no obligation to notify Sadler that it had acted as she directed and canceled the policy. *Griffin v. Indemnity Co., supra; Daniels v. Insurance Co.*, 258 N.C. 660, 129 S.E. 2d 314; *Underwood v. Liability Co.*, 258 N.C. 211, 128 S.E. 2d 577. Neither

the 10-day-notice requirement of the policy nor the 15-day-notice requirement of G.S. 20-310, applicable when the insurer cancels, were apposite.

We hold that cancellation of the policy was accomplished when IPD mailed defendant the request for "immediate cancellation." Nothing further was required of either the insured or the insurer, and nothing which the insurer did or failed to do thereafter affected the cancellation. Thus the policy was canceled on 8 June 1961, and not on 30 June 1961, despite the fact that the notice, which Sadler received from the Department of Motor Vehicles on 14 July 1961 (the day before the accident) stated that it had been canceled on the later date. Since the evidence does not disclose the actual time, we may assume that defendant failed to notify the Commissioner within 15 days after 8 June 1961 (as then required by G.S. 20-310) that the policy had been canceled. Such notice, however, was not a condition of cancellation as plaintiff contends. In *Nixon v. Insurance Co.*, 258 N.C. 41, 127 S.E. 2d 892, the insured canceled the policy on 26 April 1960 and insurer mailed notice to the Commissioner on 16 May 1960, two days after an accident in which the plaintiff was injured. She recovered judgment against insured and sued on the policy. In affirming the judgment of nonsuit this Court said: "Cancellation of a policy is not conditioned upon the statutory notice to the Commissioner." *Id.* at 44, 127 S.E. 2d at 894. See also *Levinson v. Indemnity Co.*, 258 N.C. 672, 674, 129 S.E. 2d 297, 300.

From the foregoing, it follows that each of defendant's assignments of error to the charge must be sustained. Defendant was entitled to its prayers for special instructions, and the court erred in failing to give them as requested. The specific portion of the charge to which exception is taken implied that, in order to effect cancellation, some affirmative or formal action was required of defendant after it received IPD's notice to cancel immediately. It was therefore confusing and prejudicial.

As pointed out in the second appeal of this case, "[C]ancellation of the policy is an affirmative defense and the burden is upon the defendant to prove a valid cancellation effective before the liability of the insured arose." *Griffin v. Indemnity Co.*, 265 N.C. 443, 445, 144 S.E. 2d 201, 203. Thus, the judge may never nonsuit plaintiff so long as IPD's request for cancellation of the policy does not appear from her evidence. We point out, however, that the only issues in this case are (1) whether Sadler executed the power of attorney (Defendant's Exhibit 1), and (2) if so, whether IPD mailed it to defendant prior to 15 July 1961. Upon the evidence presented at each of the three trials which this Court has reviewed, defendant will always be entitled to have the jury instructed that, if they find

the facts to be as all the evidence tends to show, they will answer both issues YES. In the event the jury should disregard this instruction it would seem appropriate for the judge to set the verdict aside.

In the trial below, over defendant's objection, evidence was admitted which tended to show (1) that IPD — not Sadler herself — mailed the request that defendant cancel the policy; (2) that blanks in the information sheet, note, and note discount contract — documents which Sadler signed to secure premium financing from IPD — were unfilled at the time she signed them; (3) that defendant figured the unearned premium refund on "a pro rata cancellation" rather than a "short rate method"; and (4) that the refund was not made until 18 July 1961. All of this evidence was foreign to the issues and prejudicial to defendant. The jury speech, which plaintiff's counsel based upon this incompetent testimony, also patently prejudiced the defense. Defendant's assignments of error, based upon exceptions to both the evidence and the argument, are also sustained.

We sympathize with the plight of plaintiff, who has been injured by an uninsured motorist; nevertheless, the fault is not defendant's. The law permitted Sadler to borrow the money to pay the premium on the insurance which it required her to have before she could lawfully operate the vehicle upon the highway. The law also allowed her, in effect, to mortgage the required insurance by authorizing IPD (1) to cancel the policy if, at any time, she failed to pay an installment on the premium loan, (2) to collect the unearned premium from the insurance company, and (3) to apply the refund to the satisfaction of her debt. *Daniels v. Insurance Co., supra.* Furthermore, IPD was not required to notify Sadler when it requested the cancellation of her policy. However, the present law, G.S. 58-60, requires an insurance premium finance company to give an insured not less than 10 days' written notice of its intent to cancel his insurance contract unless the defaulted installment is received. *Grant v. Insurance Co.*, 1 N.C. App. 76, 159 S.E. 2d 368, *cert. denied* 30 April 1968, 273 N.C. 657. We also note that when an insured cancels a policy, G.S. 20-309(e) now requires an insurer to give the Department immediate notice of such cancellation, but thereafter an uninsured automobile owner does not forfeit his registration for 15 days after the Department notifies him of the cancellation.

For the errors indicated, the fifth trial of this case must be ordered.

New trial.

HUSKINS, J., took no part in the decision or consideration of this case.

STATE v. NAT VILLIAM WRIGHT.

(Filed 14 June 1968.)

1. Criminal Law § 75—

Miranda v. Arizona, 384 U.S. 436, lays down the governing principle that, as a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial police interrogation, the suspect must be advised in unequivocal terms (1) that he has a right to remain silent, (2) that anything he says can and will be used against him in court, (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation, and (4) that, if indigent, a lawyer will be appointed to represent him.

2. Same—

Evidence of statements or admissions by defendant is rendered incompetent by circumstances indicating coercion or involuntary action.

3. Criminal Law § 76; Constitutional Law § 37—

Mental capacity of the defendant, whether or not he is in custody, the presence or absence of mental coercion without physical torture or threats, are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights.

4. Constitutional Law § 32; Criminal Law § 66—

Confrontation for identification is a "critical stage" of pretrial proceedings requiring the presence of counsel unless waived.

5. Constitutional Law § 33; Criminal Law §§ 42, 58, 60, 66, 67—

Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and are outside the protection of the Fifth Amendment privilege against self-incrimination.

6. Constitutional Law §§ 32, 33—

Requiring the accused to walk, to wear certain type clothing, to talk and repeat words allegedly uttered by the assailant at the time of the crime, nothing else appearing, are pretrial procedures which accused may be compelled to perform without violating his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments; yet, when performed by the accused for purposes of identification by the prosecutrix they then become part of a critical stage requiring the presence of counsel unless that right has been voluntarily, knowingly and intelligently waived.

7. Criminal Law § 76—

Where the court finds upon competent evidence that defendant had been fully advised of his constitutional rights and that his written waiver to "answer questions and make a statement" without a lawyer was made voluntarily, knowingly and intelligently, such findings are conclusive on appeal, and defendant's statement that he removed a screen, entered the prosecutrix' home through the window and touched but did not rape her is competent evidence and is properly admitted for the jury's consideration.

STATE *v.* WRIGHT.

8. Constitutional Law § 37—

Waiver of constitutional rights may be made orally and without advice of counsel.

9. Constitutional Law §§ 32, 33; Criminal Law § 66— Confrontation of defendant and his victim for identification required presence of counsel.

Defendant's statement, upon being advised of his right to counsel during a police identification line-up, that he "would not sign anything" but that he did not mind being in the line-up, is a sufficient waiver of the right to counsel, and the prosecutrix' failure to identify defendant as her assailant in the line-up with nine other prisoners exhausted the procedure to which defendant had orally consented; when defendant was taken from the line-up, made to put on clothes allegedly worn by the assailant, and was then exhibited singly to the prosecutrix for identification while being required to walk in her presence and to repeat the words allegedly spoken by her assailant at the time the crime was committed, the proceedings lost its character as a pretrial investigative procedure and became a critical stage requiring the presence of counsel, and evidence that the prosecutrix identified defendant at this confrontation is incompetent in the absence of evidence that defendant freely and understandingly waived the right to counsel.

10. Criminal Law §§ 66, 84—

Where prosecutrix' out-of-court identification of the defendant was made during a "critical stage" of the proceedings under circumstances whereby defendant was denied the right to counsel, her in-court identification of the defendant is incompetent unless it can be shown to have had an origin independent of the illegal confrontation.

APPEAL by defendant from *Hall, J.*, at the January 1968 Regular Criminal Session, DURHAM Superior Court.

Criminal prosecution upon a Bill of Indictment charging defendant with the crime of rape upon Mrs. Naomi Marie Byrd. The jury returned a verdict of guilty as charged with a recommendation of life imprisonment. From judgment in accordance therewith defendant appeals.

The State's evidence tends to show that Mrs. Naomi Marie Byrd lives at 1112 Taylor Street in Durham with her husband and two and one-half year old child. On the night of July 22, 1967, Mrs. Byrd retired about 11:15 p.m. The child was already asleep in a separate bed located in her bedroom. Mr. Byrd was asleep on a couch in the living room where they had watched a television movie.

Mrs. Byrd suddenly awakened around 12:15 a.m. and saw a man standing beside her bed. At first she thought it was her husband, but the man seemed larger and heavier than her husband and was wearing a cap with a little bill on it similar to a baseball cap. When she realized it was not her husband and started to raise up on her bed the man stuck a sharp object to the side of her neck and said, "Hush, hush, if you make a fuss I will kill you." He thereupon got on the

bed and repeated the quoted statement several times and also the words "open up." He had sexual intercourse with Mrs. Byrd by force and against her will while keeping the sharp object pressed against her neck. Mrs. Byrd feared for her life and was fearful that her husband might awaken and be killed or that her baby might be injured. The bedroom was rather light due to the fact that there is a street light to the rear of the house and the light was on in the living room straight down the hall from the bedroom. She could tell that her assailant was "definitely colored" and that he had on dark pants and a light shirt. She could not see his face because he kept it turned away. She could hear the way he talked because there was no whisper about it.

After the act was completed the intruder did not move for a few moments, and she said, "My husband is going fishing early." Her assailant said "okey" and got up and walked out of the bedroom and disappeared from view. She observed his walk for about eighteen to twenty feet. Prior to that time she had never seen nor known the defendant Nat Villiam Wright. Officers were called; they found that screens had been removed from the den and bathroom windows and placed on the ground to the rear of the house.

At 1:30 a.m. on July 23, Mrs. Byrd was examined by Doctor T. F. Adkins, a specialist in obstetrics and gynecology. She had gone to the hospital complaining of having been raped. The examination revealed the presence of male sperm. Her pelvic region was normal. No marks, abrasions or contusions were found on her neck, and no bruises were found about her body.

At 1:50 a.m. on Sunday morning, August 20, 1967, the defendant Nat Villiam Wright was arrested on a Peeping Tom charge, advised of his rights and lodged in jail. At 10:00 a.m. that same day, Detectives King and Upchurch of the Durham Police Department took defendant to the detective bureau, again warned him of his rights, and defendant in writing waived his right to counsel and agreed to answer questions and make a statement.

Thereupon, the detectives talked with him for awhile, advised him of their desire to put him in a line-up to be observed, and advised him that he had a right to have a lawyer during the time of the line-up. He refused to sign a written consent to be placed in a line-up, but said he did not mind being in the line-up and stated that he did not wish a lawyer present, that he did not need one. With his oral consent he was placed in a line-up of ten prisoners in a hall about twenty-five feet long and fourteen feet wide. Mrs. Byrd said she could not identify her assailant but would be able to identify him if she could hear him talk and see him walk. The line-up was then

discharged and defendant was immediately taken to a little room. At that time he had on dark pants and a light shirt, and the officer asked him to put on his cap. Then, in the presence of two officers and Mrs. Byrd, defendant was asked to repeat "hush, hush, if you make a fuss I will kill you. Open up." Officer Upchurch would say the words and then defendant would go along repeating them. He repeated them one time and then changed his voice and repeated them again. The officer asked him to speak in his normal voice the way he had been talking to them during the day, and he did. Then the officers requested him to walk back and forth so Mrs. Byrd could observe his walk, and he did. No other person or suspect was exposed to her. After seeing his walk and hearing him talk, Mrs. Byrd stated that defendant was the person who entered her bedroom and raped her.

After this episode, defendant was placed in a police car and driven to Taylor Street. The car was stopped on Taylor Street so its occupants could sit in the car and see between the houses. Defendant said he had seen Mrs. Byrd's house before. He lived about four blocks from it and would necessarily cross Taylor Street to go to the stores on Liberty Street. Officer Upchurch asked defendant if he didn't take the window out of that house and he said yes. At that time defendant told the officers that he took the screen off and entered the house through a window but said he did not rape this woman, that he put his hands on her and left. He said it was the window on the upper side of the house and that he left the house the same way he entered it.

The following day, August 21, 1967, an attorney was appointed for the defendant, and no statement was thereafter made to anyone.

On a *voir dire* examination in the absence of the jury the trial court found that defendant had been fully warned of his constitutional rights; that no threats of any nature were made against the defendant and no promises made to him; that defendant freely, voluntarily and understandingly made his statements to Detective Upchurch in the presence of Officer King and freely, voluntarily and understandingly uttered the words which the officers asked him to utter in the presence of Mrs. Byrd. The court therefore concluded that the statements made and the words uttered were made freely, voluntarily and understandingly by the defendant, and evidence thereof was admitted over defendant's objections.

Evidence for the defendant: Defendant testified that during July and August 1967 he lived at 419 Dale Street in Durham; that he has been married six years and has two children, ages four and five; that he has held four or five jobs since moving to Durham from

South Carolina, the longest being at the Buick place for about a year or more; that he cannot read or write although he went to the fourth grade at Chavis Highway School in Himmingway, South Carolina; that he quit school when thirteen years of age. He took oral tests for a driver's license.

He further stated that on August 20, 1967 he worked around his home cleaning and painting until 11:00 p.m. when he left to go to a store across Liberty Street to get some shoe strings. He had frequently gone to this little store and passed Taylor Street going and coming. He had frequently seen the outside of Mrs. Byrd's house at 1112 Taylor Street but had never been inside it. He had completed his mission and was on his way home about midnight to 12:30 a.m. when arrested and told he was being charged with Peeping Tom. He was placed in jail and first learned that he was charged with rape at the preliminary hearing on the following Monday after a lawyer had been appointed to represent him. He had never been arrested before and had never been in a police station. He didn't know what happened. At the time of his arrest he was wearing a cap with a bill, State's Exhibit 6, the same cap he wore for the confrontation with Mrs. Byrd. He stated that he had purchased the cap at the Salvation Army only the day before his arrest.

Defendant further testified that he is unable to read and write and that the writing on State's Exhibit 7, which purports to bear his signature on a waiver of his constitutional rights, is not his handwriting; that he did not write anything. In regard to his signature he stated that sometimes he signs his name with an "X" and sometimes he scribbles it. When he scribbles his name, he cannot tell whether he has done the scribbling or not.

According to defendant's testimony, Officer Upchurch accused him of entering Mrs. Byrd's house on Taylor Street. He denied the accusation saying he did not tell the officers he broke into her house, did not tell the officers he prized the screen off the window, did not tell the officers he entered the house and put his hands on the woman but did not rape her.

Two ministers and a member of the church to which defendant belongs testified that the general character and reputation of the defendant in the community where he lives is good. These witnesses also testified that defendant's mental capacity is that of a nine or ten year old child and that defendant is retarded, easily led and persuaded.

Defendant's wife testified that they had been married six and one-half years and had two children, ages five and three; that defendant doesn't think straight and clearly — more like an eight or

nine year old child. In July 1967 he was employed at the Triangle Brick Yard. He has had many jobs during the five years they had lived in Durham because he wasn't intelligent enough to do the work they put him to doing on different jobs. In spite of his mentality, he worked regularly and was able to support his family. He attended Mount Calvary Holy Church every Sunday with his wife and did so on the 23rd of July 1967, attending both the Sunday morning and Sunday night services. On the nights of July 21, 22 and 23, he was home with his wife and children. On the night of August 19 and early morning of August 20 he was not home. On the evening of August 19 he had washed his car, cut the grass, eaten supper and started painting a chest of drawers until about 9:30 or 10:00 p.m. He then left and said he was going to get some shoe strings but did not mention which store. He had been taking pills for stomach ulcers and also headaches since 1964.

Defendant offered in evidence the report of Doctor Bruce Kyles, Assistant Superintendent of Cherry Hospital, Goldsboro, N. C., where defendant had been confined for a sixty-day observation period following his arrest and prior to his arraignment. Following the clinical summary, which is without significance, the diagnosis is "moderate mental deficiency, without psychosis, IQ 62." Dr. Kyles thereupon returned defendant to court as able to stand trial stating, "It is the carefully considered opinion of the medical staff of this hospital that Nat Williams [*sic*] Wright is able to plead to the bill of indictment against him. He knows right from wrong, is aware of the nature and probable consequences of the offense with which he stands charged and in our opinion is able to consult with counsel in the preparation of his defense."

T. W. Bruton, Attorney General, by Bernard A. Harrell, Assistant Attorney General, for the State.

E. C. Harris, Jr. and C. Wallace Vickers, Attorneys for defendant appellant.

HUSKINS, J. Defendant brings forward the following assignments, to wit: (1) The court erred in permitting the prosecuting witness to identify defendant as her assailant because such in-court identification was based upon the out-of-court confrontation at the police station following her abortive attempt to identify him in a line-up, no counsel being present to represent him; (2) the court erred in permitting Officers Upchurch and King to testify regarding defendant's inculpatory statements to them, no counsel being present to represent him; (3) the court erred in failing to nonsuit, and (4) the court erred in failing to charge on circumstantial evidence.

Miranda v. Arizona, 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, lays down the governing principle that as a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial police interrogation, the suspect must be advised in unequivocal terms (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer with him during interrogation; and (4) that if he is an indigent a lawyer will be appointed to represent him. After having been so advised, a defendant may waive these constitutional rights provided the waiver is made voluntarily, knowingly, and intelligently.

"The test of admissibility is whether the statement by the defendant was in fact made voluntarily." *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. See also *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Gosnell,* 208 N.C. 401, 181 S.E. 323; *State v. Livingston,* 202 N.C. 809, 164 S.E. 337. The admission is rendered incompetent by circumstances indicating coercion or involuntary action. *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619. The "totality of circumstances" under which the statement is made should be considered. *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620. Mental capacity of the defendant, *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396, whether he is in custody, *State v. Guffey, supra,* the presence or absence of mental coercion without physical torture or threats, *State v. Chamberlain, supra,* are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights.

Confrontation for identification is a "critical stage" of pretrial proceedings requiring the presence of counsel unless waived. *U. S. v. Wade,* 388 U.S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926; *Gilbert v. California,* 388 U.S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951. That being true, Mrs. Byrd's out-of-court identification of defendant at the police station on August 20 was violative of defendant's constitutional right to counsel at that stage, and evidence of it was incompetent at the trial, unless defendant had voluntarily, knowingly and intelligently waived his right to counsel. *U. S. v. Wade, supra; Gilbert v. California, supra.*

The authorities hold, however, that handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, even the body itself, are identifying physical characteristics and outside the protection of the Fifth Amendment privilege against self-incrimination. *Schmerber v. California,* 384 U.S. 757, 16 L. ed. 2d 908, 86 S. Ct. 1826; *Gilbert v. California, supra; U. S. v. Wade, supra; State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873; Annotation: Accused's

Right to Counsel under the Federal Constitution, 18 L. ed. 2d 1420. Such pretrial police investigating procedures are not of such a nature as to constitute "critical" stages at which the accused is entitled to the assistance of counsel guaranteed by the Sixth Amendment and made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright,* 372 U.S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792; *Escobedo v. Illinois,* 378 U.S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758; *Pointer v. Texas,* 380 U.S. 400, 13 L. ed. 2d 923, 85 S. Ct. 1065. Therefore, requiring the accused to walk, to wear certain type clothing, to talk and repeat words allegedly uttered by the assailant at the time of the crime, nothing else appearing, are pretrial procedures which defendant may be compelled to perform without violating his constitutional rights under the Fifth, Sixth and Fourteenth Amendments. Even so, when performed by the accused for purposes of identification by the prosecutrix they then become part of a "critical" stage requiring the presence of counsel unless that right has been voluntarily, knowingly, and intelligently waived. *Gilbert v. California, supra.* It thus becomes necessary to examine the facts and circumstances under which defendant allegedly waived his right to assistance of counsel at the confrontation with Mrs. Byrd for identification purposes and during in-custody interrogation by Officers Upchurch and King.

Defendant was observed by Policeman Carter looking into a window at 1012 Franklin Street, four blocks from 1112 Taylor Street, at 1:50 a.m. on August 20, 1967. He was arrested and warned of his rights as follows:

> "You have the right to remain silent, anything you say can and will be used against you in a court of law; you have the right to talk to a lawyer and have him present with you while you are being questioned; if you cannot afford to hire a lawyer one will be appointed to represent you for any questions, if you wish one."

He was thereafter lodged in jail. He was wearing a baseball or fishing cap at the time. At 10:00 a.m. the same day, defendant was advised again orally and in writing as follows:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one

will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer."

Thereupon, defendant signed this waiver:

"I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me."

Officer Upchurch with Officer King present then talked with defendant for awhile, took him into a little room apart from the main hall in the county jail and explained his rights about being in a line-up. "At that time Detective King wrote out on a piece of paper giving his consent for a line-up and asked him if he would sign it. At that time he told us that he would not sign it but did not mind being in a line-up. He told us that he would not sign it, would not sign anything in writing but gave us his oral consent to us putting him in a line-up." He was then placed in a line-up with nine other prisoners, and Mrs. Byrd viewed them. She stated she could not identify her assailant from the line-up but could do so if she could hear him talk and see him walk. Defendant was then taken from the line-up, made to put on his dark pants and a light shirt and asked to put on his cap. Then, in the presence of the two officers and Mrs. Byrd, defendant was required to repeat, "Hush, hush, if you make a fuss I will kill you. Open up", and required to walk back and forth so Mrs. Byrd could observe his walk. After thus seeing him walk and hearing him talk, Mrs. Byrd identified defendant as the person who entered her bedroom and raped her. Later in court at the trial of this case, Mrs. Byrd identified defendant in the presence of the jury after the trial court had determined the competency of such evidence on a *voir dire* examination in the jury's absence. The court's findings and determination in that respect are as follows:

"After the alleged date of the offenses for which the defendant was arrested on a peeping tom charge on or about the 20th of August, 1967; that while the defendant was in custody on said peeping tom charge he was questioned by Police Detective Upchurch and other officers about the charges for which he is now being tried; that prior to any questioning by said officers the defendant was fully warned of his constitutional rights to

remain silent, that anything he said might be used against him in court; that he had a right to have a lawyer during the interrogation and that he had a right to have a lawyer appointed if he could not afford one; that the defendant stated that he did not desire counsel; that after his rights had been fully explained to him he freely and voluntarily signed a waiver; that there were no threats or promises whatever made by the said officers against the defendant; that in addition to the statements made to the officers by the defendant the officers asked the defendant to utter certain words in the presence of the prosecuting witness, Mrs. Byrd, the words being, 'Hush, hush, if you make a fuss I will kill you; open up open up,' or words to that effect. That prior to making these utterances no threats of any nature were made against the defendant and no promises made; that the defendant freely, voluntarily and understandingly made statements to Detective Upchurch and in the presence of Officer King, and freely, voluntarily, and understandingly uttered the above quoted words which the officers asked him to utter. The Court therefore concludes that the statements including the words uttered were made freely, voluntarily and understandingly by the defendant, and that the same are competent evidence."

Defendant's first assignment challenges the proceedings thus had and the competency of the evidence thus obtained.

In *State v. Gray, supra* (268 N.C. 69, 150 S.E. 2d 1), Lake, J., speaking for the Court, said:

"When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. *State v. Barnes, supra* [264 N.C. 517, 142 S.E. 2d 344]; *State v. Outing, supra* [255 N.C. 468, 121 S.E. 2d 847, cert. den., 369 U.S. 807, 82 S. Ct. 652, 7 L. ed. 2d 555]; *State v. Rogers, supra* [233 N.C. 390, 64 S.E. 2d 572]. The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify

those findings if so supported by competent evidence in the record." [Citations].

Such findings are conclusive in both state and federal courts if supported by competent evidence. *Watts v. Indiana,* 338 U.S. 49, 93 L. ed. 1801, 69 S. Ct. 1347; *Lyons v. Oklahoma,* 322 U.S. 596, 88 L. ed. 1481, 64 S. Ct. 1208; *Lisenba v. California,* 314 U.S. 219, 86 L. ed. 166, 62 S. Ct. 280.

Is there competent evidence in the record to support the finding by the trial judge that defendant freely, voluntarily and understandingly waived his right to counsel at the out-of-court confrontation for identification by the prosecutrix and at the in-custody interrogation by the officers?

Defendant's *written* waiver was to "answer questions and make a statement" without a lawyer. There is competent evidence to support the finding that defendant had been fully advised of his constitutional rights and that this waiver was made voluntarily, knowingly and intelligently. Hence, such findings by the trial judge are conclusive, and "no reviewing court may properly set aside or modify those findings. . . ." *State v. Gray, supra.* Therefore, the questions asked by the officers and the answers given by defendant relative to removal of the screen, entry of the Byrd home through the window, and touching the woman but not raping her, became competent evidence and were properly admitted for consideration by the jury.

On the other hand, defendant's *oral* waiver related to "being in a line-up". Defendant refused to sign a consent for a line-up written by Officer King, "said he would not sign anything", but stated he did not mind being in a line-up. Such waiver does not have to be in writing to be valid. *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. Nor is advice of counsel required in regard to making such waiver. *State v. Davis,* 267 N.C. 429, 148 S.E. 2d 250. He was placed in a line-up with nine other prisoners, and the prosecutrix was unable to identify him. This exhausted the procedure to which the defendant had orally consented. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ." *Stovall v. Denno,* 388 U.S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967. When he was taken from the line-up, made to put on dark pants and a light shirt and his cap, and then exhibited to the prosecutrix for identification while required to repeat the words allegedly spoken by her assailant at the time the crime was committed and required to walk back and

forth so she could observe his walk, the proceeding lost its character as a pretrial investigative procedure and became a "critical" stage requiring the presence of counsel. Hence, findings by the trial judge that defendant freely, voluntarily and understandingly waived his right to counsel at this critical stage of the case are not supported by competent evidence. The out-of-court identification by Mrs. Byrd violated defendant's constitutional rights to the assistance of counsel under the Sixth and Fourteenth Amendments and rendered evidence of such out-of-court identification incompetent at the trial. Likewise, her in-court identification of defendant is incompetent unless it can be shown to have had an independent origin and did not result from the illegal, out-of-court confrontation. *Wong Sun v. U. S.*, 371 U.S. 471, 9 L. ed. 2d 441, 83 S. Ct. 407. In determining the admissibility of her courtroom identification of defendant, the test is whether, granting the primary illegality of her out-of-court identification, the in-court evidence "has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. U. S., supra.* More simply stated, if the in-court identification had an independent origin it is competent. If it resulted from the illegal, out-of-court confrontation it is incompetent because denial of counsel requires its exclusion. That question should be decided by the trial court on a *voir dire* examination at the next trial if the State again offers her in-court identification. *Wong Sun v. U. S., supra.*

For the reasons discussed, defendant's first assignment of error is sustained, and his second overruled. The remaining assignments may not arise again, and we refrain from a discussion of them at this time. It suffices to say that there was sufficient competent evidence to carry the case to the jury.

For the error pointed out defendant is entitled to a

New trial.

STATE v. KENNETH RAY SHEDD AND JIMMY LEE SHEDD.

(Filed 14 June 1968.)

1. Criminal Law § 75—

Statements made by defendants when apprehended at the scene of a storebreaking *are held* properly admitted into evidence where the trial court found upon competent evidence on *voir dire* that the statements were freely, voluntarily and understandingly made after defendants had been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, and further, since the questions asked by the officers constituted a general on-

the-scene investigation of the crime and were not the type of custodial interrogation condemned by *Miranda.*

2. Criminal Law § 84; Searches and Seizures § 1—

Upon being arrested within a fence surrounding a building which had been broken and entered, an attempt having been made to open a safe therein and various tools and instruments which could be used for safe-cracking and storebreaking having been found around the safe, defendants showed the officers where their car was parked some 100 yards from the building. *Held:* The officers had a right to search the automobile without a warrant as incident to a lawful arrest, and testimony as to articles found in the car was properly admitted into evidence.

3. Same—

A key taken from the pocket of one defendant after his arrest at the scene of a storebreaking and attempted safecracking which unlocked an automobile parked nearby was properly admitted into evidence, no search warrant being necessary to search a lawfully arrested person for evidence connected with the crime.

4. Criminal Law §§ 42, 84—

The admission into evidence of clothing worn by defendants when arrested, which was taken from them by officers, and expert testimony as to the results of an examination of the clothing *is held* proper since it is not an unlawful search and seizure for officers to take from the person under arrest and to examine an article of clothing worn by him.

5. Criminal Law § 158—

Where the solicitor has agreed to the statement of the case on appeal, he may not thereafter repudiate its accuracy by letter to the Supreme Court, and the Supreme Court is bound by the record as certified and can judicially know only what appears of record.

6. Criminal Law §§ 128, 130—Record held not to disclose facts requiring mistrial as a matter of law.

Where it appears in the record on appeal that during a recess in the trial a witness for the State discussed the case within the hearing of the jury and that this was called to the court's attention, but the jury was not instructed to disregard any statement not made under oath by the witness, and where the record does not show what statements the witness made, and defendant's counsel made no motion for mistrial and made no request that the court instruct the jury to disregard such statements, the record fails to disclose facts requiring an order of mistrial as a matter of law or to show an abuse of the court's discretion in failing to order a mistrial, although the better practice would require that the trial judge conduct an investigation and make findings of facts as to what statements the witness made within the hearing of the jurors and determine whether a mistrial was proper.

7. Criminal Law § 130—

Refusal of the court after verdict to inquire as to whether notes had been taken by a juror and, if so, whether such notes were used in the jury's deliberations *is held* proper, the making and use of trial notes by the jury not being misconduct, and defendant's request for such inquiry coming too late after verdict.

STATE *v.* SHEDD.

APPEAL by defendants Kenneth Ray Shedd and Jimmy Lee Shedd from *Snepp, J.*, 7 August 1967 Schedule "C" Criminal Session of MECKLENBURG.

Criminal prosecution on three indictments, which were consolidated and tried together. The first indictment charges Kenneth Ray Shedd, Albert Leon Shedd, and Jimmy Lee Shedd on 2 July 1967 in the county of Mecklenburg with feloniously breaking and entering a building occupied by one Borden's Milk & Ice Cream Company, a corporation, with intent to commit larceny of property of more than $200 in value, a violation of G.S. 14-54. The second indictment charges the same defendants at the same time and place with feloniously attempting by the use of drills and other tools to break into a combination locked safe of the Borden's Milk & Ice Cream Company, a corporation, a violation of G.S. 14-55. The third indictment charges the same defendants at the same time and place with feloniously having in their possession, without lawful excuse, implements of storebreaking, to wit, electric drills and bits, punches, a 3-foot piece of ¾ inch pipe, a pair of large bolt cutters, gloves, a wrecking bar, a large hammer, an axe, a pry bar, and a flashlight, a violation of G.S. 14-55.

All three defendants, who were represented by their counsel Frank Rankin, entered a plea of not guilty to all the charges against them. Verdict: Guilty as charged in each of the three indictments as to each defendant. When the verdict was returned, defendants' counsel asked that the jury be polled. The jury was polled and each juror, as his name was called, said that his verdict was that each defendant was guilty of all three charges in the indictments against them, and that he still assented to that verdict.

From judgments of imprisonment as to Kenneth Ray Shedd and Jimmy Lee Shedd, they appealed to the Supreme Court. Albert Leon Shedd was sentenced to imprisonment on the three charges against him, but his sentences of imprisonment were suspended, and he was placed on probation. Albert Leon Shedd did not appeal.

Upon both appeal entries the trial court found that the defendants were indigent and appointed their trial attorney to perfect their appeal, to file a brief in their behalf, and to argue the case in the Supreme Court. This was done, the cost of the appeal being borne by the taxpayers of Mecklenburg County.

Attorney General T. W. Bruton and Assistant Attorney General Millard R. Rich, Jr., for the State.

Frank Battley Rankin for defendant appellants.

STATE *v.* SHEDD.

PARKER, C.J. This is a brief summary of the State's evidence: On 2 July 1967 Borden's Milk & Ice Cream Company, a corporation, owned and occupied a building on the service road off Interstate Highway #85 between North Graham Street and Sugar Creek Road in the city of Charlotte, North Carolina. The building contains refrigerated space, both high and low temperature, and office space. The office space faces the service road, and the refrigeration facilities are behind the office. A high fence encircles the entire lot. A tunnel about 34 or 35 inches high and 20 inches wide and approximately 90 feet long runs between two of its buildings. The purpose of this tunnel is to enable it to circulate hot air to keep ice from accumulating between the two low temperature rooms in the two buildings. A grate is placed there to throw hot air down into this tunnel.

An ADT burglar alarm system was installed upon the premises of Borden's. When a door is opened at Borden's, a light comes on at a switchboard in an office of the ADT Detective Service located at 325 East Ninth Street. About 9:28 a.m. on Sunday, 2 July 1967, Richard J. Rice, Jr., an employee of the ADT Detective Service, was in its office at 325 East Ninth Street and received a DT alarm there indicating that a door was open at Borden's. Rice immediately sent to the scene James Paul Gentry, the serviceman on duty at the office, and also called the county police, who in turn notified the city police. Gentry proceeded to the Borden building and upon arrival he saw there Officer Smawley, a city policeman. Soon thereafter Marvin Lee Ross, an employee of Borden's arrived at the scene. Ross unlocked the gate to the fence. Gentry went inside. Officer Smawley went back to his police car, got his shotgun out of the car, and gave it to Ross. Ross and Smawley went inside the fence and when they got about half-way back past the building, they saw Gentry coming around the building with the three defendants. Gentry had a pistol in his hand. These three men had on dirty, muddy clothes. Two of them had on black or dark gloves. Smawley took a two-barrel Derringer from the person of Albert Leon Shedd. A search of the premises of Borden's disclosed that entrance to the building was gained through a tunnel and that a grate over the tunnel had been removed at the end of the tunnel. Four cement blocks had been knocked out of the southernmost wall of the building. The northernmost wall of the storage room had bricks knocked down and there was a hole in the wall. The walls had not been damaged when the plant was closed on Saturday, the night before, at 6 p.m. The safe in the drivers' check-out room had been damaged. The hinges of the lock had been knocked off and there was a small

hole drilled in the door. In the storage room of the building there was found a hammer, drill, flashlight, crowbar, a shop hammer of about 10 pounds, a pry bar, a ¾ inch pipe approximately three feet long, a tire tool, and some assorted punches and chisels. Some of these were on the floor and others were in a burlap sack. The storage room was near the hole that was knocked out in the wall of Borden's.

B. D. Brown, an employee of the Mecklenburg County Police Department, testified that he had advised the defendants as to all their constitutional rights before John F. McAuley, also an employee of the Mecklenburg County Police Department, asked defendants any questions. While defendants were under arrest for storebreaking, and possession of burglar's tools not for a lawful use, and for attempting to break open a safe in the Borden building, and after defendants had been advised of all their constitutional rights, at the scene of the arrest within the fence on the premises of Borden's, McAuley asked defendants their names and where their automobile was. The three defendants told the officers their names and showed them where to drive to a wagon road in a field in the woods, and at the end of the wagon road there was found a 1962 white Ford. This Ford was approximately 100 yards in a straight line from the fence at the back of Borden's in the woods. Defendants objected to the admission of the testimony that they had showed the officers where their car was and also objected to any statements they had made. The trial court found as a fact that the statements referred to allegedly made by defendants were made freely, voluntarily, and understandingly after defendants had been informed of the nature of the charges against them, of their right to remain silent, of the possible use against them of any statements they might make, of their rights to confer with counsel before making any statement, and that if they were unable to hire counsel, they were entitled to have counsel appointed to represent them. The court overruled their objections and defendants excepted.

Jimmy Lee Shedd when searched had an inch drill bit in his rear pocket. A search of the car in the woods disclosed that bolt cutters were in it. McAuley testified that Jimmy Lee Shedd said, when the officers arrived at the car, that there was a creek in the vicinity and that he had gone down to the creek to look for bait to go fishing. Jimmy Lee Shedd said further that when they left the car in the woods they went up to a hole in the fence around Borden's, that the bolt cutters were there and also the box with Independence Electric on it, and that he and his two brothers picked them up and carried them back to their car and placed them in it.

After the three defendants were arrested on the charges for which they were later indicted, they were carried to the Mecklenburg County police station. At this police station the clothes and shoes defendants were wearing were taken off of them, and they were given other clothes to wear. These clothes were bundled up and sent to the Federal Bureau of Investigation in Washington. The officers took sweepings from the floor and from the brick walls or cement walls of Borden's and sent them to the Federal Bureau of Investigation in Washington.

Thomas J. Hughes is an employee of the Federal Bureau of Investigation in the Laboratory in Washington, D. C. He testified in detail as to his education, training, and experience in the examination and comparison of material of a mineral nature, including soil, safe insulation material, building materials such as plaster, mortar, concrete, etc. He is assigned to the Soils and Minerals Unit of the Laboratory. He has done this work for a little over four years. He has been held qualified as an expert witness in this field about fifty times in various states of the Union and in the Federal courts. The court found that Mr. Hughes was an expert Geologist and Mineralogist with special training in the field of examination and comparison of materials of a mineral nature. To this finding defendants did not object. He testified in brief summary: He examined the clothes of the three defendants sent to the F.B.I. Laboratory, and he examined sweepings from the floor of Borden's. He testified in detail as to the minute examination he made of this material. He testified in substance that in the shirts of the defendants he found some small particles of mortar which matched the mortar of the sweepings on the floor of the Borden building, and he also found in these clothes material which matched the cinder block, the mortar, and also the brick from the sweepings from the Borden building.

The State's evidence was amply sufficient to carry the case to the jury on all the counts in all the bills of indictment against all the defendants. Defendant appellants made no argument to the contrary. They made no motion that the State's case should be nonsuited.

Appellants assign as error the trial court's finding that appellants' replies to questions as to their names when they were arrested by the officers inside the fence of Borden's, and other statements they made there after they had been warned in detail of their constitutional rights were freely, voluntarily, and understandably made. This assignment of error is overruled for the following reasons: (1) The trial judge's finding of fact is amply supported by competent evidence, and consequently it is conclusive and binding on appeal.

S. v. Gray, 268 N.C. 69, 150 S.E. 2d 1; (2) all the questions which the officer or officers asked defendants after they had been caught within the fence of Borden's plant early Sunday morning constituted that general type of on-the-scene questioning which is customarily conducted by an officer or officers charged with the duty of investigating the breaking and entry into buildings, and such questioning is a far cry from the custodial interrogation condemned by *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977; *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974. *S. v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638. Appellants have not favored us with any citation of authority to support their contention that the alleged statements of appellants under the circumstances here were incompetent.

Appellants assign as error the search of their automobile parked in the woods about 100 yards back of Borden's plant and testimony as to what was found in it. Appellants about 9:35 a.m. Sunday morning had been caught within a fence encircling Borden's. There was evidence tending to show that they had attempted to drill a hole in a safe in a building occupied by Borden's, that around this safe were many instruments and tools that could be used for safecracking or storebreaking, that they were arrested by the officers at the scene, and that they told the officers where their car was parked and showed them the way to it. According to these facts, it is our opinion, and we so hold, that the officers had a right to search this automobile and to testify as to the contents found therein as an incident to a lawful arrest. Under all the facts and circumstances, the officers had probable cause to search the automobile and the search was reasonable. *S. v. Carver,* 265 N.C. 710, 144 S.E. 2d 855; 79 C.J.S. Searches and Seizures § 67 and 67e; 47 Am. Jur. Searches and Seizures § 19.

Kenneth Ray Shedd assigns as error the introduction in evidence of a trunk key taken from his pocket which unlocked the 1962 Ford parked in the woods behind the Borden building. This assignment of error is overruled. Kenneth Ray Shedd was under lawful arrest when searched. "A search warrant is not necessary to search lawfully arrested persons for evidence connected with the crime." 79 C.J.S. Searches and Seizures § 67 at 842. In accord, *S. v. Tippett,* 270 N.C. 588, 596, 155 S.E. 2d 269, 275.

Appellants assign as error the admission in evidence of clothing they were wearing at the time of their arrest which was taken off of them by officers and sent to the Federal Bureau of Investigation in Washington for examination and the testimony of an expert there as to what he found upon an examination of these clothes. This assignment of error is overruled upon the authority of *S. v. Ross,* 269

N.C. 739, 153 S.E. 2d 469. In that case Lake, J., speaking for the Court, said:

> "There was no error in overruling the defendant's objection to the introduction in evidence of the trousers taken from the defendant while he was in custody. These trousers were not obtained by a search of his mother's residence. They were selected and put on by the defendant when the officers aroused him from the couch and told him to get dressed. After he was placed under arrest and given other clothes to wear, these trousers were taken and examined for blood stains. It is not an unlawful search or seizure for officers to take from the person under arrest and to examine an article of clothing worn by him. See: 47 Am. Jur., Searches and Seizures, § 53; 5 Am. Jur. 2d, Arrest, § 73; 6 C.J.S., Arrest, § 18. It is not error, nothing else appearing, to admit in evidence, over objection, testimony as to the condition or contents of such garments discovered by such examination or to admit in evidence the garment itself."

See in accord 2 Strong, N. C. Index 2d, Criminal Law, § 42.

Appellants assign as error the following which appears on page 128 of the record:

> "PROCEEDINGS
>
> "At the close of the cross examination of the witness, James P. Gentry, the Court took a ten (10) minute recess and the jury retired into the hall at the back of the court room. The witness, James P. Gentry, also went into the hallway at the back of the court room and entered into a discussion with other witnesses and spectators, as to the incidents concerning the charges against the defendants, which took place on the morning of July 2nd, 1967, at the Borden Milk and Ice Cream Company, all in the hearing of the jurors. This was all called to the attention of the Court and at no point in the proceedings did the Court instruct the jury that said statements were not made under oath from the witness stand and, therefore, should not be considered as evidence. The defendants contend that this fact alone would entitle them to a new trial. EXCEPTION No. 77."

We have before us a letter from the solicitor dated 17 May 1968 stating that he agreed to the statement of the case on appeal, that he accepted and signed as true the case on appeal without reading it, and he now wishes to repudiate in part the accuracy of the above statement. We have a letter from the trial judge dated 17 May 1968 stating that the statement that we have quoted above is not in all respects accurate. However that may be, the solicitor for the State

agreed to the statement of the case on appeal, and the record on appeal imports verity. The Supreme Court is bound by the record as certified and can judicially know only what appears of record. 1 Strong, N. C. Index 2d, Appeal and Error, § 42. There is nothing in the record to show what James P. Gentry said to the witnesses and spectators in the hearing of the jurors outside the courtroom. It is not shown that anything he said was prejudicial to appellants. A reading of the testimony of James P. Gentry shows that he testified in substance that he was an employee of ADT Detective Service and went to the building occupied by Borden on Sunday morning, 2 July 1967; that when the fence around Borden's was unlocked he went in and came back out with the three defendants who had their hands raised, Gentry being armed. So far as the record shows that is all that Gentry knew about the case. He had testified to those facts before the alleged conversation took place with witnesses and bystanders in the presence of the jury outside the courtroom. Those facts were not in dispute in the trial of the case. The appellants' defense was that they did not attempt to blow open the safe or break into the building of Borden's, but went inside the fence around Borden's having found a hole cut in the fence. Appellants' counsel apparently did not think it was prejudicial at the time because he did not move the court for a mistrial, and did not request the court to instruct the jury not to consider anything they heard Gentry say. Perhaps it would have been well had the trial judge conducted an investigation and found as facts what Gentry said to witnesses and spectators in the hearing of the jurors and whether it was proper to have ordered a mistrial.

This is said in *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19:

> "In McIntosh North Carolina Practice and Procedure, 2d Ed., Vol. 2, p. 67, it is said: 'Any misconduct of the jurors or of others which may influence them in finding a verdict may be considered as operating to cause a mistrial or to set aside the verdict; but the rule is the same as stated above in regard to separation. Where the circumstances are such as merely to give rise to a suspicion that there may have been improper influence, the Judge may in his discretion order a mistrial or set aside the verdict, and where there was such influence he should do so as a matter of law. What is such misconduct must depend to a great extent upon the circumstances of each case.' The text is supported by our cited cases beginning with *S. v. Tilghman,* 33 N.C. 513, and including *Lewis v. Fountain,* 168 N.C. 277, 84 S.E. 278; *Baker v. Brown,* 151 N.C. 12, 65 S.E. 520, and other cases cited in the opinions in those cases."

To the same effect: *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363.

This is said in 39 Am. Jur., New Trial, § 100:

> ". . . Even in criminal cases a new trial ordinarily will not be granted if there is nothing to show that the communication between the jury and the witness was improper or that the party complaining was prejudiced thereby."

The trial judge is clothed with power of discretion as to whether he should order a mistrial or set aside a verdict by reason of alleged misconduct of a juror or jurors "because of his learning and integrity, and of the superior knowledge which his presence at and participation in the trial gives him over any other forum. However great and responsible this power, the law intends that the Judge will exercise it to further the ends of justice, and though, doubtless it is occasionally abused, it would be difficult to fix upon a safer tribunal for the exercise of this discretionary power, which must be lodged somewhere." *Moore v. Edmiston*, 70 N.C. 471.

The burden is on the appellants not only to show error but that the alleged error was prejudicial and amounted to the denial of some substantial right. 1 Strong, N. C. Index 2d, Appeal and Error, § 46. Upon the facts of the instant record, it is our opinion that the trial judge was not required as a matter of law to order a mistrial in the case, and that no abuse of discretion on his part appears. This assignment of error is overruled.

This appears on page 124 of the record:

> "MR. RANKIN: One of my clients called it to my attention just as I arose to make the motion to set aside the verdict, that notes had been taken by the juror sitting in No. 5 Box — Mrs. Ruth Griffin — and without inquiry we wouldn't know whether they were used or not in their deliberations, but I requested inquiry while the jury was present, your Honor.
>
> "THE COURT: MOTION IS DENIED. EXCEPTION No. 74."

Appellants assign as error the refusal of the court to inquire as to whether the notes taken by the juror, Mrs. Ruth Griffin, were taken into the jury room and were used or not used in the jury's deliberations.

Most authorities in this Nation take the view that the making and use of trial notes by the jury is not misconduct but is proper, and may even be desirable, where it is unattended by undue consumption of time. *S. v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334,

cert. den. 377 U.S. 978, 12 L. Ed. 2d 747; *Cowles v. Hayes,* 71 N.C. 230; Annot. in 14 A.L.R. 3d 831 *et seq.* entitled "Taking and Use of Trial Notes by Jury"; 89 C.J.S., Trial, § 456; 23A C.J.S., Criminal Law, § 1367; 53 Am. Jur., Trial, § 851 and 1967 Cumulative Supplement thereto; 5 Wharton's Criminal Law and Procedure, Anderson Ed., Deliberations of Jury, § 2112.

As long ago as 1874 this Court in *Cowles v. Hayes, supra,* used this language:

> "The Court allowed the jury to copy a memorandum of articles sold and the prices thereof, made out by the plaintiff's counsel. This was objected to by the defendants. But the case states that this memorandum was but the copy of the account proved and admitted in evidence. It was therefore nothing more than a note of the evidence taken down by a juror, which was not only proper, but often commendable."

In *S. v. Goldberg, supra,* the Court held that in the trial of two defendants in a long and complicated criminal trial upon eight indictments, containing 29 counts, and taking 34 pages of the record to reproduce them, that it was not prejudicial error for the court to deliver to the jurors blank tablets for the purpose of enabling them to list the indictments and the counts as recited to them by the court.

Everyone with long experience on the trial bench has occasionally seen a juror or jurors taking notes of the testimony during the trial, particularly in long drawn-out or complicated trials. It is a fact of general and common knowledge that almost all of our trial judges on the Superior Court Bench take and use notes during the trial. *Vincent v. Woody,* 238 N.C. 118, 121, 76 S.E. 2d 356, 359.

If Mrs. Ruth Griffin was taking notes during the trial, it must have come to the attention of counsel and his clients before the verdict was rendered. Before the verdict was rendered, neither counsel nor his clients made any objection to Mrs. Ruth Griffin's taking notes, if she did. This is said in an annotation in 14 A.L.R. 3d, § 7, p. 850:

> "It seems well settled that irrespective of the propriety of jurors taking trial notes, any error therein may not be urged as grounds for reversal unless prompt objection thereto was made at the time the note-taking first came, or should have come, to the attention of the appealing party."

The refusal of the trial court to conduct an inquiry of Mrs. Ruth Griffin as to whether she had taken notes during the trial and, if so, what use she had made of them, upon the mere statement of counsel that one of his clients had called it to his attention after the verdict

that Mrs. Ruth Griffin was taking notes during the trial, shows no prejudicial error in respect to appellants' rights, and, further, the request of defendants' counsel to the judge to make such an inquiry came too late after verdict. This assignment of error is overruled.

The court has carefully examined all appellants' assignments of error which have been brought forward in their brief and discussed with citation of authority, and no error is made to appear which would warrant disturbing the verdicts and judgments below. All assignments of error of appellants are overruled.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. OTIS EUGENE PEELE.

(Filed 14 June 1968.)

1. Constitutional Law §§ 29, 30—

The Fifth Amendment right to plead not guilty in a criminal prosecution and the Sixth Amendment right to demand a jury trial are made applicable to State trials by the due process clause of the Fourteenth Amendment.

2. Same; Criminal Law § 24; Rape § 7; Jury § 1—

G.S. 14-21, setting the punishment for rape at death unless the jury recommends life imprisonment, and G.S. 15-162.1, permitting a defendant who is represented by counsel to tender a written plea of guilty to a charge of rape which, if accepted by the State and approved by the court, has the effect of a jury verdict of guilty with a recommendation of life imprisonment, do not together place an impermissible burden on the right of a defendant charged with rape to plead not guilty and to demand a jury trial so as to prevent the death penalty from being imposed under any circumstances for the crime of rape.

3. Same—

In a prosecution for rape, defendant's rights to plead not guilty and to demand a jury trial were not deterred by a fear of the death penalty, which he could escape by pleading guilty, where defendant entered a plea of not guilty and was tried by a jury which found him guilty as charged with a recommendation of life imprisonment.

4. Arrest and Bail § 3—

Where the mother of a 10-year-old alleged rape victim saw defendant and the victim in a compromising position, observed the victim's bloody condition and called police officers, who arrived immediately, and the officers heard the mother's story, observed the victim's condition and apprehended defendant in the act of leaving the scene, the officers possessed ample evidence to authorize the arrest of defendant without a warrant. G.S. 15-41.

5. Criminal Law §§ 42, 84—

Clothing taken by officers from the person of defendant as an incident to a lawful arrest is not gained by an unlawful search and seizure, and the clothing and testimony of the results of a chemical analysis of blood-stains found thereon are properly admitted into evidence.

6. Jury § 7—

In a prosecution for rape, the State is entitled to challenge for cause prospective jurors who state under oath that they have moral and religious scruples against capital punishment which would make it impossible for them to return a verdict of guilty as charged without a recommendation of life imprisonment, even though the State proved the guilt of defendant beyond a reasonable doubt.

7. Same—

Where defendant did not challenge for cause or otherwise any jurors on the panel that tried him and did not exhaust his peremptory challenges, objection to the jury is not properly raised on appeal.

8. Criminal Law §§ 102, 165—

Objection to portions of the State's argument to the jury should be made before the case is submitted to the jury.

9. Criminal Law § 102—

The manner of conducting the argument of counsel, the language employed, and the temper and tone allowed must be left largely to the discretion of the presiding judge.

10. Criminal Law § 166—

Assignments of error not brought forward in the brief and in respect of which no reason or argument is stated or authority cited will be deemed abandoned. Rule of Practice in the Supmere Court No. 28.

BOBBITT, J., concurring in result.

SHARP, J., joins in concurring opinion.

APPEAL by defendant from *Exum, J.*, December 11, 1967 Criminal Session, GUILFORD Superior Court, High Point Division.

In this criminal prosecution the defendant, Otis Eugene Peele, on arraignment, plead not guilty to a charge of rape — a capital felony. The Grand Jury indictment was drawn under G.S. 14-21, charging that the named defendant, on June 11, 1967 ". . . unlawfully, wilfully, and feloniously did carnally know, rape, and abuse one Cherly Ann Ollis, a female child under the age of twelve years . . . to wit: ten (10) years of age. . . ."

Before pleading to the indictment, the defendant moved to quash upon these grounds: (1) The allegations of the indictment were insufficient to charge the crime of rape under G.S. 14-21; (2) All the evidence before the Grand Jury was incompetent as hearsay; (3) North Carolina General Statutes 14-21 and 15-162.1, when con-

strued together, unduly discourage assertion of the Fifth Amendment right to plead not guilty, and deter the exercise of the Sixth Amendment right to demand a jury trial. The Court overruled the motion to quash. The defendant's Exception No. 4 is assigned as Error No. 1.

The defendant lodged a preliminary motion to suppress the introduction in evidence of clothing, containing bloodstains, worn by the defendant at the time of his arrest. After *voir dire* examination of witnesses, the Court denied the motion to suppress and ruled the evidence admissible. The defendant took exception (No. 26), which is the subject of his Assignment of Error No. 2.

The parties selected the jury by examining the veniremen one at a time. The record discloses that twenty veniremen were challenged for cause by the State, after each had stated he was opposed to capital punishment. Before the challenges for cause were allowed, however, the prospective jurors stated under oath that they had either moral or religious scruples against capital punishment and that on account of their moral and religious scruples it would be impossible for them to return a verdict of guilty as charged in this case without a recommendation of life imprisonment, even though the State proved the guilt of the defendant beyond a reasonable doubt. The Court sustained the State's challenges for cause. The defendant took Exceptions 6 to 25, inclusive. These exceptions form his Assignment of Error No. 3.

"A jury of twelve with one alternate juror, after questions and certain challenges by the State and the defendant, was duly selected and impaneled according to the law and practice in this State in capital cases." The record does not disclose any juror was accepted over defendant's objection, or that he had exhausted his preemptory challenges at the time he passed the jury.

The State examined as witnesses, the victim, her mother, her brother, the lady next door, the doctor who treated the victim for serious injuries, and other witnesses, including a specialist in blood matching. The State introduced the pants and undershorts worn by the defendant at the time of the arrest, which contained what appeared to be fresh bloodstains. The specialist, after analysis, expressed the opinion the stains on the defendant's clothing were made by human blood, compatible with the victim's blood type.

The defendant testified as a witness and denied the assault. He admitted his presence in the apartment where it is alleged to have occurred. He testified the bloodstains on his clothing resulted from an act of intercourse with the victim's mother.

At the close of the evidence, the Court overruled defense motion for directed verdict of not guilty. Neither in the brief nor in the

oral argument does the defendant question the sufficiency of the evidence to make out a case for the jury.

The jury returned its verdict, finding the defendant ". . . Guilty of Rape as charged in the bill of indictment, with the recommendation that his punishment be life imprisonment in State's Prison. . . ." The Court imposed the mandatory life sentence. From the verdict and judgment thereon, as returned by the jury, the defendant appealed.

T. W. Bruton, Attorney General; Millard R. Rich, Jr., Assistant Attorney General, for the State.

Gardner & Wilson by Jerry Wilson for the defendant.

HIGGINS, J. On this appeal the defendant contends the indictment is fatally defective and the Court's failure so to declare and dismiss the case is the subject of Assignment of Error No. 1. He further contends, if the indictment is held valid, the Court committed errors entitling him to a new trial: (a) By overruling the motion to suppress the introduction of the bloodstained garments worn by the defendant at the time of his arrest (Assignments of Error No. 2); (b) By sustaining the State's for cause challenges of veniremen on account of conscientious scruples against capital punishment (Assignment of Error No. 3); and (c) By reason of the solicitor's unjustly prejudicial argument to the jury (Assignment of Error No. 4).

The indictment was drawn under G.S. 14-21, which provides: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

Objections to the indictment on the ground it does not charge the crime of rape or that it was returned on incompetent evidence were abandoned. They are not discussed in the brief. In his motion to quash the defendant relies entirely upon his contention that G.S. 14-21 and G.S. 15-162.1, when construed together, place an impermissible burden upon his right to plead not guilty and to demand a jury trial. The former statute fixes the punishment for rape at death unless the jury recommends life imprisonment. The latter statute permits a defendant, if represented by counsel, to tender a written plea of guilty of rape, and if the plea is accepted by the State, with

the approval of the Court, the tender and acceptance shall have the effect of a jury verdict, with a recommendation that punishment may be imprisonment for life. If the defendant pleads not guilty, as he has a constitutional right to do, and the jury returns a guilty verdict without recommending life imprisonment, the death sentence becomes mandatory. The defendant argues the fear of the death penalty, which he may escape by pleading guilty, places an impermissible restraint on his right to have a jury pass on the question of his guilt or innocence. Fear of the death penalty did not deter or induce the defendant to forego his right to plead not guilty and to have a jury trial. His plea of not guilty was heard by the jury, which he passed as unobjectionable.

As authority in support of his motion to quash, the defendant cites *United States v. Jackson,* decided by the Supreme Court of the United States on April 8, 1968, reported in 36 Law Week, page 4277. Jackson was indicted in the District Court of the United States under the Federal Kidnapping Act (18 U.S.C. 1201(a)), which provides: "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise, . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." Jackson moved to quash the indictment upon the ground the death penalty provision of the kidnapping statute makes "the risk of death the price for asserting the right to a jury trial and thereby impairs the free exercise of that right." The Court granted the motion to quash and dismissed the kidnapping count in the indictment.

On direct appeal the Supreme Court held the death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise of constitutional rights under the Fifth and Sixth Amendments. Nevertheless, the Court remanded the case for trial and disposition, minus the death penalty. The Court said: "By holding the death penalty clause of the Federal Kidnapping Act unenforceable, we leave the statute an operative whole, free of any constitutional objection." The Court reversed the District Court's order quashing the indictment and returned the cause to the District Court for trial.

The *Jackson* case holds the death penalty provision of the kidnapping act, in the light of the other provisions, violates fundamental rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States. The defendant Peele argues, by analogy, the death penalty provision of G.S. 14-21, in the light of

G.S. 15-162.1, violates his fundamental rights guaranteed by the due process clause of the Fourteenth Amendment. In *Duncan v. Louisiana,* 36 U.S.L.W. 4414 (May 20, 1968), the Supreme Court held the Fifth and Sixth Amendment rights herein discussed are made applicable to State trials by the Fourteenth Amendment. This case was decided since the instant case was argued here.

We think there are certain material differences in the Federal Kidnapping Act and in North Carolina Statutes 14-21 and 15-162.1, and that *Jackson* is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnapping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G.S. 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute. Except as provided in G.S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital felony. G.S. 15-187 provides the death sentence shall be executed ". . . against any person in the State of North Carolina *convicted* of a crime punishable by death. . . ." (Emphasis added.)

G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the *Jackson* case, there are "defendants who would greatly prefer not to contest their guilt." Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty. The possibility of a death penalty, however, has deterring effect — how much, no one knows. This, however, we may say with certainty — the provision for, or fear of, the death penalty did not deter the defendant in the exercise of his rights under the Fourteenth Amendment. He entered a plea of not guilty. He submitted his case to the jury. As a part of the verdict of guilty, the jury fixed the punishment at life imprisonment.

The indictment in *Jackson* was held good. However, that part of the kidnapping act which provided for the death penalty was held to impose an impermissible restraint on the defendant's right to plead not guilty and to have the jury pass on the question of his guilt or innocence. It seems certain, therefore, a conviction under the kidnapping act will support a prison sentence, for years or for life. Likewise, conviction, with the jury's recommendation for life imprisonment, under the indictment against Peele will support a life sentence. Judge Exum, in this case, overruled the motion to quash and correctly held the indictment good. Assignment of Error No. 1 is not sustained.

The mother saw the defendant and the victim in a compromising position on the couch. The defendant left the room. The mother observed the victim's bloody condition and called the officers, who arrived immediately. The officers heard the mother's story, observed the victim's condition, and in view of what they saw and heard, apprehended the defendant in the act of leaving the scene. They took him to police headquarters and there obtained and served a warrant. The officers had ample evidence to authorize the arrest of the defendant without a warrant. G.S. 15-41; *State v. Egerton,* 264 N.C. 328, 141 S.E. 2d 515; *State v. Brown,* 264 N.C. 191, 141 S.E. 2d 311. Incident to the arrest, the officers took the defendant's bloodstained clothing to be held as evidence. Chemical analysis disclosed the stains on the clothing were made by human blood of the same type as the victim's blood. The garments were admissible in evidence. *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *State v. Wall,* 205 N.C. 659, 172 S.E. 216. "It is not an unlawful search or seizure for officers to take from the person under arrest and to examine an article of clothing worn by him. See: 47 Am. Jur., Searches and Seizures, Sec. 53; 5 Am. Jur. 2d, Arrest, Sec. 73; 6 C.J.S., Arrest, Sec. 18. It is not error, nothing else appearing, to admit in evidence, over objection, testimony as to the condition or contents of such garments discovered by such examination or to admit in evidence the garment itself." *State v. Ross,* 269 N.C. 739. The denial of the motion to suppress was not error. The defendant's Assignment of Error No. 2 is not sustained.

The defendant contends the Court committed error in allowing the State to challenge for cause certain of the veniremen on the ground they had moral or religious scruples against capital punishment. However, before allowing the challenge, each prospective juror was further questioned, and each stated ". . . on account of these moral or religious scruples it would be impossible for them *(sic)* to return a verdict of guilty as charged in this case without a recom-

mendation of life imprisonment, even though the State proved the guilt of the defendant beyond a reasonable doubt." Under our decisions, the views expressed were sufficient to sustain the challenge for cause. *State v. Bumpers,* 270 N.C. 521, 155 S.E. 2d 173 (reversed by the United States Supreme Court on other grounds); *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453. The defendant cites, *contra, Crawford v. Bounds,* a Fourth Circuit decision involving a death sentence.

Each party to a trial is entitled to a fair and unbiased jury. Each may challenge for cause a juror who is prejudiced against him. A party's right is not to select a juror prejudiced in his favor, but to reject one prejudiced against him. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802. In this case, a jury was passed as acceptable by both the State and the defendant. The defendant did not challenge for cause or otherwise any juror on the panel that tried him. The record does not show he exhausted his preemptory challenges. Objection to the jury was not raised ". . . in apt time or in the appointed way". *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1; *State v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77; *State v. Kirksey,* 227 N.C. 445, 42 S.E. 2d 613; *State v. Brogden,* 111 N.C. 656, 16 S.E. 170. The Court's action in sustaining the State's challenges did not violate the defendant's right to a jury trial.

In holding the challenges not improper, this Court calls attention to the decision of the Supreme Court of the United States in *Bumpers v. North Carolina* (Case No. 1016), decided on June 3, 1968. Before the Court in that case was this question: "Was the petitioner's 'constitutional right to an impartial jury violated in this capital case when the prosecution was permitted to challenge for cause all prospective jurors who stated they were opposed to capital punishment or had conscientious scruples against imposing the death penalty.' ". (A second question involved an illegal search and is not pertinent to the present inquiry.) The Court held, on the pertinent question:

> "In *Witherspoon v. Illinois,* decided today, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been removed for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in *Witherspoon* does not govern the present case, because here the jury recommended a sentence of life imprisonment. The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and

> Fourteenth Amendments to trial by an impartial jury. *Duncan v. Louisiana,* 391 U.S. 145; *Turner v. Louisiana,* 379 U.S. 466, 471-473; *Irvin v. Dowd,* 366 U.S. 717, 722-723. We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone,' and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon.* Accordingly, we decline to reverse the judgment of conviction upon this basis."

Assignment of Error No. 3 is not sustained.

We have examined the defendant's objection to the argument made to the jury by the Assistant Solicitor. The defendant did not interpose objection. He did not request the judge to stop the argument or to instruct the jury not to consider it. The objection appears for the first time in the case on appeal. He should have excepted and moved for a mistrial before the case went to the jury, rather than wait until after verdict to make complaint. "It is well settled that the exception must be entered at the time." *York v. York,* 212 N.C. 695, 194 S.E. 486; Strong's N. C. Index, 2d Ed., Vol. 1, Appeal and Error, Sec. 33, p. 170. Although we have serious doubt whether objection to the argument is properly presented; nevertheless, we have reviewed that part of the argument set out in the record and conclude it is well within the bounds of legitimate jury debate. "The manner of conducting the argument of counsel, the language employed, the temper and tone allowed, must be left largely to the discretion of the presiding judge. He sees what is done, and hears what is said. He is cognizant of all the surrounding circumstances, and is a better judge of the latitude that ought to be allowed to counsel in the argument of any particular case." *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424, quoting from *State v. Bryan,* 89 N.C. 531. Assignment of Error No. 4 is not sustained.

In the case on appeal, the defendant has taken a number of exceptions and has made assignments of error thereon. They are set out in the record, but are not discussed in the brief and were not discussed on the oral argument. Neither reason nor authority is cited in support. "Assignments of error not set out in the appellant's brief and in respect of which no reason or argument is stated, or authority cited, will be deemed abandoned." Strong's N. C. Index, 2d Ed., Appeal and Error, Sec. 45, p. 188; Rule 28, Rules of Practice in the Supreme Court; *Mathis v. Siskin,* 268 N.C. 119, 150 S.E. 2d 24.

Because of the gravity of the case, however, we have examined them and find them to be without merit.

In the trial, we find

No error.

BOBBITT, J., concurring in result. The differences between the Federal Kidnapping Act, 18 U.S.C. § 1201(a), considered in *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, and the North Carolina statutes codified as G.S. 14-21 and G.S. 15-162.1, are set forth clearly and accurately in the Court's opinion.

This defendant pleaded not guilty. After trial by jury, the verdict was guilty of rape as charged with the recommendation that defendant's punishment be imprisonment for life. Accordingly, a judgment of life imprisonment was pronounced.

This appeal does not present for decision whether *United States v. Jackson, supra,* invalidates the death penalty under present North Carolina statutes. I would reserve decision of this very important question and withhold any expression of views with reference thereto until the question is directly presented and further explored and considered. Hence, I withhold approval of expressions in the Court's opinion relating to this question.

Except as stated, I concur in the Court's opinion and in the result.

SHARP, J., joins in this opinion.

JOHN H. GRAHAM v. RESERVE LIFE INSURANCE COMPANY.

(Filed 14 June 1968.)

1. Insurance § 43.1—

A hospital expense policy in which the insurer agrees to pay "expense actually incurred" contemplates expenses for which the insured has become legally liable.

2. Insurance § 44— Recovery allowed on hospital expense policy for tuberculosis treatment in State hospital.

Plaintiff was admitted as a paying patient for treatment of tuberculosis at a state sanatorium and was told that he would be charged, and expected to pay, the standard rate of $10.00 per day which all patients are charged. Collection of sanitorium accounts is made on the basis of the patient's current ability to pay under a policy adopted by the board of directors pursuant to statutes requiring the hospital to admit patients regardless of ability to pay and providing that patients who are able must pay for treatment received. G.S. 131-54, G.S. 131-79. *Held:* Plaintiff is

legally obligated to the sanitorium for treatment received and may recover upon an insurance policy in which the insurer agreed to pay plaintiff for certain hospital expenses actually incurred.

3. Insurance § 43.1—

Where the insuring clause provides that the insurer will pay the insured for certain items of hospital expense actually incurred, notations on the back of the policy and on the top of the first page that the policy provides benefits for "loss due to hospital confinement" do not change the contract from one of insurance against liability to one of indemnity for expenses actually paid.

4. Insurance § 44; Constitutional Law §§ 13, 20—

The policy and practice of a State tuberculosis sanitorium of charging all patients the same rate but collecting from each according to his current ability to pay and requiring patients who have hospital insurance to pay the amount of such insurance *is held* not an unconstitutional discrimination between citizens who have been patients at the hospital entitling an insurer of such a patient to avoid liability upon a hospital expense policy, it being within the police power of the State to provide treatment of tuberculosis for those who cannot afford it in order to protect all its citizens from this highly infectious disease.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by defendant from *Copeland, S.J.*, June 1967 Non-Jury Assigned Civil Session of WAKE, docketed and argued at the Fall Term 1967 as Case No. 534.

Action to recover $600.00, the maximum benefit provided by a policy of hospital and surgical insurance issued to plaintiff by defendant. The following facts were stipulated:

Defendant corporation is engaged in the business of writing and selling hospital and surgical insurance in North Carolina. On 12 November 1949, it issued to plaintiff its policy (No. R-409687), which was in force at all times relevant to this suit. After the issuance of the policy, plaintiff contracted tuberculosis. He was necessarily confined to Eastern North Carolina Sanatorium at Wilson (Eastern) from 10 August 1961 until 16 September 1961, and from 28 September 1961 until his final discharge on 23 July 1962, a total period of 336 days. Plaintiff has complied with all policy requirements in respect to notice and proof of loss.

The policy provisions applicable to hospital-expense benefits resulting from sickness provide:

"PART I. If the Insured or any member of the Family Group shall be necessarily confined within a recognized Hospital as a resident patient on account of such injury or such sickness, the Company will pay the Insured (or the Hospital if authorized by the In-

sured to do so) for the following items of hospital expense actually incurred but not to exceed the amounts stated below:

"A. HOSPITAL ROOM, including meals and general nursing care, not to exceed Six Dollars ($6.00) per day, for the period that the Insured or member of the Family Group shall be confined therein, but not to exceed One Hundred Days as the result of any one accident or sickness.

"* * *

"The Company will pay only the usual, customary and regular charges for the services and materials stated above, and the maximum amounts specified in this Part 1. . . ."

On the outside of the policy and also at the top of the first page above the label, "Hospital and Surgical Expense Policy," and above defendant's name and address, there appears this notation: "This policy provides benefits for loss due to hospital confinement and for other specified expense resulting from accidental bodily injury, sickness, or childbirth, to the extent herein limited and provided."

Eastern is one of the four units of the North Carolina sanatorium system, in which tubercular patients are accepted regardless of their financial condition. Approximately two-thirds of all patients are certified by the counties as welfare patients and pay nothing for services rendered them. The county in which the patient resides, however, pays the sanatorium sixty cents per day.

During plaintiff's hospitalization, Eastern's charges were controlled by a resolution of the board of directors of the North Carolina sanatorium system, which provided in part: "(2) (a) that the accrued total of the bill for regular medical and hospital services rendered to . . . in-patients . . . shall be computed at a standard rate of $10.00 per day, based on cost which exceeds the Sanatorium System's average per diem patient cost . . . and (3) that the following collection policy shall be applicable:

"(A) No allowance shall be granted as a discount on the accrued total of the bill of any patient who is financially able to pay the total bill.

"(B) An appropriate allowance, based on the patient's financial condition, shall be granted and applied as a discount on the accrued total of the bill of each patient who is financially unable to pay the full bill. It is intended that discretion shall be exercised in analyzing a patient's financial condition and in determining an appropriate allowance. If a patient has hospital insurance, it shall be considered as one of the several factors that make up his whole financial picture. By taking all factors into consideration, including in-

surance, it shall be determined how much the patient is able to pay per day; then the allowance shall be set as the difference between (a) the accrued total of the bill and (b) the amount which the patient is able to pay. The patient's financial condition shall be reviewed periodically and the allowance revised accordingly."

The parties waived a jury trial. Both plaintiff and defendant offered evidence which was without material conflict. That offered by plaintiff tended to show: Plaintiff was admitted as a paying patient. He was informed that he would be charged, and expected to pay, the standard rate of $10.00 per day, which all patients — welfare, indigent and nonindigent — are charged. This charge was set by the board of directors after determining the average daily patient cost by dividing the total number of patient days into total sanatorium expenditures exclusive of physical improvements. This actual cost was $10.16. The $10.00-charge included room, meals, medical care, laboratory work, x rays — everything. Eighty-three percent of the charge, or $8.30, represented room and board.

Ledger cards are maintained for each patient, and all but welfare patients are billed monthly. Welfare accounts are handled by billing the respective counties at $ .60 per day. The difference of $9.40 appears on the patient's card as a balance due, but no effort is made to collect it from the welfare patient unless he thereafter becomes able to pay.

All patients, when they enter the hospital, are informed that they must pay the full $10.00-rate if they are able; if they are not, that they are expected to pay as much as they can, and that any unpaid balance will be a debt which they are expected to pay as soon as they are able to do so. When a patient claims inability to pay the full charge, a financial statement is taken to determine the amount he can currently pay. In determining a patient's ability to pay, Eastern's administrator considers a patient able to pay the amount for which he has insurance. Only about five percent pay their total bill. Eastern and the other sanatoriums in the system are largely supported by appropriations made by the General Assembly.

Eastern charged plaintiff $10.00 a day for 336 days. He owes the hospital $3,360.00, no part of which has been paid, although bills have been sent to him and defendant periodically. If defendant pays the amount of its policy, $600.00 will be entered as a credit on plaintiff's total bill.

Defendant's evidence, in addition to showing the facts detailed above, tended to show: The ledger card of each patient is totaled at the 15th of each month. No effort is made to itemize charges or expenditures; all entries are at the $10.00 per day standard rate irre-

spective of the care required by the particular patient. Collections are made on the basis of the patient's current ability to pay as determined by the hospital administrator after investigation. Once this amount is determined — be it $1.00, $5.00, or $10.00 — the patient is periodically reminded of the payments he agreed to make. On plaintiff's application for admission to Eastern, he listed his wife as his only dependent and his assets as follows: the hospital insurance policy in suit; railroad retirement income of $228.00 a month; real estate, $20,000.00; household furniture, $3,000.00; Cadillac automobile, $4,000.00.

Defendant's motions for judgment of nonsuit, made at the close of plaintiff's evidence and again at the close of all the evidence, were denied.

Judge Copeland found the facts to be in accord with those delineated above. *Inter alia,* he specifically found: (1) During the 336 days plaintiff was a patient at Eastern, he was charged $10.00 a day, "the usual, customary, and regular charges" for the services he received. (2) Of the standard rate of $10.00 a day, $8.30 was for meals, room, and general nursing care. (3) Plaintiff actually incurred hospital expenses of $3,360.00 during his stay at Eastern. Upon these findings, he adjudged that plaintiff is legally obligated and indebted to Eastern in the sum of $3,360.00. Under its policy of insurance "defendant is liable to plaintiff for hospital room expense benefits" of $6.00 per day for 100 days, a total of $600.00.

From judgment that plaintiff recover of defendant the sum of $600.00 with interest at 6 percent per annum from September 15, 1962 until paid, defendant appealed.

Teague, Johnson, Patterson, Dilthey & Clay for plaintiff appellee.

Young, Moore & Henderson for defendant appellant.

Attorney General Bruton and Staff Attorney Denson for the State, amici curiæ.

SHARP, J. Defendant's denial of liability to plaintiff is based upon the contentions (1) that plaintiff has *incurred* no expense for his hospitalization at Eastern because it is a State hospital where "he was entitled to receive, and did receive, treatment and maintenance free of charge"; (2) that its policy is a contract of indemnity against loss, and plaintiff has shown no out-of-pocket expense; and (3) that to the extent Eastern attempts to collect from some patients and not from others, or to collect varying amounts for the same services, "Such policy creates an unwarranted discrimination" between citizens of the State who are, or have been, patients at

Eastern and is in violation of the 14th Amendment to the Constitution of the United States and Sections 7 and 17 of Article I of the Constitution of North Carolina.

Defendant's contract is to pay plaintiff the "usual, customary, and regular charges" for "hospital expenses actually incurred" for a "hospital room including meals and general nursing care," not to exceed $6.00 a day and for not more than 100 days. The first question for determination, therefore, is whether plaintiff actually *incurred* expenses during his hospitalization at Eastern.

Webster's Third New International Dictionary-Unabridged (1961) defines *incur:* "to meet or fall in with (as an inconvenience); become liable or subject to: bring down upon oneself (incurred large debts to educate his children) (fully deserving the penalty he incurred)." This definition was quoted with approval by this Court in *Czarnecki v. Indemnity Co.,* 259 N.C. 718, 720, 131 S.E. 2d 347, 349. See also *Reliance Mutual Life Insurance Co. of Ill. v. Booher,* 166 So. 2d 222 (Fla. Dist. App.); 42 C.J.S. 552 (1944).

In considering the meaning of *incurred* as used identically in a policy issued by this same defendant, the Supreme Court of Mississippi in *Reserve Life Insurance Co. v. Coke,* 254 Miss. 936, 943, 183 So. 2d 490, 493, adopted the following definition from *Irby v. Government Employees Insurance Co.,* 175 So. 2d 9 (La. App.):

" 'As used in the policy in suit the word "incurred" emphasizes the idea of liability and the definition of "incur" is: "To have liabilities (or a liability) thrust upon one by act or operation of law"; a thing for which there exists no obligation to pay, either express or implied, cannot in law constitute an "incurred expense"; a debt or expense has been incurred only when liability attaches. *Drearr v. Connecticut General Life Insurance Co.,* La. App., 119 So. 2d 149; *United States v. St. Paul Mercury Indemnity Co.,* 8 Cir., 238 F. 2d 594; see also *Stuyvesant Insurance Co. of New York v. Nardelli,* 5 Cir., 286 F. 2d 600, 603,' 175 So. 2d at 10." *Accord, Maryland Casualty Co. v. Thomas,* 289 S.W. 2d 652 (Tex. Civ. App.); *Hermitage Health and Life Insurance Co. v. Cagle,* 420 S.W. 2d 591 (Tenn. App.).

Eastern is a State hospital for the treatment of tuberculosis. It was established by P. L. 1939, ch. 325, now G.S. 131-76 through G.S. 131-82. It is controlled by the same board of directors which controls North Carolina Sanatorium at McCain and Western North Carolina Sanatorium at Black Mountain, G.S. 131-77, G.S. 131-62. These directors have the same duties, powers, and obligations in connection with the operation of Eastern which they have in connection with the other sanatoria. G.S. 131-78. They are specifically directed by

G.S. 131-79 to operate Eastern by regulations which "shall make said sanatorium as nearly self-supporting as shall be consistent with the purposes of its creation."

G.S. 131-54 prohibits the directors from making any regulation which would exclude any tubercular patient, otherwise eligible for admission to a sanatorium, on account of inability to pay for treatment. However, it also directs them (1) to "require of all patients who are able, including those having persons upon whom they are legally dependent who are able, to pay the reasonable cost of treatment and care of said institution" and (2) to "make such bylaws and regulations as shall most equitably carry out the directions" that the institution shall be as nearly self-supporting as shall be consistent with the purpose of its establishment.

In the event a person able to pay, or a person upon whom a patient is legally dependent, refuses to pay the charges for treatment and care, G.S. 131-54 authorizes the directors to institute a suit in the name of the sanatorium for the collection of the unpaid bill, and, upon the trial, "the charges so made shall be collectible, as upon express promise to pay the same."

Tuberculosis, a highly infectious disease, is a major public health problem, which the State has attempted to solve by the establishment of four sanatoria. Since the disease most often attacks the indigent, any control of the disease would be impossible if isolation and treatment were available only to those who could pay for it. To protect the citizenry, the State must furnish treatment for those who cannot provide it for themselves. Notwithstanding, it is the declared public policy that all who receive treatment at any of the hospitals in the State sanatorium system are indebted to the State for it and that all who can pay must pay. G.S. 131-54, G.S. 131-79. Realistically, the General Assembly has not required the directors to reduce the indebtedness of an indigent to judgment, but it enjoined them to "require" payment from all patients who are able to pay the cost of their treatment. Should a solvent patient refuse to pay his bill, the directors are authorized to sue in the name of the sanatorium as upon the patients' "express promise to pay."

Clearly, plaintiff is liable to Eastern in the amount of $3,360.00 for the treatment he received there. He was admitted as a nonindigent patient and told that he would be charged, and expected to pay, $10.00 a day. Like all other patients similarly situated, he was required to disclose his resources. His retirement income was not enough to pay the hospital charges. He had other property, however, and his hospital-expense policy with defendant was an asset. *In Re Edmundson,* 273 N.C. 92, 159 S.E. 2d 509.

From the decided cases which have considered this question the general rule seems to be that a hospital-expense policy, in which the insurer agrees to pay "expense actually incurred" will cover expenses for which the insured becomes legally liable. If he never incurs any liability for his hospital bill — as where hospital care is furnished him solely upon the promise of a third party to pay for it or as a matter of right, without charge and without future obligation contingent upon his ability to pay — the policy does not cover the bill.

In *Reserve Life Insurance Co. v. Coke, supra,* the defendant issued its health and accident policy "providing indemnities against hospital and surgical expense actually *incurred,* not to exceed $6.00 per day." The plaintiff's wife (also covered by the policy) became a patient at the Mississippi State Sanatorium at Magee for 52 days. The hospital billed the plaintiff at $6.00 a day; the defendant refused to pay more than $21.00 a week. Since Mississippi law provided that "there shall be collected from patients in the State sanatorium not less than $5.00 per week, nor more than $21.00 per week, according to the patients' 'ability to pay,'" when the plaintiff sued on the policy, the Mississippi court agreed with the defendant that its liability was limited to $21.00 per week because (1) the sanatorium was restricted by law to a maximum charge of $21.00 a week; and (2) insured incurred no legal liability in excess of that sum. The court made it quite clear, however, that within its limits the policy covered the expenses for which the policyholder had become legally liable. See also *Collins v. Farmers Insurance Exchange,* 271 Minn. 239, 135 N.W. 2d 503, in which the court said, "The definition of incur is 'to become liable for,' as distinguished from actually 'pay for.'" *Id.* at 244, 135 N.W. 2d at 507.

Defendant relies upon the case of *United States v. St. Paul Mercury Indemnity Co.,* 133 F. Supp. 726 (D.C. Neb.), *affirmed* 238 F. 2d 594 (8th Cir.). In that case, a veteran of World War II, who was stricken with poliomyelitis, was admitted to a VA hospital where he remained a year. At the time he had a poliomyelitis expense policy issued by defendant "for expenses actually incurred" for hospital and medical care not to exceed $5,000.00. The insured assigned his rights under the policy to the Veterans Administration and the government brought suit when the defendant refused to pay the sum of $3,796.69. The District Court dismissed the government's action upon the ground that, under the law (38 U.S.C.A. § 706), the insured was entitled to receive, and did receive, such treatment without cost. He, therefore, had incurred no expenses, and the government could have no greater rights under the policy than the insured

himself. *Accord, Drearr v. Connecticut General Life Insurance Co.,* 119 So. 2d 149 (La. App.); *Gordon v. Fidelity & Casualty Co. of N. Y.,* 238 S.C. 438, 120 S.E. 2d 509; *Reserve Life Insurance Co. v. Coke,* 254 Miss. 936, 183 So. 2d 490; *Irby v. Government Employees' Insurance Company,* 175 So. 2d 9 (La. App.). *Cf. State Farm Mutual Automobile Ins. Co. v. Fuller,* 232 Ark. 329, 336 S.W. 2d 60; *American Indemnity Co. v. Olesijuk,* 353 S.W. 2d 71 (Tex. Civ. App.).

In *Protective Industrial Ins. Co. of Alabama v. Gray,* 40 Ala. App. 578, 118 So. 2d 289, the State Rehabilitation Department of the State of Alabama contracted with a private hospital to operate on the insured's hand. The insured herself paid nothing on the bill and made no contract with the hospital for payment. Furthermore, no statute imposed any liability upon her for the hospital charges. In a suit on her hospital policy, the court held that, "where there exists no obligation on the part of the plaintiff below, express or implied, to pay anything, the plaintiff cannot be heard to assert a claim for 'items of actual hospital expense.'" *Id.* at 580, 118 So. 2d at 291.

Even if plaintiff's indebtedness to Eastern be conceded, defendant contends that the notation on the outside of the policy and at the top of the first page limits its liability to the *reimbursement* of plaintiff for hospital bills which he has actually paid. This contention is entirely untenable. The contract between plaintiff and defendant is found in the insuring clause of the policy and the parts to which it refers. These provide that "the Company will pay the Insured (or the hospital if authorized by the Insured to do so) for the following items of hospital expenses actually incurred. . . ." With that language in the body of the policy, the notation on the back and at the top that "it provides benefits for loss due to hospital confinement" cannot change a contract of insurance against liability to one of indemnity for expenses actually paid. If defendant intended this limitation upon its liability it should have so specified in the policy. *American Indemnity Co. v. Olesijuk, supra.* Furthermore, an insured who had already paid his hospital bill would not direct defendant to make payment to the hospital. *Hermitage Health and Life Insurance Co. v. Cagle, supra.* See *Casualty Co. v. Angle,* 243 N.C. 570, 91 S.E. 2d 575. A policy which covered only bills the insured was able to pay would be inadequate coverage indeed.

Defendant's third and last contention is that the "policy and practice of Eastern North Carolina Sanatorium violates both the United States Constitution and the Constitution of North Carolina" because it collects "different amounts from different people," and

"[i]f a patient has hospital insurance, he is expected to pay whatever the insurance policy will pay." To borrow a phrase from *Hermitage Health and Life Insurance Company v. Cagle, supra* (a case in which the defendant made the same contention under the same circumstances) "this most unusual and novel defense" has no merit. It is within the police power of the State to provide treatment for infectious and contagious diseases, which — if untreated — can become epidemic. 16 Am. Jur. 2d *Constitutional Law* § 308 (1964). Germs attack both the affluent and the indigent. Therefore, in order to protect all its citizens, the State must — in the first instance, at least — provide treatment without cost to the indigent. It does not follow, however, that it must also furnish free treatment to those who are able to pay or who have had the forethought to purchase insurance to cover the cost of hospitalization. Such a contention is least expected from those who, under other circumstances, decry the expansion of the welfare state and urge medical and hospital insurance with private corporations as a bulwark against socialized medicine. It seems entirely unnecessary to say that the law makes no unconstitutional discrimination between classes when it charges all tubercular patients the same rate but actually collects from only those who can pay.

All the evidence in this case tends to establish the facts found by the court. From these facts, it follows as a matter of law that plaintiff incurred indebtedness to Eastern in the amount of $3,360.00 and that defendant is liable to plaintiff for the sum of $600.00, the policy limit. The judgment of the Superior Court is affirmed.

We have reached the conclusion that plaintiff himself is liable to Eastern for the total amount of his hospital bill without reference to Article 7 of Ch. 143 of the General Statutes, which was enacted as ch. 120, P. L. 1925. By unmistakable legislative oversight the names of Eastern North Carolina Sanatorium at Wilson, Western North Carolina Sanatorium at Black Mountain, Gravely Sanatorium at Chapel Hill (and perhaps some other institutions established since 1925) have not been added to the list of State institutions contained in G.S. 143-117. Included, however, is the North Carolina Sanatorium at Sanatorium (now at McCain), and there is no reason to suppose that the legislature intended to show any difference between the patients of the four sanatoriums. Indeed, its specific declarations are to the contrary.

Affirmed.

HUSKINS, J., had no part in the decision or consideration of this case.

STATE v. JOHN ALFORD.

(Filed 14 June 1968.)

1. Criminal Law § 83—

No statute provides that a husband is not a competent witness against his wife or that a wife is not a competent witness against her husband in any criminal action or proceeding; the statute now codified as G.S. 8-57, and the statutes on which it is based, simply provide that rules of the common law with reference to whether one spouse is competent to testify against the other spouse in a criminal action or proceeding are unaffected by these statutes.

2. Same—

Subject to common-law and statutory exceptions, the general rule of the common law that the husband or wife of a defendant in a criminal case is incompetent to testify for the State is recognized in this jurisdiction when the relationship of husband and wife is subsisting at the time of the trial; upon the absolute divorce of the parties, all asserted reasons for the rule based on (1) the fictional oneness of husband and wife and (2) the preservation of peace and harmony in the family are no longer pertinent.

3. Same—

Where the former husband or wife is prosecuted for a felony, the divorced spouse is a competent witness to testify for the State as to the defendant's conduct during the marriage in his or her presence when the alleged felony was being committed.

4. Constitutional Law § 10—

Absent a legislative declaration with reference to the competency of a divorced wife to testify for the State as to her former husband's conduct during the marriage when the alleged felony was being committed, it is for the Supreme Court to declare the public policy according to the right reason of things.

5. Criminal Law §§ 40, 86—

Where defendant's plea of guilty in a homicide prosecution is set aside in a post-conviction hearing on the ground that defendant did not knowingly and understandingly enter the plea, testimony in a subsequent trial relating to such void plea is incompetent for any purpose, and it is prejudicial error to permit the solicitor to cross-examine defendant, for purposes of impeachment, as to his plea of guilty in the first trial.

HIGGINS, J., concurs in result.

APPEAL by defendant from *Crissman, J.*, September 25, 1967 Criminal Session of GUILFORD, High Point Division.

Defendant was indicted at April 12, 1965 Criminal Session of Guilford for the first degree murder of George Bethea on March 2, 1965. When the case was called for trial at May 3, 1965 Criminal Session, the Assistant Solicitor advised the court that the State "does not elect to try this defendant for first degree murder, but

instead, elects to try him for second degree murder." Defendant, represented by John W. Langford, his court-appointed counsel, entered a plea of not guilty. Thereupon, a jury was selected, sworn and impaneled. At the conclusion of all the evidence defendant, through his said counsel, withdrew his plea of not guilty and tendered a plea of guilty of manslaughter, which plea was accepted by the State. Judgment imposing a prison sentence of "not less than ten (10) years nor more than fifteen (15) years" was pronounced.

At March 20, 1967 Session of Guilford, Greensboro Division, a post-conviction hearing was conducted by His Honor, Walter E. Brock, the presiding judge. The hearing was on stipulations and on the testimony of defendant (then petitioner) and of said attorney who had represented him at May 3, 1965 Criminal Session. In an order filed May 30, 1967, Judge Brock, based on findings of fact set forth therein, concluded as a matter of law "(t)hat defendant did not knowingly and understandingly enter a plea of guilty to the offense of manslaughter" at May 3, 1965 Criminal Session. Judge Brock's order vacated and set aside the plea, the judgment and the commitment entered at May 3, 1965 Criminal Session and directed that defendant be retried. His order provided further that defendant be released from custody on condition that he give an appearance bond in the amount of $5,000.00.

Thereafter, at September 25, 1967 Criminal Session, defendant was again placed on trial on said bill of indictment. Again the State announced that defendant would not be tried for first degree murder but for second degree murder or manslaughter as the evidence may warrant. Defendant having again pleaded not guilty, a jury was selected, sworn and impaneled. Thereupon, in the absence of the jury, the court allowed defendant's motion that the State be restricted to a prosecution of defendant for manslaughter. The court did not then so notify the jurors but did instruct them to this effect when charging the jury.

Evidence was offered by the State and by defendant. The State's evidence consisted largely of the testimony of Mary Alford, who was defendant's wife on March 2, 1965, when George Bethea, her brother, was killed, but who had obtained an absolute divorce prior to the trial at September 25, 1967 Criminal Session. The jury returned a verdict of guilty of manslaughter. Thereupon, the court pronounced judgment imposing a prison sentence of not less than ten nor more than fifteen years, with the provision that credit be given defendant for the time he served on the sentence imposed by the judgment pronounced at May 3, 1965 Criminal Session.

Defendant excepted and appealed. The court, on account of de-

fendant's indigency, appointed defendant's present counsel, who as court-appointed counsel had represented defendant at September 25, 1967 Criminal Session, to represent him on appeal, and ordered Guilford County to pay all necessary costs incident to appeal.

Attorney General Bruton and Assistant Attorney General Harrell for the State.

Haworth, Riggs, Kuhn & Haworth for defendant appellant.

BOBBITT, J. On March 2, 1965, Mary Alford, John Alford, husband of Mary Alford, Mary Ann Alford, their three-year-old daughter, and Ed Bethea and George Bethea, brothers of Mary Alford, lived together in the house where George Bethea was shot and killed. At the September 25, 1967 Criminal Session, Mary Alford, then the divorced wife of defendant, did not testify to any confidential communication from defendant to her. Her testimony related to what was said and done by defendant and others in her presence on the occasion of the homicide.

Defendant contends the admission of Mary Alford's testimony over his objection was prejudicial error. He bases his position upon the statutory provisions now codified as G.S. 8-57 and the decisions of this Court in *State v. Jolly, et al.*, 20 N.C. 108 (1838), *State v. Jones*, 89 N.C. 559 (1883), and *State v. Raby*, 121 N.C. 682, 28 S.E. 490 (1897).

G.S. 8-57 provides: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse; Provided that this section shall not affect

pending litigation relating to a criminal offense against a minor child."

The factual situations and holdings in *Jolly, Jones* and *Raby* will be discussed below.

"At common law the husband or wife of the defendant in a criminal case was incompetent to testify either for the State or for the defense." Stansbury, N. C. Evidence, Second Edition, § 59; 97 C.J.S., Witnesses § 75; 58 Am. Jur., Witnesses § 175. Obviously, the reasons assigned for the incompetency of a husband or wife to testify *for* the State in such criminal case were quite different from those assigned for the incompetency of a husband or wife to testify *in defense of the* other. As stated by Dean Wigmore: "(T)he two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey." 8 Wigmore, Evidence § 2227 (McNaughton rev. 1961).

The portion of G.S. 8-57 providing that "(n)othing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding," with exceptions therein set forth, originated as Section 3, Chapter 43, Laws of 1866, providing in part "(t)hat nothing contained in the second section of this act . . . shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband." The second section of said 1866 statute provided "(t)hat on the trial of any issue, or of any matter or question, or on any enquiry arising in any suit or other proceeding in court, or before any judge, justice, jury or other person having by law authority to hear and examine evidence, the parties and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either *viva voce,* or by deposition, according to the practice of the court, in behalf of either or any of the parties to said suit or other proceeding."

In *Rice v. Keith,* 63 N.C. 319 (1869), the Court pointed out that the purpose and function of said 1866 statute was to remove, except as provided therein, all common law disqualifications of parties as witnesses on account of *their interest* in the outcome of the trial. It was held the 1866 statute did not change the common law rule that a wife was not a competent witness *for* her husband. This common-law rule was changed by Section 3, Chapter 110, Laws of 1881.

No statute provides that a husband is not a competent witness against his wife or that a wife is not a competent witness against her husband in any criminal action or proceeding. The statute now

codified as G.S. 8-57, and the statutes on which it is based, simply provide that rules of the common law with reference to whether a husband is competent to testify against his wife or a wife is competent to testify against her husband in a criminal action or proceeding are unaffected by these statutes. In this respect, the portion of G.S. 8-57 quoted above differs from the portion thereof providing directly and positively that "(n)o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage."

There were and are exceptions to the common-law rule that a wife was not a competent witness against her husband in a criminal action. In *State v. Hussey,* 44 N.C. 123 (1852), Nash, C.J., states: "The rule, as we gather it from authority and reason, is, that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her, and we would say from an assault and battery which inflicted or threatened a lasting injury or great bodily harm; but in all cases of a minor grade she is not." Subsequently, it was provided "(t)hat in all criminal prosecutions *of a husband* for an assault and battery upon the person of the wife, it shall and may be lawful to introduce and examine the wife in behalf of the State against her said husband; any law or custom to the contrary notwithstanding." (Out italics.) Laws of 1856-'57, Chapter 23. In the absence of a statute providing that the husband was a competent witness to testify against his wife when charged with felonious assault upon him, this Court continued to apply the common law. Thus, in *State v. Davidson,* 77 N.C. 522 (1877), where *the wife* was indicted for an assault and battery upon her husband, it was held the husband was a competent witness to testify his wife struck him with an axe. The opinion of Faircloth, J. (later C.J.), after referring to *State v. Hussey, supra,* and to *State v. Rhodes,* 61 N.C. 453 (1868), and to *State v. Oliver,* 70 N.C. 60 (1874), said: "In the present case the wife is indicted for an assault and battery upon her husband by striking him with an axe, without any sufficient provocation. Is he a competent witness to prove the assault? The instrument used is a dangerous one, and is a deadly weapon, calculated to inflict lasting injury. The use of it indicates malice, and its character would be considered by a jury upon a question of an assault with intent to kill. We think in such case the defendant is indictable, and *ex necessitate* that the husband is competent, as the wife would be if the assault had been upon her." In *State v. Alderman,* 182 N.C. 917, 110 S.E. 59 (1921), it was held that the husband was a competent witness to testify against his wife upon her trial for attempting to murder him by poisoning. In

State v. French, 203 N.C. 632, 166 S.E. 747 (1932), it was held the husband was a competent witness to testify against his wife upon her trial for malicious assault and battery upon him with a deadly weapon and in a secret manner. There was no statute providing the husband was a competent witness for the State in a criminal prosecution of his wife for an assault upon him until the enactment of Chapter 116, Session Laws of 1967.

The general rule of the common law that the husband or wife of a defendant in a criminal case is incompetent to testify for the State has been severely criticized by eminent authority. Wigmore, *op. cit. supra,* §§ 2227 and 2228. Be that as it may, it is recognized in this jurisdiction, subject to common-law and statutory exceptions, when the relationship of husband and wife is subsisting at the time of trial. Obviously, upon absolute divorce, all asserted reasons for the rule based on (1) the fictional oneness of husband and wife and (2) the preservation of peace and harmony in the family, are no longer pertinent. If the divorced husband or wife of the defendant in a criminal case is to be held incompetent to testify for the State, such a decision must be based on considerations of public policy. *State v. Jolly, et al., supra.*

In *State v. Jolly, et al., supra,* the defendants, Curen Jolly and Elizabeth Whitley, were indicted and tried for fornication and adultery. Henry C. Whitley, offered as a witness by the State, *had been* the husband of Elizabeth but they were divorced prior to the trial. It is stated that "(t)he witness was examined and proved a criminal intercourse between the defendants before the separation of the witness from his wife, the defendant, Elizabeth, and for some time after that separation, but before the divorce." It was held the divorced husband was not a competent witness to testify to the adultery of his wife during the subsistence of their marriage. In an eloquent statement, Gaston, J., said: "The law had invited confidence, and it should not permit this confidence to be violated or betrayed. But it is not enough to throw protection over *communications* made in the spirit of confidence. The intimacy of the marriage union enables each to be a daily and almost constant witness of the *conduct* of the other; and thus in fact a confidence, reaching much farther than that of verbal communications, is forced upon each of the parties. What one may even desire to conceal from all human eyes and ears is thus almost unavoidably brought within the observation of the other. The confidence which the law thus *extorts* as well as that which it *encourages,* ought to be kept sacred, and therefore the husband and wife are not in general admissible to testify against each other as to any *matters* which *occurred* during the relation."

Decision in *State v. Jolly, et al., supra,* was followed in *State v. Jones, supra,* and in *State v. Raby, supra,* both involving prosecutions of the divorced wife and her paramour for fornication and adultery and holding that the divorced husband was incompetent to testify as to the wife's alleged adultery during the subsistence of their marriage. There has been no consideration by this Court of the questions involved in *Jolly, Jones* and *Raby* since 1897.

We are not concerned with testimony as to a "confidential communication" made by defendant to plaintiff during their marriage. In this connection, see *Hicks v. Hicks,* 271 N.C. 204, 155 S.E. 2d 799 (1967). We are concerned with whether the divorced wife of a defendant on trial for unlawful homicide is a competent witness for the State as to her former husband's conduct in her presence during the subsistence of their marriage when the alleged felony was being committed.

On this appeal, we do not decide that the divorced husband or wife would be a competent witness to testify against the other in *all* criminal prosecutions as to what occurred during the subsistence of their marriage. It may be conceded, *arguendo,* that considerations of public policy were sufficient to justify holding the divorced husband an incompetent witness in factual situations involving misdemeanors, *e.g.,* those involved in *Jolly, Jones* and *Raby.* However, in a criminal prosecution for a felony, weightier considerations of public policy, to wit, the protection of the citizens of the State by the proper enforcement and just administration of the criminal law, are present. In our opinion, and we so hold, where the former husband or wife is prosecuted for a felony the divorced spouse is a competent witness to testify for the State as to what occurred during the subsistence of their marriage in his or her presence when the alleged felony was being committed. Absent a legislative declaration with reference thereto, it is for this Court to declare the public policy according "to the right reason of things." *State v. Wiseman,* 130 N.C. 726, 41 S.E. 884 (1902).

Defendant rightly concedes that the weight of authority supports the proposition that a divorced spouse may testify under the circumstances approved herein.

This general statement appears in 97 C.J.S., Witnesses § 80: "Although there is a conflict of opinion, the weight of authority, as well as of reason, favors the view that an absolute divorce places the former spouses in the same position with respect to competency as witnesses as though there had been no marriage, and that each may testify for or against the other, even as to matters which occurred or came to his or her knowledge during the existence of the marriage

relation, unless such matters are in the nature of confidential communications, as discussed *infra* §§ 266-275, although there is authority denying the competency of a divorced spouse to testify to any matters occurring prior to the divorce, at least with respect to matters coming to the knowledge of a spouse through means of the marital relation, *or holding that one spouse is incompetent after divorce to testify against the other with respect to adultery committed by the other prior to divorce.* Irrespective of this conflict of authorities, the former spouses are competent for or against each other as to matters which occurred after the divorce." (Our italics.) In accord: 58 Am. Jur., Witnesses § 204. See Annotation, "Effect of divorce or annulment on competency of one former spouse as witness against other in criminal prosecution." 38 A.L.R. 2d 570 *et seq.* Also, see 8 Wigmore, *op. cit. supra,* § 2237, and Stansbury, *op. cit. supra,* § 59, at 128.

Decisions holding the divorced wife of a defendant in a criminal case is not a competent witness for the State as to the defendant's conduct during the subsistence of the marriage include the following: *State v. Kodat,* 158 Mo. 125, 59 S.W. 73, 81 Am. St. Rep. 292, 51 L.R.A. 509 (1900); *People v. Gessinger,* 238 Mich. 625, 214 N.W. 184 (1927); *Menefee v. Commonwealth,* 189 Va. 900, 55 S.E. 2d 9 (1949). (Note: No others have come to our attention.) Our decisions in *State v. Jolly, et al., supra,* and in *State v. Raby, supra,* are cited in *State v. Kodat, supra.*

Decisions holding the divorced spouse of a defendant in a criminal case is a competent witness for the State as to the defendant's conduct during the subsistence of the marriage include the following: *State v. Snyder,* 84 Wash. 485, 147 P. 38 (1915); *State v.. Americk,* 42 Wash. 504, 256 P. 2d 278 (1953); *Commonwealth v. Beddick,* 180 Pa. Super. 221, 119 A. 2d 590 (1956); *DeWolf v. State,* Okl. Cr., 245 P. 2d 107 (1952); *Pittman v. State,* Okl. Cr., 279 P. 2d 1108 (1955); *People v. Zabijak,* 285 Mich. 164, 280 N.W. 149 (1938); *State v. Matthews,* 133 Iowa 398, 109 N.W. 616 (1906); *Smith v. Commonwealth,* 237 Ky. 317, 35 S.W. 2d 546 (1930); *State v. Leasia,* 45 Ore. 410, 78 P. 328 (1904); *United States v. Gonella,* 103 F. 2d 123 (3 Cir. 1939); *Pereira v. United States,* 347 U.S. 1, 98 L. Ed. 435, 74 S. Ct. 358 (1954); *United States v. Ashby,* 245 F. 2d 684 (5 Cir. 1957); *United States v. Termini,* 267 F. 2d 18 (2 Cir. 1959); *Cooper v. United States,* 282 F. 2d 527 (9 Cir. 1960).

Doubt is cast upon the authority of *State v. Kodat, supra,* by this portion of the opinion of Clark, C.J., in *State v. Dunbar,* 360 Mo. 788, 230 S.W. 2d 845 (1950): "The common-law rule which generally prohibited one spouse from giving testimony against the

other was based upon the interest of the public in preserving harmonious marital relations. The exception to the general rule, which permitted the injured spouse to testify as to a criminal injury inflicted upon such spouse by the other, was also based upon public interest in protecting individuals and the necessity for such evidence, in many cases, to prove the commission of a crime.

"We believe that the administration of justice would be aided by *permitting* one spouse to testify against the other in any criminal case, but that such testimony should not be *compelled* except as to charges of a serious nature. Perhaps the dividing line should be between misdemeanors and felonies."

Further doubt is cast upon the authority of *State v. Kodat, supra,* by the opinion in *State v. Kollenborn,* 304 S.W. 2d 855 (Mo. 1957).

Although no reference is made in *People v. Zabijak, supra,* to the earlier Michican case of *People v. Gessinger, supra,* it would seem that *Zabijak* is in conflict with and supersedes *Gessinger.*

In *Menefee v. Commonwealth, supra,* the Virginia statute under consideration read: "Neither husband nor wife shall, without the consent of the other, be examined in any case as to any communication *privately* made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted." (Our italics.) The testimony of the divorced wife did not relate to a crime committed in her presence or of which she had personal knowledge. Rather, it related to events subsequent to an alleged robbery, namely, to her identification of articles in the defendant's possession and exhibited to her, and the defendant's statements to her in private with reference thereto. It was held that this was testimony as to confidential communications between spouses in violation of the quoted statute. Substantially the same factual situation was involved in *People v. Gessinger, supra,* which is cited in *Menefee.*

For the reasons stated, assignments of error based on exceptions to the admission of the testimony of Mary Alford, as to what she saw and heard on the occasion the alleged crime was being committed, are untenable. The State's evidence, inclusive of Mary Alford's testimony, was sufficient to require submission to the jury. Hence, the motion for judgment as in case of nonsuit was properly denied.

Even so, a new trial must be ordered. Defendant testified in his own defense. On cross-examination, the court, over defendant's objections, permitted the Assistant Solicitor to cross-examine defendant, for purposes of impeachment, concerning the plea of guilty of manslaughter entered by defendant at the May 3, 1965 Criminal

Session. The eliciting and admission of this evidence was erroneous and must be deemed prejudicial. It having been judicially determined by Judge Brock on May 30, 1967, that defendant did not knowingly and understandingly enter the plea of guilty of manslaughter at May 3, 1965 Criminal Session, the said (vacated) plea was a nullity. Testimony in a subsequent trial relating to such void plea was incompetent for *any* purpose. For prejudicial error in this respect, a new trial is awarded.

New trial.

HIGGINS, J., concurs in result.

LEE PERKINS v. AMERICAN MUTUAL FIRE INSURANCE COMPANY.

(Filed 14 June 1968.)

1. Insurance §§ 95, 108—

Where the insurer fails to give the insured fifteen days notice of the insurer's termination of a policy of automobile liability insurance, the notice to contain, in addition to the date and hour of termination, a warning that proof of financial responsibility must be maintained continuously throughout the registration period and that operation of a motor vehicle without such proof is a misdemeanor, the policy continues in force and effect notwithstanding plaintiff's failure to pay in full the required premium. G.S. 20-310(a).

2. Insurance § 80—

The manifest purpose of the 1957 Vehicle Responsibility Act is to provide protection to persons injured or damaged by the negligent operation of a motor vehicle by requiring that every motorist maintain continuously proof of financial responsibility.

3. Insurance § 95—

The obvious purpose of the notice and warning required by G.S. 20-310(a) is to confront the insured with the fact that operation of a car without maintaining proof of financial responsibility is a misdemeanor.

4. Insurance §§ 81, 95— Assigned Risk insured met insurer's offer of renewal, and policy continues in effect.

Where, more than 45 days prior to the expiration date of a policy of automobile liability insurance issued pursuant to the Assigned Risk Plan, the insurer sends the insured notice that a renewal policy will be issued upon receipt of the renewal premium at least 22 days prior to the expiration date of the policy, the insurer is obligated under the Plan to renew the policy upon timely payment by the insured of the required premium; the contention of the insurer in this case that its offer of renewal was rejected by insured, thereby rendering unnecessary the 15 days notice of

termination required by G.S. 20-310, is meritless when the findings indicate the insured's desire to renew the policy.

5. Insurance § 105; Damages § 12—

In insured's action against the insurer to recover under an automobile liability insurance policy expenses arising out of an automobile collision, exclusion of evidence as to insured's loss of wages on account of revocation of driver's license is proper in the absence of allegations in the complaint as to such loss.

6. Pleadings § 32—

The trial court in its discretion may deny plaintiff's motion to amend the complaint.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *McLean, J.*, January 9, 1967 Civil Session of GASTON, docketed and argued as No. 202 at Fall Term 1967.

Plaintiff having incurred legal liability and expenses growing out of an automobile collision, instituted this action to recover under a liability insurance policy issued to him by defendant.

Waiving jury trial, the parties agreed "that the court might hear the evidence, make findings of fact and conclusions of law and enter judgment." After hearing the evidence, the court made, and set forth in the judgment, the following findings of fact:

"1. On February 1, 1962, the plaintiff, Lee Perkins, went to the office of the Terry Insurance Agency in Gastonia, North Carolina and applied for the issuance of an automobile liability insurance policy.

"2. The plaintiff had been unable to secure automobile liability insurance through regular channels.

"3. On behalf of the plaintiff, Terry Insurance Agency sent an application to the North Carolina Assigned Risk Plan in Raleigh, North Carolina.

"4. The risk was duly assigned to the defendant, American Mutual Fire Insurance Company, and the liability insurance policy was issued by the defendant to the plaintiff under the North Carolina Assigned Risk Plan pursuant to the Vehicle Responsibility Act of 1957 as stipulated by the parties.

"5. Terry Insurance Agency was the producer of record.

"6. The insurance policy bearing policy number AC 455127 was effective for the period beginning February 7, 1962 and ending at 12:01 A.M., February 7, 1963.

"7. The premium for the policy period ending February 7, 1963 was $72.00 and paid by the plaintiff.

"8. Terry Insurance Agency was not an agent of the defendant, but the policy of insurance was issued through it as producer of record.

"9. Prior to January 7, 1963, pursuant to rules of the Assigned Risk Plan, the defendant sent Perkins and Terry Insurance Agency a notice advising that in order to renew the policy, plaintiff would have to pay the renewal premium twenty-two (22) days in advance of the expiration date of the policy, which notice was dated December 5, 1962 showing the total policy premium for renewal to be $55.00. The plaintiff received a copy of the notice dated December 5, 1962 prior to January 7, 1963.

"10. In addition, plaintiff received a notice from the Terry Insurance Agency prior to January 7, 1963 that he would have to pay the renewal premium on the policy thirty (30) days in advance in order to keep the policy in effect under the Assigned Risk Plan.

"11. The notice received by the plaintiff from the Terry Insurance Agency was not dated and is in evidence as defendant's Exhibit No. 2, which notice contained provision that the premium for renewal on the policy would be due on January 7, 1963 and to avoid having to turn in his license plates to be sure to see the Terry Insurance Agency by January 7, 1963.

"12. Plaintiff went to the Terry Insurance Agency on January 7, 1963 and was advised by the agency that the premium for renewal of the policy would have to be paid on January 7, 1963 in order to keep the policy in force.

"13. The premium for renewal was $55.00.

"14. The plaintiff paid the sum of $15.00 to the Terry Insurance Agency as a down-payment on the premium.

"15. On January 7, 1963, Terry Insurance Agency forwarded the sum of $43.00 to the defendant as renewal premium and requested the defendant to advise the agency whether the renewal premium would be $43.00 or $55.00.

"16. Between January 7, 1963 and January 11, 1963, the defendant notified Terry Insurance Agency to forward additional premium of $12.00 so renewal could be processed, defendant's Exhibit No. 6.

"17. On January 11, 1963, Terry Insurance Agency mailed a notice to the plaintiff at 20 Boundary Street, Belmont, North Carolina that defendant had informed the agency that renewal premium would be $55.00 rather than $43.00 and that the amount of $12.00 must be paid immediately so that renewal may be issued.

"18. That two or three days after January 11, 1963, plaintiff called Terry Insurance Agency and was advised by Mrs. Betty Barnhill that an additional premium of $12.00 must be paid for renewal of the policy. Plaintiff did not pay the additional premium of $12.00 prior to February 7, 1963 and the additional sum of $12.00 was never received by the defendant. The additional sum of $12.00 was paid by the plaintiff to Terry Insurance Agency after February 18, 1963.

"19. The sum of $43.00 was returned by the defendant to the Terry Insurance Agency on February 22 or February 23, 1963.

"20. A portion of the money paid by the plaintiff to the Terry Insurance Agency was returned to the plaintiff by the Terry Insurance Agency several months after February 18, 1963.

"21. On February 18, 1963, prior to the time of the accident on February 18, 1963, the plaintiff received a notice at his home at 20 Boundary Street, Belmont, North Carolina, from the defendant that his policy of insurance was terminated as of 12:01 A.M. on February 7, 1963. The plaintiff did not read the notice until February 19, 1963. Plaintiff's Exhibit No. 1. Said notice provided that policy expired at 12:01 A.M. on Friday, February 7, 1963 and FS-4 and SR-26 issued.

"22. That on or about February 18, 1963, the plaintiff received a notice from the defendant dated February 14, 1963, executed by Robert G. Dillard on behalf of the defendant, and posted in the United States Mail on February 14, 1963, advising that the policy expired at 12:01 A.M. February 7, 1963 and that proof of financial responsibility must be continuously maintained throughout the registration period and operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor.

"23. On February 14, 1963, and within fifteen (15) days after February 7, 1963, defendant prepared and sent to Commissioner of Motor Vehicles in Raleigh, North Carolina, notice that insurance had terminated on February 7, 1963. The notice was on Form FS-4 North Carolina Notice of Termination.

"24. The plaintiff reported the accident to the Terry Insurance Agency on February 21, 1963.

"25. The complaint makes no allegation with respect to failure of the defendant to give notice of termination to the North Carolina Department of Motor Vehicles.

"26. Plaintiff was involved in an accident on February 18, 1963 from which three lawsuits arose entitled as follows: *'Lee A. Perkins vs. David Sisk'* resulting in a jury verdict of negligence and contributory negligence. *'Novella Sisk vs. Lee A. Perkins, Orig. Def. and David Sisk, Add. Def.'* resulting in an appeal to the Supreme Court of North Carolina. *'James McGinnis vs. David Sisk and Lee A. Perkins'* in which no judgment was rendered against Perkins.

"27. That a consent judgment appears of record against the plaintiff in the office of the Clerk of Superior Court of Gaston County, North Carolina in the sum of $2,500.00, which has not been paid.

"28. *The defendant had the right to rely on the termination of the insurance contract by the plaintiff for failure of the plaintiff to pay the renewal premium and the defendant did in fact rely on plaintiff's failure to pay the renewal premium.*

"29. Plaintiff incurred attorney fees in defense of the actions filed against him.

"30. Plaintiff instituted this action for the sum of $2,500.00 and attorney fees. The complaint alleges the plaintiff paid attorney fees in excess of $500.00 and the testimony of the plaintiff was that he had paid the sum of $750.00 in attorney fees and owed an additional sum of $1,400.00 for attorney fees in defense of the suit filed against him as a result of the accident.

"31. That the defendant was notified of the actions pending against the plaintiff and the defendant refused to defend on the grounds that there was no coverage under the policy."

Upon these findings of fact, the court concluded the insurance coverage provided by the policy expired on February 7, 1963, at 12:01 a.m., on account of plaintiff's failure to pay the renewal premium.

Judgment was entered providing that "the plaintiff have and recover nothing of the defendant and that the defendant be and it is forever discharged of any and all liability to the plaintiff by reason of the matters and things alleged in the complaint and the costs taxed against the plaintiff."

Plaintiff excepted and appealed, basing assignments of error on his exceptions to the (italicized) Finding of Fact No. 28 and to each of the court's conclusions of law.

Mullen, Holland & Harrell and Thomas H. Morgan for plaintiff appellant.

Hollowell, Stott & Hollowell for defendant appellee.

BOBBITT, J. The principal question presented by plaintiff's assignments of error is whether defendant's liability under the policy terminated on February 7, 1963, at 12:01 a.m. on account of plaintiff's failure to pay in full the renewal premium. In our view, the holding designated Finding of Fact No. 28 is in substance a conclusion of law and is so treated.

The policy was issued February 7, 1962, and provided the *compulsory* coverage then required by the Vehicle Financial Responsibility Act of 1957 (Session Laws of 1957, Chapter 1393) as a prerequisite to the registration of a motor vehicle by the owner thereof. *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482.

With reference to termination of coverage, Section 2 of said 1957 Act, later codified as G.S. 20-310 in the 1959 and 1961 Cumulative Supplements to the General Statutes, provided:

"No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured at the address shown on the policy. Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor. Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination."

The quoted statutory provision was in force at all times pertinent to decision herein. It is noted the statute (G.S. 20-310) was subsequently amended (1) by Chapter 842, Session Laws of 1963, applicable to policies written or renewed after September 1, 1963, and (2) by Chapter 964, Session Laws of 1963, effective October 1, 1963, and (3) by Chapter 1135, Session Laws of 1965, effective July 1, 1965, and (4) by Chapter 857, Session Laws of 1967, effective June 21, 1967. As amended, the statutes are brought forward and codified as G.S. 20-310(a), (b) and (c) in the 1965 Replacement and

1967 Cumulative Supplement. However, the said amendments have no application to the present case.

Defendant contends it offered to renew the policy upon payment by plaintiff of the required ($55.00) premium; that the policy was not terminated *by it* but by plaintiff's failure to pay the premium; and that it was not required to give plaintiff a notice containing the provision, including the warning, set forth in the quoted statute.

No notice given by defendant to plaintiff set forth on the face thereof, in addition to the date and hour of termination, "a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor." Where applicable, the requirement of the quoted statute that the notice contained the provisions, including the warning, set forth therein, is mandatory. *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E. 2d 149; *Levinson v. Indemnity Co.*, 258 N.C. 672, 129 S.E. 2d 297. The question is whether, in the factual situation under consideration, a notice containing the provisions, including the warning, set forth in the quoted statute, was prerequisite to termination for failure to renew on account of nonpayment of premium.

The manifest purpose of said 1957 Act was to provide protection, within the required limits, to persons injured or damaged by the negligent operation of a motor vehicle. *Swain v. Insurance Co., supra; Nixon v. Insurance Co.*, 255 N.C. 106, 120 S.E. 2d 430; *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398. The quoted statute must be considered in context with other provisions of said 1957 Act. The primary intent of the General Assembly was that every motorist maintain continuously proof of financial responsibility; and the obvious purpose of the notice required by the quoted statute was to confront the insured with the fact that operation of a car without maintaining proof of financial responsibility was a misdemeanor. The quoted statute relates to the notice and warning that must be given the policyholder in the event his policy is terminated by the insurer, whether the termination is by cancellation or by failure to renew. We are of the opinion, and so hold, that the defendant was required to give such notice and warning, and that in the absence of such notice and warning the policy continued in force and effect notwithstanding plaintiff's failure to pay in full the required premium.

As noted in *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303, the provisions of the quoted statute and of § 313 of the Ve-

hicle and Traffic Law of New York, are similar in all respects pertinent to decision in the present case. See McKinney's Consolidated Laws of New York, Book 62A, pp. 106-107. The New York statute provides, *inter alia,* that "(n)o contract of insurance or renewal thereof . . . shall be terminated by cancellation by the insurer or failure to renew by the insurer" until notice is given as prescribed; and that "(e)very such notice of termination for any such cause whatsoever sent to the insured shall include . . . a statement that proof of financial security is required to be maintained continuously throughout the registration period . . ." (Note: This statute was formerly codified as Section 93-c of the Vehicle and Traffic Law of New York.)

A brief reference to the two New York decisions discussed in *Faizan,* namely, *Connecticut Fire Insurance Company v. Williams,* 194 N.Y.S. 2d 952 (1959) and *Caristi v. Home Indemnity Company, New York,* 202 N.Y.S. 2d 340 (1960), seems appropriate. In *Williams,* the Court said: "It was recently held in *Teeter v. Allstate Ins. Co.,* 9 A.D. 2d 176, 181, 192 N.Y.S. 2d 610, 616, that cancellation can only be accomplished by giving the insured notice under Section 93-c . . ." No notice of termination for failure to renew was mailed by the insurer to the insured. The Court concluded: "The court below correctly determined that there was here a unilateral failure to renew by the insurer and since section 93-c was not complied with, the insurance continued in effect." In *Caristi,* it was held the ruling in *Williams* would apply *unless* it was found the insured had *rejected* a renewal policy.

Later New York decisions, to wit, *Mong v. Allstate Insurance Company,* 223 N.Y.S. 2d 218 (1962), and *La Barre v. Nationwide Mutual Insurance Company,* 227 N.Y.S. 2d 632 (1962), and *Monette v. Nationwide Mutual Insurance Co.,* 230 N.Y.S. 2d 939 (1962), involve factual situations substantially similar to that under consideration in the present case. In each of these cases, the court rejected the contention that compliance by the insurer with Section 313 was unnecessary. In each instance, it was held the policy period extended beyond the expiration date stated therein and that the policy was in force when the accident occurred. The basis of the decisions is succinctly and accurately stated in this headnote in *Mong:* "Automobile insurance termination notice which did not contain statement that failure to maintain proof of financial security is misdemeanor was ineffective to cancel insurance for nonpayment of insurance premium, under statute requiring every notice of termination to contain such a statement. Vehicle and Traffic Law, § 313."

It is noted that *Mong, La Barre* and *Monette,* and also *Williams,*

quote, in whole or in part, the following from *Teeter v. Allstate Insurance Company,* 192 N.Y.S. 2d 610, 616, affd. 212 N.Y.S. 2d 71:

"Once a certificate of insurance . . . has been issued by the insurance company and filed with the Commissioner, the contract of insurance ceases to be a private contract between the parties. A supervening public interest then attaches and restricts the rights of the parties in accordance with the statutory provisions. Many common-law contractual rights are restricted by the statute. Thus, for example, there is, at common law, the absolute right to refuse to renew a policy upon the expiration of its term but this is restricted by the statute so that the policy continues in force after its expiration date without a renewal, unless and until notice of termination is given in accordance with the statute."

With reference to the ground of decision, this excerpt from the opinion in *Mong* is pertinent: "The notice which appellant claims to have mailed to Drone does not contain this statement required by section 93-c. The requirement that the notice should inform the insured that proof of financial security is required to be maintained and that failure to maintain it is a misdemeanor, is essential to carrying out the purposes of the act stated in subdivision 2 of section 93 thereof by assuring as far as possible that no uninsured automobile is operated in this state."

The policy here involved was issued by defendant to plaintiff under the North Carolina Automobile Assigned Risk Plan promulgated by the Commissioner of Insurance pursuant to authority conferred by G.S. 20-279.34. Provisions thereof then in effect are noted. Section 13 provided in part that "(a) risk shall be assigned to a designated company for a period of 3 consecutive years." Section 14B provided in part: "At least 45 days prior to the inception date of the first and second renewal policies the designated company shall notify the applicant that (1) a renewal policy will be issued provided the renewal premium is received at least 22 days prior to the inception date of such policy, or (2) A renewal policy will not be issued for the reason that the applicant is not entitled to insurance under the Plan."

Nothing else appearing, defendant was obligated under the Plan to renew the policy upon timely payment by plaintiff of the required premium. The only notice by defendant to plaintiff prior to February 7, 1963, was dated December 5, 1962. It was received by plaintiff prior to January 7, 1963, presumably forty-five days or more prior to February 7, 1963. It gave notice the renewal premium ($55.00) had to be paid twenty-two days in advance of February 7, 1963. Defendant had ample opportunity to give the fifteen day

notice required by the quoted statute before February 7, 1963, the expiration date stated in the policy.

The ground of decision in *Faizan* was that the insured *rejected* the defendant's offer to renew the policy. In *Faizan,* notices given by the defendant to the plaintiff, although not in full compliance with the provisions of the quoted statute, were sufficient to advise the insured plainly of the consequences of his failure to renew. The insured made no response to the insurer's notices. Instead, he "applied through the Assigned Risk Plan for further insurance, but the policy thus obtained (from another insurer) was not in effect at the time of the accident in question."

In the present action, there is no evidence or finding that plaintiff *rejected* defendant's offer to renew upon payment of a premium of $55.00. Rather, it appears uncertainty had arisen whether the proper premium was $43.00 or $55.00. While the court found $55.00 was the correct amount of the premium, the findings indicate a definite desire on the part of plaintiff to renew the policy.

We have not overlooked the assignments of error based on plaintiff's Exceptions Nos. 1 and 2. Exception No. 1 relates to the court's exclusion of evidence as to loss of wages on account of revocation of driver's license. The exception is without merit. The complaint contains no allegation as to such loss. Exception No. 2 relates to the refusal of the court to allow plaintiff to amend the complaint. This exception is without merit. It was permissible for the judge in his discretion to deny such motion.

For the reasons stated herein, the judgment of the court below is reversed; and the cause is remanded with direction that plaintiff be awarded judgment for such amount (the present findings of fact being insufficient with reference thereto) as he may establish in further proceedings.

Reversed and remanded.

HUSKINS, J., took no part in the consideration or decision of this case.

I. TAYLOR CAMPBELL v. A. C. MILLER AND WIFE, RUTH MILLER.

(Filed 14 June 1968.)

1. Partnership § 1—

A partnership is an association of two or more persons to carry on as co-owners a business for profit. G.S. 59-36(a).

2. Same—

A partnership may be formed by an oral agreement, it being immaterial that the parties intend to reduce their agreement to writing at a later date.

3. Same—

A partnership is a partnership at will unless some agreement to the contrary can be proved.

4. Partnership §§ 3, 9—

The termination of a partnership at will by the election of a partner for any reason is not a breach of contract for which that partner may be held liable for damages resulting to his copartners.

5. Same—

Plaintiff and defendants entered an agreement to go into the meat packing business as a partnership and to construct a building for that purpose on defendants' land. Defendants agreed to provide the financing and plaintiff agreed to draw the building plans and to supervise and perform the construction, with families of plaintiff and defendants aiding in the construction and each family receiving $75.00 per week from a drawing account. *Held:* The parties created a partnership at will, and a termination of the partnership by one of the parties before completion of the building does not constitute a breach of contract for which that partner may be held liable in damages.

6. Partnership § 9—

Upon the dissolution of a partnership, it continues in existence until the winding up of its affairs is completed. G.S. 59-60.

7. Same—

Upon the dissolution of a partnership, the partners are responsible to each other for an accounting of partnership funds and properties.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by defendants from *Gwyn, J.*, at the February 1967 Session of DAVIE, docketed and argued at Fall Term 1967 as Case No. 442.

This is an action for damages for breach of contract, with a counterclaim by the defendants. The complaint alleges:

> "In April, 1964, the plaintiff and the defendants entered into an agreement to go into the meat-packing and processing business as a partnership. * * * The agreement between the plaintiff and the defendants was that the plaintiff and the defendants would construct a building to be used for this business on * * * land * * * owned by the defendants. The defendants promised the plaintiff that if he would draw the floor plans for the building, see to it that the building and proposed operation met with the specifications of the North Carolina Health Department, devote his full time to the construction of

the building, and receive only $75.00 per week from a drawing account to be set up by the defendants during the construction of the plant, upon the completion of the construction of the plant and the equipping thereof, the plaintiff and the defendant A. C. Miller would operate the meat-packing and processing business as a partnership on a fifty-fifty basis with the partnership leasing the ground from the defendants and the building and equipment to belong to the partnership."

The complaint further alleges that the plaintiff drew floor plans for the building, obtained their approval by the North Carolina Health Department and assisted in the actual construction of the building until the defendants informed the plaintiff that they would not carry out their promise to operate in partnership with him and refused to permit him to perform his obligations under the contract, which he was ready, willing and able to do, by which breach of the contract the plaintiff was damaged.

The defendants filed a joint answer denying the material allegations of the complaint and alleging, as a further defense and counterclaim, that the plaintiff, after working upon the construction of the building for several weeks, informed the male defendant that he was quitting, stopped work, left the premises and never returned thereto. The answer further alleges that the plaintiff has been paid more than the amount due him for his work in the construction of the plant, that he fraudulently misrepresented to the defendants his past experience and abilities in construction work, which necessitated the hiring of others to perform work which the plaintiff had represented himself as able to do, whereby the defendants sustained damages for which they counterclaim.

The plaintiff filed a reply, denying all of the material allegations of the further answer and defense.

The plaintiff testified that prior to moving to North Carolina he had several years' experience in the operation of a slaughter house and meat processing plant in West Virginia. He was also an experienced carpenter. In March, 1964, Miller opened discussions with the plaintiff about their going into the slaughtering and meat processing business as partners on a "fifty-fifty" basis, Miller having had no experience in or knowledge of such business.

As to the agreement, the plaintiff testified:

"The terms with Mr. Miller was [*sic*] that we were going to do the work we could do and hire only what we had to hire. I told him I could draw the plans. * * * I told Mr. Miller that I would look after the cutting and processing and shipping

and for him to look after the killing * * *. It was necessary to have a building for this purpose. I had no property to pledge as security for this building although I was buying a home; I had no money to contribute either. All I had to contribute was my know-how. Mr. and Mrs. Miller were contributing money, borrowing money to contribute to the venture, which he and I both were going to pay back after the building was completed — he was to pay back 50 per cent and I was to pay back 50 per cent after the building was completed and we had it in operation; also we were to split the profits right down the middle after expenses were paid — I was to get 50 percent and he was to get 50 per cent of the profits. As to what I contributed toward the construction, it was my labor. * * * The agreement * * * was never reduced to writing. We had an oral agreement and when the building was completed, we were going to a lawyer and have a written agreement made by the lawyer, and at that time enter into a partnership agreement."

The plaintiff also testified that he, Miller and their teen-age children were to, and did, work together in the construction of the building on the land of the defendants. The original agreement was that the plaintiff and Miller would each be paid $100 a week for their work and that of their respective families but, by consent, this was reduced to $75 per week. The agreement was that the defendants would lease the land upon which the building was to be built to the partnership "for as long as we wanted it."

As to what was done under the agreement, the plaintiff testified: He prepared or supervised the preparation of plans for the proposed building and obtained their approval by the Health Department. The defendants then borrowed $28,000 for the construction of the building, the plaintiff signing no note and incurring no obligation for the repayment of the loan. Construction began and continued for 14 weeks, to 25 August 1964, at which time the building was within about four weeks of completion in accordance with the plans. Both families worked in the construction of the building. For this the plaintiff was paid $1,500. [The amount due him at the agreed rate of $75 per week for the 14 weeks was $1,050.]

As to the alleged breach of the contract by Miller, the plaintiff testified: On 25 August 1964, the plaintiff, after working on the building all day, was at his home with his wife in the evening, waiting for a telephone call about a relative seriously ill in another state. At Miller's request, he returned to the construction project in order to take to Miller a power drill, which belonged to Miller and with which Miller was going to do work on the building. He told Miller

that, as soon as the telephone call came through, he and his wife would come back to the building and work on it. Thereupon, Miller said, "The thing for you to do is get your stuff and get out of here." Thereupon, the plaintiff collected his tools and left the premises. He had no intention of returning and never returned, although at that time he was ready and willing to continue the contract. When he left the building he told Miller, "Let's get together and settle up." He "figured" the agreement between him and Miller was "finished."

The material evidence of the defendants was to the following effect:

At the time of their original negotiations, the plaintiff told Miller that he could do the construction work and was qualified to buy, process and sell meat. They then decided to go into the business, the plaintiff to be the manager, meat cutter and salesman, Miller to do the buying and supervise the slaughtering. Mr. and Mrs. Miller borrowed the money for the proposed construction, signing a note secured by mortgage on their farm. It was agreed that the plaintiff, Miller and their children would work upon the construction of the building and for the work of all of them, the plaintiff and Miller would each draw $75 per week. The plaintiff received substantially more, including an advance of $200 requested by him on the last day he worked on the project, 25 August 1964.

Prior to that date there was no disagreement. A few days earlier the plaintiff told Miller that he had learned, through the conversation of the children of the two families, that Miller did not intend that he and the plaintiff would be partners in the business. Miller, thereupon, assured the plaintiff that he intended to proceed as originally planned.

On the evening of 25 August 1964, Miller had a plumber at the plant to install the contemplated plumbing. Miller phoned the plaintiff, requesting him to bring Miller's drill to the plant for use in the plumbing work, which the plaintiff did. Miller assumed the plaintiff was going to help with the work, but the plaintiff stated that he had to make a telephone call. Miller suggested that he use the telephone at the plant but the plaintiff refused, saying he would not be back any more that evening. Miller then said, "It looks to me like you ought to help us while we got a man to lay out the work for us." The plaintiff then said, "Well, if that's the way you feel about it and won't let me take off, I'll just take my tools and leave." Miller tried to get the plaintiff to stay and help with the work but he would not and "grabbed up his tools and left." He never returned. Miller did not tell him to quit or to get off the premises, or prohibit him from coming back. At no time after he left did the plaintiff advise

Miller that he was ready, willing and able to continue with the agreement.

Prior to this undertaking, Miller had never been in the meat business. He intended, as previously agreed, that after the business was open for operation the plaintiff would draw up a contract specifying their respective duties and rights. It was contemplated that after the building had been paid for any remainder would be divided between the plaintiff and Miller equally.

Miller now has between $60,000 and $75,000 invested in the building and equipment. After the plaintiff left, Miller employed a man to help him finish the building and when the business was opened he had to employ a meat cutter and butcher. Miller sold his home and other property, investing the proceeds in the business. He has operated at a loss since the business opened. On the day the business opened, the indebtedness was $50,000. After the plaintiff left the project, it was necessary to expend $5,300 for labor on the building in the performance of work which the plaintiff and Miller had agreed would be done without the necessity of outside labor. In 1965, the Millers took $3,600 out of the business and, in 1966, approximately $4,600.

The following issues were submitted to the jury:

"1. Did the plaintiff and defendants enter into a contract whereby the plaintiff and defendants were to engage in meat-processing on a partnership basis, and whereby, in order to prepare for the business venture, the defendants agreed to furnish the land and provide for the financing and the plaintiff agreed to draw the plans, supervise and otherwise do the construction of the building, the families, including the children of both plaintiff and defendants to perform work in the construction of the building and each family to receive from a subsistence fund the sum of $75.00 per week, as alleged in the Complaint?

ANSWER: Yes.

"2. Did the defendants breach the contract, as alleged in the Complaint?

ANSWER: Yes.

"3. What amount, if anything, is the plaintiff entitled to recover?

ANSWER: $9,333.24.

"4. Did the plaintiff breach the contract, as alleged in the Answer?

ANSWER: .....

"5. What amount, if anything, are the defendants entitled to recover?

ANSWER: ....."

The court instructed the jury to answer the first issue "Yes" if the jury found the facts to be as the evidence tends to show. The jury so answered that issue. It also answered the second issue "Yes" and the third issue "$9,333.24." It did not answer Issues No. 4 and 5. From a judgment entered in accordance with the verdict, the defendants appeal, assigning as error certain rulings on the admission of evidence, the denial of their motion for judgment of nonsuit at the close of all the evidence, and certain portions of the charge of the court to the jury.

Booker and Sapp for defendant appellants.
William E. Hall for plaintiff appellee.

LAKE, J. It is clear from the evidence introduced by the plaintiff that he and the defendants entered into an agreement substantially in accordance with the allegations of the complaint. Indeed, this is not controverted by the defendants. The effect of that agreement was to bring into existence a partnership to operate a meat packing business and to construct upon the land of the defendants a building in which that business would be operated. "A partnership is an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36(a). The agreement in question was very similar to the one involved in *Fertilizer Co. v. Reams,* 105 N.C. 283, 11 S.E. 467, where Shepherd, J., speaking for this Court, said:

> "In our case, the usual elements of partnership are present. Morehead advances the capital, and Reams is to contribute the services to the joint undertaking, which is the purchase and sale of tobacco. No personal liability is contracted by Reams for the money advanced, and the said capital is to be paid out of the partnership stock, and the balance, after the payment of expenses, &c., is to be equally divided as profits between the parties. This, in our opinion, constitutes a partnership * * *"

It is immaterial that the parties intended to reduce their agreement to writing at a later date. A partnership may be formed by an oral agreement. *Eggleston v. Eggleston,* 228 N.C. 668, 47 S.E. 2d 243. That the parties understood the partnership was already in existence prior to the completion of the building, and prior to the reduction of their agreement to writing, is shown by the plaintiff's testimony, "I wasn't working with Mr. Miller as a laborer but as a partner."

There is nothing whatever in the record to indicate any agreement between the parties that their partnership was to continue for a specified term. On the contrary, the plaintiff testified that their understanding was that the site of the building would be leased to the partnership by the defendants "for as long as we wanted it." A partnership is a partnership at will unless some agreement to the contrary can be proved. Lindley on Partnerships, 10th ed., ch. 8, p. 170; 68 C.J.S., Partnership, § 62; 40 Am. Jur., Partnership, § 233.

"The significance of the partnership being one at will, *i.e.*, without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to co-partners, who have neglected to protect themselves by an agreement to continue for a definite term." Crane on Partnerships, 2d ed., § 74(b). "According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case the action of one partner actually dissolves the partnership." 40 Am. Jur., Partnership, § 236. Similarly, in 68 C.J.S., Partnership, § 108, it is said, "In view of the rule * * * that a partner may exercise his right to dissolve a partnership at will for any reason which he deems sufficient, or even arbitrarily, he is not liable for damages which have resulted to his copartners by reason of such action." The Uniform Partnership Act, G.S. 59-61, provides that dissolution of the partnership is brought about "without violation of the agreement between the partners * * * by the express will of any partner when no definite term or particular undertaking is specified."

It is apparent from the testimony of the plaintiff that, pursuant to the agreement, he and his children, together with Miller and his children, worked upon the construction of the building, which was to house the proposed business, for a total of 14 weeks and drew therefor from the partnership $1,500. He testified that for this work the agreement originally was that he would draw $100 per week, but this was changed, by consent, to $75 per week. Under any view of the agreement, the plaintiff has shown no breach of it in this respect since he drew more than $100 per week.

The plaintiff's contention that the agreement was broken by Miller's termination of the association is equally without foundation. The only evidence of termination of the association is that there was a disagreement between the plaintiff and Miller on 25 August 1964, resulting from the plaintiff's refusal to remain at the plant for work that evening. As a result, according to the plaintiff's testimony, Miller said, "The thing for you to do is to get your stuff and get out of here." Thereupon, the plaintiff, without comment, gathered up some of his tools and left, never to return. This is slender evidence upon which to rest a finding that Miller dissolved the partnership. It strongly suggests that the plaintiff, who had that day received an advancement of $200 against his drawing account, had tired of the association and took the first opportunity to dissolve it. Be that as it may, the partnership was a partnership at will and, if Miller dissolved it, he did not break the agreement thereby. There is, therefore, no evidence whatever in the record to show a breach of contract by Miller and, consequently, it was error to deny the defendants' motion for judgment of nonsuit, this being an action to recover damages for breach of contract. This being true, it is not necessary to consider the remaining assignments of error by the defendants.

For the same reason, if it be true, as the defendants allege, that the plaintiff dissolved the partnership by his action on 25 August 1964, he did not thereby violate any right of the defendants, and their counterclaim on the ground of breach of the contract by him is without merit. The defendants offered no evidence to support their allegation that the plaintiff fraudulently misrepresented his past experience and qualifications. Consequently, the defendants are not entitled to recover of him upon their allegations of breach of contract and deceit.

Upon the dissolution of a partnership, it continues in existence until the winding up of its affairs is completed. G.S. 59-60. Our decision that the plaintiff is not entitled to recover in this action for breach of contract and that the defendants are not entitled to recover upon their counterclaims for breach of the same contract and for deceit in its procurement is without prejudice to the right of either, if so advised, to seek an accounting for partnership funds and properties as of the date of the dissolution of the firm. See: *Pentecost v. Ray,* 249 N.C. 406, 106 S.E. 2d 467; *Moseley v. Taylor,* 173 N.C. 286, 91 S.E. 1035; G.S. 59-52.

The judgment of the superior court is hereby reversed, and the cause is remanded for the entry of a judgment of nonsuit as to the

plaintiff's cause of action and as to the counterclaim of the defendants.

Reversed and remanded.

HUSKINS, J., took no part in the consideration or decision of this case.

GEORGE E. STETSON, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD STETSON v. DR. W. E. EASTERLING, DR. ROBERT K. CREIGHTON, DR. JOSEPH PEDORELLA, AND DR. LEONARD PALUMBO.

(Filed 14 June 1968.)

1. Death § 3—

The right of action for wrongful death exists only by virtue of G.S. 28-173, which defines the right of action, and G.S. 28-174, which defines the basis on which damages may be recovered.

2. Same—

The statutory action for wrongful death vests in the personal representative of the deceased.

3. Same—

The right of action for wrongful death is limited to those instances where the injured party, had he lived, could have maintained such action. G.S. 28-173.

4. Infants § 4—

A child born alive has a right of action to recover damages for prenatal injuries negligently inflicted upon him.

5. Death §§ 3, 8—

Where a person is injured and later dies as a result of the negligence of another, his personal representative may recover (1) as an asset of the estate, damages for pain and suffering and hospital and medical expenses, and (2) for the benefit of the next of kin, the pecuniary loss resulting from his death.

6. Death § 3—

The Wrongful Death Act does not provide for the recovery of punitive or nominal damages but limits recovery to the pecuniary loss resulting from the death.

7. Same—

Negligence alone, without pecuniary injury resulting from the death, does not create a cause of action for wrongful death.

8. Same—

A complaint alleging that the death of an infant, following a live birth, was caused by prenatal injuries negligently inflicted by defendants, and that prior to defendants' negligence the unborn baby "was a healthy,

normal baby boy" *is held* subject to demurrer for failure to allege the wrongful death of the child resulted in pecuniary damage to the estate, since it would be sheer speculation to attempt to assess damages resulting from such death as of the time of the alleged negligently inflicted fatal injuries.

HUSKINS, J., took no part in the consideration or decision of this case.

LAKE, J., dissenting.

HIGGINS, J., joins in the dissenting opinion.

APPEAL by plaintiff from *McKinnon, J.*, March 1967 Session of ORANGE, docketed and argued as No. 849 at Fall Term 1967.

Administrator's action to recover damages for the alleged wrongful death of John Edward Stetson, heard below on demurrers to the complaint, to wit, (1) the joint demurrer of defendants Easterling and Creighton, and (2) the separate demurrer of defendant Palumbo. (Dr. Joseph Pedorella, named as a defendant, was not served with process.)

The complaint alleges in substance, except where quoted, the following:

John Edward Stetson, plaintiff's intestate, was born September 27, 1965, about 5:34 a.m. He died, "after living only a few months," from prenatal (brain) injuries suffered on account of lack of oxygen during birth.

An examination of Mary T. Stetson, the mother, on September 17, 1965, revealed the baby was "in a transverse lie with a high head." X-Rays, taken at the hospital on September 27, 1965, about 2:00 a.m., revealed the baby "was in a left occiput with a transverse lie position, and that the head of the baby had not engaged in the vaginal canal." Between 1:45 a.m. and 3:20 a.m., when the cervix of the mother was dilated "at least 5-6 cms," and about 5:00 a.m. when dilated 6-7 cms, "the head of the baby . . . had not engaged in the vaginal canal." Consent for a Cesarean section was given. It should have been but was not performed. Instead, following rupture of the membranes, "an internal and external version with breech extraction" was performed. The umbilical cord prolapsed into the vaginal canal where the baby's head clamped down on it. This cut off the vital supply of oxygen to the baby and caused the brain damage existing at birth.

The intestate's said prenatal injuries and death resulting therefrom were proximately caused by the negligence of the several defendants in the respects set forth. Prior to defendants' alleged negligent conduct, the (unborn) baby "was a healthy, normal baby boy."

The ground of demurrer is that the complaint does not state facts

sufficient to constitute a cause of action, each demurrer asserting *inter alia* that plaintiff's allegations disclose the intestate did not have and could not acquire any earning capacity.

Judgment sustaining both demurrers was entered. Plaintiff excepted and appealed.

Seawell, Van Camp & Morgan and Sawyer & Loftin for plaintiff appellant.

Smith, Leach, Anderson & Dorsett for defendant appellees Dr. W. E. Easterling and Dr. Robert K. Creighton.

Dupree, Weaver, Horton, Cockman & Alvis for defendant appellee Dr. Leonard Palumbo.

BOBBITT, J. For purposes of decision on this appeal, we assume, *but do not decide,* that the facts alleged by plaintiff are sufficient to support a finding that the death of John Edward Stetson, hereafter referred to as "John," was proximately caused by the negligence of defendants.

In *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425, 15 A.L.R. 3d 983, this Court, passing upon a question of first impression in this jurisdiction, held that, "under our Death Act, G.S. 28-173, 174, there can be no right of action for the wrongful prenatal death of a viable child *en ventre sa mere.*" It was held that defendant's demurrer to complaint should have been sustained and the action dismissed. The grounds on which our decision was based are clearly and tersely stated by Parker, J. (now C.J.), in the following excerpts from the opinion: (1) "The Court has consistently held that G.S. 28-173, 174, which gives the right of action for wrongful death, confines the recovery to 'such damages as are a fair and just compensation for the pecuniary injury resulting from such death,' and by the express language of G.S. 28-174 this is a prerequisite to the right to recover damages under our wrongful death statute." (2) "Negligence alone, without 'pecuniary injury resulting from such death,' does not create a cause of action." (3) "(T)here can be no evidence from which to infer 'pecuniary injury resulting from' the wrongful prenatal death of a viable child *en ventre sa mere;* it is all sheer speculation." It was not considered necessary to decide in *Gay* "the debatable question as to whether a viable child *en ventre sa mere,* who is born dead, is a *person* within the meaning of our wrongful death act." (Our italics.) Compare *Graf v. Taggert,* 43 N.J. 303, 204 A. 2d 140 (1964).

The question now presented is whether, upon the facts alleged, the administrator can maintain an action "under our Death Act, G.S. 28-173, 174," to recover for the death of his intestate who, "af-

ter living only a few months," died as the result of prenatal injuries allegedly caused by the negligence of defendants.

The right of action for wrongful death exists only by virtue of the statute now codified as G.S. 28-173, which defines the right of action, and G.S. 28-174, which defines the basis on which damages may be recovered. *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, 69 A.L.R. 2d 620, and cases cited.

G.S. 28-173 in pertinent part provides: "When the death of a person is caused by a wrongful act, neglect or default of another, *such as would, if the injured party had lived, have entitled him to an action for damages therefor,* the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; . . ." (Our italics.)

The statutory action for wrongful death vests in the personal representative of the deceased. *Bank v. Hackney,* 266 N.C. 17, 145 S.E. 2d 352, and cases cited. This right of action "is limited to 'such as would, if the injured party had lived, have entitled him to an action for damages therefor.' " *Goldsmith v. Samet,* 201 N.C. 574, 160 S.E. 835; *Horney v. Pool Co.,* 267 N.C. 521, 523, 148 S.E. 2d 554, 556. Hence, our first question is whether John, if he had lived, could have maintained an action to recover damages on account of injuries he sustained while *en ventre sa mere.*

In Prosser on Torts, 3rd Edition (1964), § 56, it is stated: (1) "When a pregnant woman is injured, and as a result the child subsequently born suffers deformity or some other injury, nearly all of the decisions prior to 1946 denied recovery to the child." (2) "All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof." (3) "Beginning with a decision in the District of Columbia in 1946 (*Bonbrest v. Kotz,* 65 F. Supp. 138), a series of more than thirty cases, many of them expressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." (4) "So rapid has been the overturn that at the time of publication nothing remains of the older law except decisions, not yet overruled, in Alabama, Rhode Island, and Texas." Since then Rhode Island, in *Sylvia v. Gobeille,* 220 A. 2d 222 (1966), and Texas, in *Leal v. C. C. Pitts Sand and Gravel, Inc.,* 419 S.W. 2d 820 (1967), have overruled their prior decisions.

In this jurisdiction, the question is one of first impression. Numerous decisions, texts and Law Review articles set forth elaborately the reasons underlying the rule now generally accepted. See Prosser, *op. cit. supra,* § 56; 10 A.L.R. 2d 1059; 27 A.L.R. 2d 1256, and Later Case Service; *Smith v. Brennan,* 157 A. 2d 497 (N.J. 1960); *Seattle-First National Bank v. Rankin,* 367 P. 2d 835 (Wash. 1962); *Sylvia v. Gobeille, supra.*

In *Gay v. Thompson, supra,* Parker, J. (now C.J.), referring to the question now under consideration, said: "Since the child must carry the burden of infirmity that results from another's tortious act, it is only natural justice that it, if born alive, be allowed to maintain an action on the ground of actionable negligence." The quoted statement is adopted as authoritative in this jurisdiction.

Having decided John, if he had lived, could have maintained an action to recover damages on account of injuries negligently inflicted upon him when *en ventre sa mere,* there remains for decision whether, upon his death as the result of such prenatal injuries, his administrator can maintain this action for his wrongful death.

In this jurisdiction, where a person is injured and later dies as a result of the negligence of another, his administrator has two causes of action, namely, (1) a cause of action to recover, as general assets of the estate, damages on account of the decedent's pain and suffering and on account of his hospital and medical expenses, and (2) a cause of action to recover, for the benefit of his next of kin, damages on account of the *pecuniary loss* resulting from his death. *Sharpe v. Pugh,* 270 N.C. 598, 155 S.E. 2d 108; *In re Peacock,* 261 N.C. 749, 136 S.E. 2d 91; *Hinson v. Dawson,* 241 N.C. 714, 86 S.E. 2d 585; *Hoke v. Greyhound Corp.,* 226 N.C. 332, 38 S.E. 2d 105.

The complaint herein purports to allege one cause of action, to wit, a cause of action for the wrongful death of John. Whether plaintiff is entitled to recover depends solely upon provisions of "our Death Act, G.S. 28-173, 174," which "does not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of pecuniary loss." *Armentrout v. Hughes, supra.* "The statute, G.S. 28-174, leaves no room for sentiment. It confers a right to compensation only for pecuniary loss." *Scriven v. McDonald,* 264 N.C. 727, 142 S.E. 2d 585.

As succinctly stated in *Gay v. Thompson, supra:* "Negligence alone, without 'pecuniary injury resulting from such death,' does not create a cause of action."

In *Gay v. Thompson, supra,* recovery was denied on the ground that "damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation." Here, as in *Gay,* plaintiff alleged

the viable unborn child was "a healthy, normal baby boy." Here, as in *Gay,* it would be "sheer speculation" to attempt to assess damages as of the time of the alleged negligently inflicted fatal injuries. With reference to conditions after birth, plaintiff alleged John had incurred brain damage during birth; and that, because of such brain damage, John "could not swallow," — "had to be fed by the use of a tube," — "a thick mucus" that formed in and about his mouth and nose "had to be removed by the use of a suction device," — "had no eye blink."

On the ground plaintiff's allegations are insufficient to show John's estate has suffered pecuniary loss on account of his death, the judgment sustaining the demurrers must be affirmed.

We are advertent to the fact *the result* reached herein is in conflict with *the result* reached in decisions elsewhere. Decisions in other jurisdictions holding a complaint (petition) alleging the death of an infant, following a live birth, was caused by prenatal injuries negligently inflicted by the defendant(s), was sufficient to withstand a demurrer, motion to strike or motion to dismiss, include the following: *Jasinsky v. Potts,* 92 N.E. 2d 809 (Ohio 1950); *Amann v. Faidy,* 114 N.E. 2d 412 (Ill. 1953); *Steggall v. Morris,* 258 S.W. 2d 577 (Mo. 1953); *Prates v. Sears, Roebuck and Company,* 118 A. 2d 633 (Conn. 1955); *Hall v. Murphy,* 113 S.E. 2d 790 (S.C. 1960); *Shousha v. Matthews Drivurself Service, Inc.,* 358 S.W. 2d 471 (Tenn. 1962); *Torigian v. Watertown News Co.,* 225 N.E. 2d 926 (Mass. 1967); *Leal v. C. C. Pitts Sand and Gravel, Inc., supra.*

There are marked differences between the statutory provisions in force in these jurisdictions and "our Death Act, G.S. 28-173, 174." Only the Ohio and Illinois statutes contain the phrase "pecuniary injury." In these jurisdictions, apparently no formula or rule has been adopted for determining "pecuniary injury," such as the rule well established in this jurisdiction and set forth in *Lamm v. Lorbacher,* 235 N.C. 728, 71 S.E. 2d 49, and cases cited. Too, it is noted that in Illinois, contrary to the North Carolina rule set forth in *Armentrout v. Hughes, supra,* nominal damages are recoverable in an action for wrongful death. Annotation, "Recovery of nominal damages in a wrongful death action," 69 A.L.R. 2d 628, 634-636. As to this, the Ohio rule is regarded as unsettled. *Id.* at 645.

No questions are presented or determined on this appeal with reference to whether the mother has a cause of action and, if so, the basis and extent thereof, or as to whether a parent has a cause of action for money expended and liability incurred in the care and treatment of John during the months he was alive.

On the grounds stated above, the judgment of the court below is affirmed.

Affirmed.

HUSKINS, J., took no part in the consideration or decision of this case.

LAKE, J., dissenting: I dissent for the reason that this is an appeal from a judgment sustaining a demurrer to the complaint for failure to allege facts constituting a cause of action. In such a situation, we must accept as true all facts properly alleged, together with all relevant inferences reasonably deducible from such allegations. *Gay v. Thompson,* 266 N.C. 394, 146 S.E. 2d 425; *McLeod v. McLeod,* 266 N.C. 144, 146 S.E. 2d 65; Strong, N. C. Index, Pleading, § 12, and cases cited; McIntosh, North Carolina Practice and Procedure, 2d ed., § 1191; and cases cited. The allegations of the complaint must be liberally construed in favor of the plaintiff. *Hood v. Coach Co.,* 246 N.C. 684, 99 S.E. 2d 925.

The majority opinion assumes, for the purposes of this appeal, that the complaint alleges negligence of the defendants which was the proximate cause of this child's death a few months after birth. In my opinion the allegations of the complaint are sufficient in this respect. The basis upon which the majority opinion rests is that the complaint does not allege that the alleged wrongful death of the child resulted in pecuniary damage to his estate. If the majority's premise were sound its conclusion would be. *Greene v. Nichols,* decided this day; *Gay v. Thompson, supra.*

The complaint alleges: "[P]rior to defendants' negligence and carelessness as before mentioned [*i.e.,* immediately prior to birth], the said baby was a *healthy, normal* baby boy." (Emphasis supplied.) Upon trial, the burden would be upon the plaintiff to prove this, but upon demurrer to the complaint we must treat it as if it were an established fact. It is my view that the presence of the allegation of the health and normality of the deceased in this case and the absence of any comparable evidence as to the condition of the deceased in *Greene v. Nichols, supra,* prior to her death, is a material distinction between the two cases and sufficient to cause that case to fall outside and this one to fall within the boundary of the zone in which recovery for wrongful death is permitted under the statute.

In *Russell v. Steamboat Co.,* 126 N.C. 961, 36 S.E. 191, this Court allowed recovery for wrongful death of a baby boy only five months old upon evidence that, prior to the negligence of the de-

fendant, the baby "had never been sick." This Court, speaking through Douglas, J., said:

> "This case as presented to us, raises the sole question whether more than nominal damages are recoverable for the negligent killing of an infant, incapable of earning anything, *without direct evidence of pecuniary damage other than sex, age and condition of health of the deceased.* In the very nature of things a child five months old has no present earning capacity, and has not reached a sufficient state of development to furnish any indication of his probable earning capacity in the future, *other than the fact of being a healthy boy. This is all we know of him or ever can know.* (Emphasis added.)
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> * * *
>
> "Upon the greater and better weight of authority, as well as our own convictions of natural justice and of public policy, we are constrained to hold that the plaintiff can recover substantial damages in the case at bar."

I am unable to distinguish the facts admitted by the demurrer in this case from those established by the evidence in the *Russell* case, and therefore am of the opinion that the demurrer should have been overruled.

HIGGINS, J., joins in the dissenting opinion.

STATE v. JAMES CHARLES SMITH.

(Filed 14 June 1968.)

1. Criminal Law § 60—

To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time the crime was committed.

2. Larceny § 6—

Circumstantial evidence, if not too remote, is admissible to prove larceny.

3. Larceny § 7—

Evidence of the State tending to show that while shopping the prosecuting witness discovered that a $20 bill was missing from her wallet, that the wallet had been in a drawer of her desk that morning, that after $41 disappeared from her desk drawer a week later, defendant's finger-

print was found on her wallet, *is held* insufficient to be submitted to the jury on the issue of defendant's guilt of larceny of the $20 bill, there being no evidence that the money was stolen and there being no evidence tending to show that defendant's fingerprint could only have been impressed on the wallet at the time the $20 was allegedly stolen.

ON *certiorari* from *Bickett, J.*, August 1967 Regular Criminal Session of WAKE.

Criminal prosecution on an indictment containing two counts. The first count charges defendant on 8 April 1966 with the larceny of $20 in U. S. currency, the property and moneys of Elizabeth H. Keith, and the second count charges defendant at the same time and place with feloniously receiving the said $20, the property of said Elizabeth H. Keith, well knowing that theretofore it had been feloniously stolen, taken, and carried away.

This criminal action was initiated in the city court of Raleigh by trial on a warrant. At this trial defendant was adjudged guilty and sentenced to imprisonment for four months — said sentence to begin at the expiration of the sentence he was then serving for forgery having been convicted of the same in Halifax County on 7 December 1965. From the judgment defendant appealed to the Superior Court where he was tried upon the aforesaid indictment. In the Superior Court he was represented by William T. McCuiston, his privately employed counsel. Upon his trial in the Superior Court he pleaded not guilty. Verdict: Guilty of larceny as charged.

From a judgment of imprisonment for two years, he appealed. He did not perfect his appeal to the Supreme Court. On 18 September 1967 he filed an affidavit of indigency with Judge Bickett stating that when he was sentenced in the Superior Court he was financially unable to employ counsel. Whereupon, he requested the court to appoint counsel for him to apply for *certiorari* to the Supreme Court. Mr. Garland B. Daniel, the lawyer appointed by Judge Bickett to represent defendant, filed a petition in this Court for a writ of *certiorari* which we allowed 28 November 1967. The defendant has had his case on appeal mimeographed and his brief prepared for him by his lawyer, Mr. Daniel, like all solvent defendants.

Attorney General T. W. Bruton and Deputy Attorney General James F. Bullock for the State.

Garland B. Daniel for defendant appellant.

PARKER, C.J. Defendant assigns as error the denial of his motion for judgment of compulsory nonsuit made at the close of the State's evidence. The defendant offered no evidence.

The State's evidence tends to show the following facts:

On 8 April 1966 Mrs. Elizabeth H. Keith was employed by the State Highway Commission. Her office was next door to the office of her supervisor. About 8:30 a.m. on the same day she went into her supervisor's office to take dictation. The supervisor then closed the door that separates the two offices. The front door to Mrs. Keith's office that leads into the hallway stays closed all the time. It has a glass door but one cannot see through it. One can hear the door open and shut. She does not recall hearing that door make any noise while she was in the supervisor's office taking dictation. She does not recall seeing defendant that morning between 8:30 and noontime. There was a $20 bill and a $10 bill in her wallet which was in her pocketbook which she had left in her office in the desk drawer underneath the typewriter. She finished taking dictation about 12 o'clock noon, about which time she left and went to Efird's Department Store. She bought something at Efird's for one of her sons. She cannot remember what it was. She paid cash for it and used the $10 bill. Just after she had left Efird's and gone down the street, she missed the $20 bill. She ran back and asked the clerk what she had given him, if she had given him a $10 bill, and he said yes. It scared her when she found the $20 bill was missing. She thought she had dropped it out when she pulled out the $10 bill, and she and the clerk looked on the floor and elsewhere but could not find the $20 bill. She ran back to where she worked and told them she had lost a $20 bill. She told Mrs. Daniels, a secretary in the same office whose desk is situated beside hers, that she thought she had lost a $20 bill.

In response to the question as to what she did between Friday, the 8th, and Friday, the 15th, she testified as follows: "In between I just thought I had lost the $20.00 bill and didn't do anything about it, but on the 15th I had $41.00 to disappear right out of my desk drawer and that is when the SBI man was called in." On 15 April 1966 she said the following to Mr. Stephen R. Jones, the SBI agent: "I had had $41.00 to get gone; $20.00 to get gone on the 8th, and $41.00 on the 15th." The $41 was just lying loose in the middle drawer of the desk.

Between 8 April and 15 April 1966 she saw defendant James Charles Smith. He was an employee of the State Highway Department and emptied the trash can in the office daily. Her trash can was right behind her desk and about three feet from it.

Stephen R. Jones, who is Supervisor of Identification and Photography at the State Bureau of Investigation in Raleigh, had previously been employed by the Federal Bureau of Investigation for two years and nine months. He has had extensive classroom train-

ing in the field of fingerprinting, and has a considerable background in and knowledge of fingerprint identification. He has been employed in such work by the State Bureau of Investigation for four years, eight months, and twenty-one days. At this point in the testimony it was stipulated by counsel that Mr. Jones is an expert in the field of fingerprinting. He examines for identification and comparison an average of 1800 latent fingerprint lifts per month. Fingerprint lifts are fingerprints that are lifted for identification and comparison. They are usually given an application which is usually applied with a camel-hair brush at the scene of the crime. These prints are composed of a mixture of 98 per cent water and approximately 2 per cent body oils. On 15 April 1966 he was called to the office of the Assistant Controller of the State Highway Commission to make an examination of the desk in the office of Mrs. Elizabeth H. Keith and of her wallet. He processed the center drawer and outside of the desk on its glass top and came up with negative results. He made an examination of Mrs. Keith's wallet, which is marked State's Exhibit No. 1. He processed a note pad in the wallet. He processed both sides of this wallet except that he did not attempt to process the rough leather because it is not of an acceptable quality surface. The plastic parts of the wallet were acceptable as quality surfaces from which to lift latent prints. He lifted a print from a piece of note paper and compared the prints so as to identify the person who had made the print, and the print on this piece of note paper was identified by him as the thumb print of Mrs. Keith. He lifted three latent prints of value from the plastic surface of the wallet for identification purposes.

Since 15 April 1966 Mr. Jones has had occasion to take fingerprint samples from the defendant. He testified:

> ". . . I took the defendant's fingerprints the 7th month, 11th day, 1967, in the back of this courtroom. Mr. Harry M. Smith and myself had previously taken his prints on the 5th month, 3rd day, 1966. I made a comparison of the prints of the defendant which I obtained on the 11th day of July, 1967, with the latent prints which I lifted from the wallet of Mrs. Elizabeth H. Keith on the 15th day of April, 1966.
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> "I have an opinion satisfactory to myself and it is my opinion that one of three latent prints, of value for identification purposes, lifted from the plastic folder of this wallet, was made by the right thumb, representing this position here on this latent print here lifted, was made by the one and the same James Charles Smith. I was able to identify the other prints so lifted. One of them was identified as being the number 3, the right

middle finger of Mrs. Elizabeth H. Keith, and the other one was identified as being the right thumb or the number 1 finger of Mrs. Elizabeth H. Keith. There was two other prints but they were of no value for identification purposes. I lifted the prints from the wallet on the 15th day of April, 1966, and I took the fingerprint of the defendant on the 11th day of July, 1967.

"The article handed me marked for identification as State's Exhibit No. 2 is a white surface containing an inked impression of the right thumb print of James Charles Smith which I took on July 11, 1967. (State's Exhibit No. 2 was offered and received in evidence.)

* * *

"The basis of my comparison of this latent print I lifted with the print of the defendant's fingers were four basic points of identification which we use. They are known as Galton points of identification, Ending Ridge, Bifurcation, Ridge Dot, Ridge Island, have to do with these ridges which can be seen on them; some of these ridges flow evenly and some split and come back into one ridge, and these are the points that I used to make my comparison and identification. I compared these points that I refer to on these two State's Exhibits 2 and 3 and in doing so I became convinced that they were made by one and the same finger.

"(Witness goes to the jury box and points out some of the points of comparison on the prints.)

"In studying these prints, we use a five-powered magnifying glass to pick out the points of comparison and, as a general rule, I do not go into Court without at least twelve points of identification, and while in this case I do not recall just how many points of identification I did have, however, I know that there were more than twelve."

Mr. Jones testified on cross-examination that there were several fragmentary prints in this billfold wherein there were not sufficient points to make an identification of anyone. This wallet, State's Exhibit No. 1, was given to him on 15 April 1966; and, as far as he knows, the defendant's print could have been put on it anytime after 8 April 1966. He did not testify in any way as to when this latent print identified as defendant's was put on there. He just testified as to the identity of it. A latent print could stay on an article used daily for a full week or more, four or five weeks, if it had not been smeared or erased. He said on redirect examination that the finger-

print which he identified as a latent fingerprint left by the defendant was unsmeared, and he made a positive identification of it as being made by James Charles Smith.

"To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time when the crime was committed." Anno: Evidence — Finger, Palm, or Footprint, 28 A.L.R. 2d 1115, 1154, § 29. See also *S. v. Combs,* 200 N.C. 671, 158 S.E. 252; *S. v. Huffman,* 209 N.C. 10, 182 S.E. 705; *S. v. Helms,* 218 N.C. 592, 12 S.E. 2d 243; *S. v. Palmer,* 230 N.C. 205, 52 S.E. 2d 908; *S. v. Tew,* 234 N.C. 612, 68 S.E. 2d 291; 29 Am. Jur. 2d, Evidence, § 375; 30 Am. Jur. 2d, Evidence, § 1144; 3 Wharton's Criminal Evidence, 12th Ed., § 982, p. 480.

It is well-settled law that circumstantial evidence, if not too remote, is admissible to prove larceny. *S. v. Mihoy,* 98 N.H. 38, 93 A. 2d 661, 35 A.L.R. 2d 852; Underhill's Criminal Evidence, 4th Ed., Larceny, § 505, p. 1022.

The warrant and the indictment both charge defendant with the larceny of $20 in money, the property of Elizabeth H. Keith, on 8 April 1966. Defendant is not charged with, and is not on trial for, the larceny of any part of the $41 in money, the property of Elizabeth H. Keith, which the State's evidence tends to show was stolen from her desk in the State Highway Commission building on 15 April 1966.

The State's evidence tends to show the following facts: On 8 April 1966 Elizabeth H. Keith, an employee of the State Highway Commission, had a $20 bill and a $10 bill in her wallet which was in her pocketbook in a desk drawer underneath the typewriter in her office when she went into the adjoining office of her supervisor to take dictation. She finished taking dictation about 12 o'clock noon, about which time she left and went to Efird's Department Store. She carried her wallet and pocket book with her. She bought something at Efird's, paid cash, and used her $10 bill. Just after she had left Efird's and had gone down the street, she missed the $20 bill. She ran back and asked the clerk what had she given him, if she had given him a $10 bill, and he said yes. It scared her when she found the $20 bill was missing. She thought she had dropped it out of her wallet when she pulled out the $10 bill, and she and the clerk looked on the floor and elsewhere but could not find the $20 bill. She went back to where she worked and told them she had lost a $20 bill. She told Mrs. Daniels, a secretary in the same office whose desk is situated beside hers, that she thought she had lost a $20 bill.

In response to the question as to what she did between Friday, the 8th, and Friday, the 15th, she testified as follows: "In between I just thought I had lost the $20.00 bill and didn't do anything about it, but on the 15th I had $41.00 to disappear right out of my desk drawer and that is when the SBI man was called in." It is true a witness for the State who is a fingerprint expert took fingerprints from Mrs. Keith's wallet on 15 April 1966, and that he took the fingerprints of defendant on 3 May 1966 and on 11 July 1966, and testified that he found on this wallet a fingerprint of the defendant. There is no evidence to show when defendant handled the wallet of Mrs. Keith to make the fingerprint. If, as the State contends, defendant opened her wallet and took $20 in money on 8 April 1966, it is unrealistic to believe or to infer that with a $20 bill and a $10 bill in her wallet, he would have taken the $20 and left the $10 bill in the wallet. Mrs. Keith has not sworn that the $20 in currency that she missed was stolen. Her evidence tends to show that she thought it had been lost out of her wallet. If she was not willing to swear that the $20 in money had been stolen, it would be unreasonable to hold that the State has produced sufficient evidence of the larceny of the $20 on 8 April 1966, as charged, to carry the case to the jury. Considering all the facts the State has no evidence tending to show that the fingerprint of defendant found on Mrs. Keith's wallet could only have been impressed at the time the $20 in money was allegedly stolen from her wallet on 8 April 1966. The State's evidence, considered in the light most favorable to the State and giving to it every reasonable inference to be drawn therefrom, fails to show any evidence tending to show that defendant stole $20 in cash belonging to Mrs. Keith from her wallet on 8 April 1966.

What is said in *S. v. Mullinax,* 263 N.C. 512, 139 S.E. 2d 639, is applicable here:

> "The motion for nonsuit on the larceny count should have been allowed. There is no evidence that Lenoir Country Club, Inc., found any money to be missing or had any money in the building. . . . There is simply no evidence that any money belonging to it has been stolen. The State failed to prove the larceny as alleged."

The court erred in overruling the motion for judgment of compulsory nonsuit. The judgment of the court below is

Reversed.

SAMUEL G. JONES, SR., v. NINA WILLIAMS WARREN AND HUSBAND, WILLIAM WARREN.

(Filed 14 June 1968.)

1. Ejectment § 7—

A complaint alleging that plaintiff owns the described land in fee, that he is presently entitled to its possession, and that defendant who is in possession wrongfully withheld from the plaintiff to his specified damage, states a cause of action in ejectment.

2. Pleadings § 38—

A motion for judgment on the pleadings is in the nature of a demurrer, allowable against the plaintiff only when the complaint as modified by the reply fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto.

3. Same—

When a party moves for judgment on the pleadings, he admits for the purpose of the motion (1) the truth of all well pleaded facts in the pleadings of his adversary, together with all fair inferences to be drawn from such facts, and (2) the untruth of his own allegations insofar as they are controverted by the pleadings of his adversary, and where the pleadings raise an issue of fact on any single material proposition, the motion is properly denied.

4. Wills § 9—

G.S. 31-19, which provides that record and probate of a will is conclusive evidence of its validity until it is vacated or declared void by a competent tribunal, is restricted to a decree of probate regular on its face and does not apply where the face of the decree affirmatively shows that the will was not probated as required by mandatory applicable statutes for the probate of wills. G.S. 31-39.

5. Wills § 10—

The phrase, "Nina Warren hear life estate if desired," which appears, without the signatures of attesting witnesses thereto, on the same paper writing probated as a will in common form of the testatrix but beneath the signatures of the attesting witnesses to the will, must necessarily be probated as a holographic codicil, since the clerk has jurisdiction to probate a will or codicil only in accordance with the applicable statute, and until its probate in solemn form in a manner required by law, the codicil is not a muniment of title and conveys no estate to the devisee named therein.

6. Wills § 27—

Where a later will or a codicil to an earlier will is probated after the probate of the earlier will, beneficiaries or devisees under the codicil or second will have no rights or remedies against one who, in good faith, for a valuable consideration and without actual of constructive notice of the later will or codicil, has purchased property from a beneficiary under the earlier will.

7. Same; Wills § 29—

The recorded but unprobated words, "Nina Warren hear life estate if desired," which appear on the same paper writing with the testatrix's handwritten and probated will devising a life estate to one of her daughters with remainder in fee to her son, the unprobated words appearing below the probated will and referring to another of testatrix's daughters,

are held to constitute notice, thereby putting a purchaser from the remainderman on inquiry, that the words were susceptible of probate as the codicil of the testatrix devising a life estate in the homeplace to the other daughter; consequently, the purchaser does not acquire title as an innocent purchaser for value.

8. Wills § 60—

There is a rebuttable presumption that a devisee or legatee has accepted a beneficial devise or bequest.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by plaintiff from Bundy, J., May 1967 Session of HYDE, docketed and argued at the Fall Term 1967 as Case No. 30.

Action for the recovery of land and damages for its wrongful detention. Plaintiff appeals from an adverse judgment on the pleadings.

The allegations in the complaint are summarized as follows: On 23 May 1956, subject to the life estate of Addie Williams (Addie), plaintiff became the owner in fee simple of a certain described house and lot in Ocracoke Township, Hyde County. Addie died on 18 December 1962. At that time her sister, defendant Nina Williams Warren (Nina), was in possession of the property. She continues in possession and despite plaintiff's repeated demands, refuses to surrender the property. Plaintiff is entitled to recover $8,990.00, the rental value of the property from 18 December 1962.

The answer of defendants (Nina and her husband), in short version, alleges: The land in suit was formerly owned by Alice Wahab Williams, who died on 26 November 1953, leaving the following "holographic will":

"Ocracoke, N. C. Sept. 15, 1946

"STATE OF NORTH CAROLINA HYDE Co.

"I ALICE WILLIAMS being of sound mind at my death give my son Pinta Williams my home and all land and money safe I give my daughter Addie Williams her life estate if desired. I give my two daughters Addie Williams and Nina Warren al house hold furniture. if any money left it will be labeled in my sons and daughters names Addie Williams Nina Warren Dallas Williams Jasper Williams Pinta Williams. I name my son Pinta Williams executor of my last will and ask that he may not be bonded

Signed Alice Williams

W. B. Jefferson-Witness
Charles R. Mason
Ansley O'Neal

Nina Warren hear life estate if desired."

The will, filed for probate 16 December 1953 by the executor

named therein, was proved upon the oath of W. B. Jefferson and Charles R. Mason, two of the subscribing witnesses. The testimony of each, except when quoted, is summarized as follows: "[H]e is a subscribing witness to the paper writing now shown him, purporting to be the last will and testament of Alice Williams; that the said Alice Williams in the presence of this deponent, subscribed her name *at the end of said paper writing,* which is now shown as aforesaid, and which bears date of the 15th day of September, 1946." At the time Alice Williams signed the paper writing she declared it to be her last will. She was then "of sound mind and memory, of full age to execute a will, and was not under any restraint, to the knowledge, information or belief of this deponent." At her request and in her presence, he did "subscribe his name *at the end of said will* as an attesting witness thereto." (Italics ours.)

Upon this proof, the Clerk of the Superior Court adjudged the paper writing and every part thereof to be the last will and testament of Alice Williams and ordered its probate. Under the terms of the will, testatrix devised a life estate in her homeplace to both Addie Williams and Nina "if they so elected," with remainder in fee to their brother, Pinta. Nina, "together with her said sister, made a formal election to claim the said life estate" and, from the death of their mother, they have been rightfully in possession under her will. Plaintiff has acquired the vested remainder devised to Pinta.

From the death of Addie until the institution of this action, plaintiff's only demand for possession was made on 1 December 1964. In bar of his right to recover rents, defendants also pled the provisions of the three-year statute of limitations, G.S. 1-52(3).

Plaintiff's reply to the answer is abridged as follows: The will of Alice Williams devised her homeplace to Addie for life with remainder in fee to Pinta. By his will, probated 14 January 1954, Pinta devised this land to his wife, Wilma. She, by deed dated 23 May 1956, conveyed the land in fee simple to plaintiff for a valuable consideration. (The deed, which recites a consideration of "$10.00 and other good and valuable considerations," contains no covenants of warranty.)

Thereafter, at the May 1957 Term of the Superior Court of Hyde County, the line appearing beneath the signatures of the witnesses to the will of Alice Williams, "Nina Warren hear life estate if desired," was probated in solemn form as a codicil to said will. It is under this codicil that Nina claims a life estate. Her claim is invalid because (1) the codicil is void for indefiniteness; (2) it was not probated within two years next after the death of Alice Williams, and plaintiff acquired the land as an innocent purchaser for value.

Plaintiff denied that either Alice or Nina had made a formal election to claim a life estate in the property.

When the case came on for trial, "after the reading of the pleadings, the defendants demurred *ore tenus* on the ground that the complaint, when taken with the reply to the answer, disclosed that no cause of action was stated." Judge Bundy, "being of the opinion that the demurrer *ore tenus* should be allowed," entered judgment dismissing the action. Plaintiff appealed.

The parties stipulated that "the case on appeal" should consist of the complaint, answer, reply, certified copy of the will of Alice Williams and its probate in common form, certified copy of the will of Pinta Williams and its probate in common form, deed of Wilma A. Williams to Samuel G. Jones, and the summons.

George T. Davis and Wheatly & Bennett for plaintiff appellant.

James R. Vosburgh and John A. Wilkinson for defendant appellees.

SHARP, J. The complaint contains the usual and essential allegations in an action of ejectment: that plaintiff owns the described land in fee; that he is presently entitled to its possession; and that defendant who is in possession wrongfully withheld from plaintiff to his specified damage. 1 McIntosh, N. C. Practice and Procedure § 1065 (2d Ed. 1956). Defendants concede that it states a cause of action in ejectment. Had defendants' motion been a demurrer to the complaint it must necessarily have been overruled. G.S. 1-127; McIntosh, *supra* § 1194. It was not, however, a demurrer; it was, in fact, a mislabeled motion for judgment on the pleadings. The judgment and appeal entries clearly disclose that the court and the parties so treated it, and that the will of Alice Williams and its probate, the will of Pinta Williams and its probate, and the deed from Wilma Williams to plaintiff were considered as exhibits incorporated by reference in the answer and reply. Appellant's brief is written "on the assumption" that this Court will deem "the defendants' action to be 'motion for judgment on the pleadings.'" We so treat it.

"The motion for such judgment is in the nature of a demurrer, allowable against the plaintiff only when the complaint as modified by the reply fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto." *Van Every v. Van Every,* 265 N.C. 506, 510, 144 S.E. 2d 603, 606. See also *Ferrell v. Worthington,* 226 N.C. 609, 39 S.E. 2d 812; *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647. "When a party moves

for judgment on the pleadings, he admits for the purposes of the motion (1) the truth of all well pleaded facts in the pleadings of his adversary, together with all fair inferences to be drawn from such facts, and (2) the untruth of his own allegations insofar as they are controverted by the pleadings of his adversary. The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition." *Shaw v. Eaves,* 262 N.C. 656, 660, 138 S.E. 2d 520, 524. *Accord, Erickson v. Starling,* 235 N.C. 643, 71 S.E. 2d 384. See 3 Strong, N. C. Index, Pleadings § 30 (1960 & Supp.).

The answer denies that plaintiff owns and is entitled to the possession of the land described in the complaint. Defendants allege: The land in suit was formerly the homeplace of Alice Williams. In her will — a copy of which is attached to the answer — she devised the property to her two daughters, Addie and Nina for life "if they so elected," with remainder to her son, Pinta. Addie and Nina elected to claim the life estate and have possessed the property since their mother's death. Plaintiff has acquired the vested remainder devised to Pinta. The reply admits the will of Alice Williams and its probate in common form as alleged in the answer and makes these additional disclosures: Pinta, by his will, which was probated on 14 January 1954, devised the land to his wife, Wilma. For a valuable consideration, by deed dated 23 May 1956 and recorded 29 May 1956, Wilma conveyed the property to plaintiff. Thereafter, in May 1957, the following "codicil" to the will of Alice Williams was probated in solemn form: "Nina Warren hear life estate if desired." Plaintiff alleges that, as "an innocent purchaser for value," he acquired the land subject only to the life estate of Addie, who is now dead. Thus, in the reply, plaintiff sets out the muniments of title upon which he bases his conclusion, alleged in the complaint, that he is entitled to the immediate possession of the land.

The pleadings establish that plaintiff and Nina claim the land from a common source, the will of Alice Williams, and that plaintiff owns the fee. The question is whether he took it subject to a life estate in Nina. By dismissing plaintiff's action the trial court held that the pleadings, which incorporated the record evidence, disclosed as a matter of law that he did.

The answer alleges that the will of Alice Williams was holographic. This allegation is not admitted by the reply, and the record shows that the will was probated in common form as an attested will upon the oath of two of the three attesting witnesses required by G.S. 31-18.1 — not as a holographic in the manner required by

G.S. 31-18.2. The signatures of the three attesting witnesses appear beneath that of the testatrix. Each of the two who proved the will swore that Alice Williams "subscribed her name at the end of the paper writing" and that the witness "did subscribe his name at the end of the will." Thus, the affidavits upon which probate in common form was had established that the phrase under which Nina claims was not on the paper writing at the time the witnesses affixed their signatures. At the May 1957 Term of the Superior Court of Hyde, the phrase, "Nina Warren hear life estate if desired," which appears beneath the signature of the witness, was probated in solemn form as a codicil to the will. The absence of signatures *beneath* the phrase discloses that it was necessarily probated as a holographic codicil.

Defendants argue, however, (1) that the clerk probated the entire paper writing in common form; (2) that even if the probate was erroneous, it was conclusive evidence of the validity of the codicil until set aside by direct attack; and (3) even if it was not probated, the record of the codicil was notice to plaintiff of Nina's title which prevented him from acquiring title as an innocent purchaser for value.

G.S. 31-19 provides that record and probate of a will is conclusive evidence of its validity until it is vacated or declared void by a competent tribunal. Under this statute, a will probated and recorded in accordance with the applicable statute may not be collaterally attacked and constitutes a muniment of title. *In re Will of Puett,* 229 N.C. 8, 47 S.E. 2d 488. However, as pointed out by Parker, J. (now C.J.), in *Morris v. Morris,* 245 N.C. 30, 35, 95 S.E. 2d 110, 114, "[T]his statute [G.S. 31-19] is restricted to a decree of probate regular on its face, and does not apply where on the face of the decree of probate it affirmatively shows that the will was not probated as required by mandatory applicable statutes for the probate of wills. . . ." G.S. 31-39 provides, "No will shall be effectual to pass real or personal estate unless it shall have been duly proved and allowed in the probate court of the proper county. . . ." In *Morris v. Morris, supra,* an action under the Declaratory Judgment Act for construction of a will, the probate revealed that a holograph had been probated upon the testimony of only two witnesses. This Court declined to construe an unprobated will because "the probate shows on its face that the paper writing . . . has never been validly proven and probated as a holographic will, and is therefore ineffective to pass real or personal property. G.S. 31-39." *Id.* at 33, 95 S.E. 2d at 112. *Accord, Paul v. Davenport,* 217 N.C. 154, 7 S.E. 2d 352; *Cartwright v. Jones,* 215 N.C. 108, 1 S.E. 2d 359; *Leatherwood v. Boyd,* 60 N.C. 123; 57 Am. Jur. *Wills* § 942 (1948). It is

"[t]he probate of a will in the manner provided by law" which is "conclusive in evidence of the validity of the will until it is vacated on appeal or held void by a competent tribunal." *Crowell v. Bradsher,* 203 N.C. 492, 493, 166 S.E. 331, 332; *Edwards v. White,* 180 N.C. 55, 103 S.E. 901. In other words, the clerk has jurisdiction to probate a will only in accordance with the applicable statute. Thus, prior to its probate in solemn form after plaintiff acquired the land, the codicil was not a "muniment of title." Before its probate, it conveyed no life estate to Nina. *Hargrave v. Gardner,* 264 N.C. 117, 141 S.E. 2d 36; *Paul v. Davenport, supra.*

Defendants' first two contentions therefore cannot be sustained. We next consider their third. The motion for judgment on the pleadings admits plaintiff's allegation that he purchased the land for value. It does not, however, establish his conclusion that he was an *innocent purchaser* — that is, one without knowledge of the codicil under which Nina claims — if his pleadings disclose notice as a matter of law. In legal effect this codicil is analogous to a second will, probated after a first one has been duly probated.

When a later will is probated after the probate of an earlier will, beneficiaries under the second will have no rights or remedies against one who, in good faith, for a valuable consideration, and without notice of the later will, has purchased property from a beneficiary under the earlier will. Devisees and legatees under a later will, however, can follow property into the hands of beneficiaries under the earlier will or persons who purchased from them "with knowledge of the existence of a later will and of its contents." 57 Am. Jur. *Wills* § 968 (1948); *Gaines v. DeLa Croix,* 6 Wall. 719, 18 L. Ed. 965; Annot., Probate of wills or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder. 107 A.L.R. 249, 260 (1937). This rule is just another application of the principle that the setting aside of a duly probated will does not affect the title of a purchaser for value from a devisee if the purchaser had no knowledge or intimation that the will would be attacked. *Whitehurst v. Hinton,* 209 N.C. 392, 403, 184 S.E. 66, 72; *Whitehurst v. Abbott,* 225 N.C. 1, 33 S.E. 2d 129, 159 A.L.R. 380; *Mills v. Mills,* 195 N.C. 595, 143 S.E. 130; *Newbern v. Leigh,* 184 N.C. 166, 113 S.E. 674, 26 A.L.R. 266; Annot., Revocation of probate of will as affecting title of purchaser from beneficiaries under will, 26 A.L.R. 270 (1923). An innocent purchaser takes title free of equities of which he had no actual or constructive notice. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174.

The decisive question here is: Did the unprobated but recorded words, "Nina hear life estate," which appeared on the same paper

writing and below the will, constitute notice to plaintiff that those words might be probated as a codicil to the will, which constituted the first link in his chain of title? If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and a prudent person to make inquiry concerning the rights of others, these facts constitute notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed. *Randle v. Grady,* 228 N.C. 159, 44 S.E. 2d 735; *German-American Bank v. Martin,* 277 Ill. 629, 649, 115 N.E. 721, 729.

The answer alleges that Alice Williams "left a holographic will," but the reply does not admit this. We therefore do not know whether the will was handwritten, or if it was, whether the codicil is in the same handwriting. Notwithstanding, an examination of the original paper writing of which it was a part, together with reasonable inquiry and investigation, would surely have disclosed that the codicil was in the handwriting of testatrix and therefore susceptive of probate.

Despite the economy of words and the erroneous spelling, the meaning of the codicil is clear. Testatrix, who had devised a life estate to her single daughter, decided thereafter that she wanted her married daughter, Nina, to have a life estate in her homeplace also if she so desired. If Nina survived Addie and did not desire the life estate, Pinta's fee would vest at Addie's death. The will called for no affirmative act by Nina to indicate her acceptance of the life estate, and there is a rebuttable presumption that a devisee or legatee has accepted a beneficial devise or bequest. *Perkins v. Isley,* 224 N.C. 793, 798, 32 S.E. 2d 588, 590-91; 57 Am. Jur. *Wills* § 1569 (1948); 96 C.J.S. *Wills* § 1148 (1957). Annot., What constitutes or establishes beneficiary's acceptance or renunciation of devise or bequest, 93 A.L.R. 2d 8 (1964). Plaintiff alleges that Nina has been in possession of the property since the death of Addie. Investigation by plaintiff on 23 May 1956 would doubtlessly have disclosed — if indeed plaintiff did not know — that Nina claimed a life estate. Had she been in possession with Addie (as the answer alleges), her possession of the devised property would, in itself, have been evidence of acceptance. *Hearne v. Kevan,* 37 N.C. 34; 57 Am. Jur. *Wills* § 1570 (1948); Annot., 93 A.L.R. 2d 8, 39.

We hold that the facts disclosed by the record were sufficient to put plaintiff on inquiry, and that a proper inquiry would have disclosed that the words which purported to give Nina a life estate were susceptible of probate as a valid codicil to the will of Alice

Williams. Plaintiff was therefore charged with notice of it; thus, he was not an innocent purchaser at the time he acquired the property.

The judgment of the court below is

Affirmed.

HUSKINS, J., had no part in the decision or consideration of this case.

FLETCHER N. WADEN, JR., v. RICHARD SPENCER McGHEE ORIGINAL DEFENDANT, AND SANDRA JOYNER PAYNE, ADDITIONAL DEFENDANT.

(Filed 14 June 1968.)

1. Torts § 7—

Prior to the effective date of the Uniform Contribution Among Tort-Feasors Act, G.S. 1B-1, *et seq.*, a valid release of one of several joint tort-feasors released all and was a bar to a suit against any of them for the same injury.

2. Same—

While a covenant not to sue one tort-feasor does not extinguish the cause of action against the remaining tort-feasors, they are entitled to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party.

3. Same—

The preferred method of crediting one tort-feasor with the amount another has paid the plaintiff as consideration for a covenant not to sue is for the trial judge to deduct the amount after the jury has assessed the full amount of plaintiff's damages, and all evidence of the payment and covenant should be excluded at the trial.

4. Same—

Where evidence of the amount paid by one tort-feasor to the plaintiff for a covenant not to sue is admitted without objection, the trial court must instruct the jury (1) to determine the full amount of the plaintiff's damages and then deduct the payment or (2) to determine the full amount of the plaintiff's damages without reference to the payment and to leave it to the court to allow the credit.

5. Same—

Where evidence of the amount paid by one tort-feasor to the plaintiff for a covenant not to sue was admitted without objection, an instruction to the effect that the jury should assess plaintiff's damages according to the usual rule in personal injury cases as if plaintiff had not received the payment for the covenant not to sue, and if they found plaintiff's damages to be more than the amount he had received, the court would credit the payment in order to prevent double compensation, is held to be without error.

6. Appeal and Error § 31—

An assignment of error based on the failure of the court to charge should set out appellant's contention as to what the court should have charged.

APPEAL by plaintiff from *Crissman, J.*, 11 September 1967 Civil Session of GUILFORD.

Action for personal injuries.

On 11 September 1965, while a passenger in an automobile owned by Eddie Joyner and being operated by his daughter, Sandra Joyner Payne (Payne), plaintiff was injured when that vehicle collided with one owned by Richard Spencer McGhee and operated by Phillip Garner.

On 20 May 1966, in consideration of $2,250.00, plaintiff executed and delivered to Joyner and Payne a covenant not to sue either of them for damages sustained in the accident. He further covenanted that, if he should sue McGhee or any other person who joined covenantees as additional parties defendant for contribution, he would "immediately confess judgment" for their benefit.

On 28 July 1966, plaintiff instituted an action against McGhee. He alleged that the collision which caused his injuries was proximately caused by specified negligence of the operator of McGhee's automobile. Answering the complaint, defendant McGhee denied that Garner, the driver of his car, was negligent. He averred that the collision resulted solely from certain negligent acts of Payne. *Inter alia*, McGhee pled plaintiff's covenant not to sue Payne and Joyner as a set-off of $2,250.00 against any judgment which might be obtained against him. In addition, he alleged a cross action against Payne for contribution, and she was made an additional party defendant. In her answer, she denied that she was guilty of any negligence. She also pled plaintiff's covenant not to sue "as a set-off" against any judgment which plaintiff might obtain against McGhee and in bar of any judgment for contribution against her.

McGhee moved to strike Payne's plea of the covenant not to sue. Judge Harry C. Martin heard the motion and denied it. However, he ordered that this pleading "not be read to the jury at the time of the trial."

Prior to the trial, plaintiff and additional defendant Payne, in order to give effect to the covenant not to sue, signed a stipulation, which is summarized as follows: (1) If the jury returned a verdict of not more than $4,500.00 but more than $2,250.00, plaintiff could recover from McGhee only the difference between the amount of the verdict and $2,250.00, and McGhee would receive nothing from Payne. (2) If the verdict exceeded $4,500.00 and Payne was found

not to have been negligent, plaintiff would recover of McGhee the amount of the verdict less $2,250.00, and McGhee would recover nothing against Joyner. (3) If the verdict was $2,250.00 or less, plaintiff would recover nothing. (4) If the verdict exceeded $4,500.00 and Payne was adjudged negligent, plaintiff would recover of McGhee $2,250.00 and one-half the amount by which the judgment exceeds $4,500.00. (5) Plaintiff and Payne would request the trial judge to instruct the jury that plaintiff could recover only the amount by which the verdict exceeds $2,250.00.

At the trial, plaintiff testified on cross-examination, without objection, that he had given Payne a covenant not to sue in consideration of $2,250.00. Also without objection, McGhee introduced into evidence the covenant not to sue.

The court submitted the usual issues relating to actionable negligence and damages. Plaintiff made no objection to these issues and tendered no others. The jury's verdict established that plaintiff was injured by the joint and concurring negligence of McGhee and Payne and that his damages were $1,850.00. From judgment entered upon the verdict that plaintiff recover nothing of defendant, plaintiff appealed.

John W. Langford for plaintiff appellant.

Jordan, Wright, Henson & Nichols by Karl N. Hill, Jr., for Richard Spencer McGhee, original defendant appellee.

SHARP, J. Plaintiff's first assignment of error is that the court failed "to charge the jury clearly" as to the legal effect of the $2,250.00-payment, which was made to plaintiff on behalf of Payne and Joyner in consideration of his covenant not to sue.

On 20 May 1966, the date of the covenant, the rule governing the effect of a payment to an injured party by one or more of the joint tort-feasors was as follows: "A valid release of one of several joint tort-feasors releases all and is a bar to a suit against any of them for the same injury. This is true for the reason that the injured party is entitled to but one satisfaction, the cause of action is indivisible, and the release operates to extinguish the cause of action. . . . But a covenant not to sue does not release and extinguish the cause of action, and the cause of action may be maintained against the remaining tort-feasors notwithstanding the covenant. . . . The remaining tort-feasors are entitled, however, to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party." (Citations omitted.) *McNair v. Goodwin*, 262 N.C. 1, 3-4, 136 S.E. 2d 218, 220. (We note that as of 1 January 1968 the effect of a *release* and the right of con-

tribution between joint tort-feasors when one or more has been released by the plaintiff, were substantially changed by Article I of Ch. 847, 1967 Session Laws, codified as G.S. 1 B-1 through 1B-6 and known as the "Uniform Contribution among Tort-Feasors' act.")

When Judge Martin declined to strike Payne's plea of the covenant not to sue but ordered that the plea not be read to the jury, it is apparent that he was attempting to chart the course of the trial on the issue of damages in accordance with the practice suggested in *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209. The opinion in that case contains the following persuasive quotation from *DeLude v. Rimek*, 351 Ill. App. 466, 473-74, 115 N.E. 2d 561, 565:

" 'It is well understood by lawyers and judges experienced in such matters that in a case where evidence is offered of the payment of a substantial sum for a covenant not to sue, the jury considers it evidence that the covenantee is the party responsible for the injury, and that defendant or defendants should be exculpated. Hence, there is always an effort on the part of the defense to put the covenant before the jury and to make the most of it during the course of the trial. . . .

" 'While the amount paid under a covenant not to sue should be deducted from the total damages sustained, we hold it is the function of the jury to find the plaintiff's total damages, and the function of the judge, upon application of the defendant after verdict, to find the amount by which such verdict should be reduced by virtue of any covenant made by the plaintiff with another concerned in the commission of the tort.' " *Ramsey v. Camp, supra,* at 445, 119 S.E. 2d at 211.

There was no exception to Judge Martin's order that the additional defendant's plea of the covenant not be read to the jury. Thereafter, however, plaintiff and Payne stipulated that they would request the judge to instruct the jury that plaintiff could recover only the amount by which the verdict exceeded $2,250.00. At the trial, without any objection being made, plaintiff testified on cross-examination that he had received $2,250.00 from Payne in return for a covenant not to sue her, and defendant McGhee (who had originally moved to strike all mention of the covenant from the pleadings) introduced it in evidence without objection.

After instructing the jury as to the measure of damages for personal injuries, the judge dealt with the evidence relating to the covenant not to sue as follows:

"Now, Members of the Jury, on this matter of damages, the Court charges you that you are to determine what amount, if any, that the plaintiff is entitled to recover as just and fair compensa-

tion for the injuries that he sustained, without any reference or consideration to any amount that may have already been paid to him, that as far as that payment is concerned, that the Court will take care of that, that you are to determine from the evidence, if you get to that Issue, what amount in all that he is entitled to recover for the injuries he sustained, the total amount that he is entitled to recover, and should that amount be greater than the $2,250.00, then the Court will take care of the adjustments that are necessary to take care of that part of the compensation. It will not mean that he will be doubly paid. That if you do not answer that Issue in the total amount that he would be entitled to recover as just and fair compensation for his injuries past, present and prospective, then he would suffer from it. That is, if you gave any consideration to the fact that he has already received something. He will not receive doubly. That will be taken into consideration. So, you are to consider the total amount he is entitled to recover for all of his injuries growing out of this matter, past, present and prospective, regardless of any amount that he may have received."

Earlier, in recapitulating plaintiff's evidence, Judge Crissman had told the jury: "[H]e stated that he had been paid $2,250.00 by the additional defendant, Payne, as a covenant not to sue; that he did this because he was being pushed for bills, hospital bills, and so forth, growing out of this matter."

In stating the contentions of the parties, the judge told the jury: (1) that plaintiff contended that his injuries and damage entitled him to "a substantial recovery, much in excess of the $2,250.00 that he had accepted from one of the defendants," and that $15,000.00, the amount for which he had sued, would not be excessive; (2) that defendants McGhee and Payne contended that plaintiff had been amply compensated and, if the jury awarded damages, the amount should not exceed $2,250.00.

We think the charge made it quite clear that the jury should assess plaintiff's damages according to the usual rule in personal injury cases as if he had not received the $2,250.00 from Payne and, if they found his damages to be more than $2,250.00, the court would credit the payment in order to prevent double compensation.

Plaintiff made no written request for special instructions in accordance with G.S. 1-181, nor did he orally request further explanation at the conclusion of the charge when Judge Crissman inquired, "Are there any other contentions?"

We think that the preferred method of crediting one tort-feasor with the amount another has paid the plaintiff as consideration for a covenant not to sue is for the judge to deduct the amount *after*

the jury has assessed the full amount of the plaintiff's damage, and that all evidence of the payment and covenant should be excluded. When, however, such evidence has been admitted without objection, to insure that the defendant receives credit for the payment, the court must instruct the jury (1) to determine the full amount of the plaintiff's damages and then deduct the payment or (2) to determine the full amount of the plaintiff's damages without reference to the payment and leave it to the judge to allow the credit. See Annot., Manner of crediting one tort feasor with amount paid by another for release or covenant not to sue, 94 A.L.R. 2d 352 (1964), wherein the various methods are discussed and the cases collected. In this case, the judge chose method (2). Even though method (1) might have been preferable, the instructions were clear, and there is no reason to believe that the jury was confused.

Although we have considered plaintiff's first assignment of error, we point out that it failed to comply with the rules of this Court, which require that "[a]n assignment based on failure to charge should set out the defendant's contention as to what the court should have charged." *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736. *Accord, State v. Malpass* and *State v. Tyler,* 266 N.C. 753, 147 S.E. 2d 180. Plaintiff's other assignments of error likewise fail to comply with the rules. *Tynes v. Davis,* 244 N.C. 528, 94 S.E. 2d 496. Nevertheless, we have also considered them and find them to be without merit.

No error.

RAYMOND A. SCOTT AND WIFE, DORIS C. SCOTT, v. FARMERS COOPERATIVE EXCHANGE, INCORPORATED.

(Filed 14 June 1968.)

1. Judgments § 27—

To sustain a collateral attack on a judgment for fraud, the complaint must allege facts constituting extrinsic or collateral fraud in the procurement of the judgment and not merely intrinsic fraud arising within the proceeding itself and relating to the merits of the case.

2. Same—

In an action to set aside a judgment secured against plaintiffs by defendant in a prior action on the ground that it was obtained through the use of a false statement of account which did not give the plaintiff credit for payments made thereon, demurrer to the complaint is properly sustained since the facts alleged constitute intrinsic fraud and are insufficient to support an independent action to set aside the judgment.

3. Same—

An action to set aside a judgment procured by intrinsic fraud must be by motion in the cause in which the judgment was rendered.

4. Pleadings §§ 29, 32—

Where plaintiff filed without authority of the court an amendment to his complaint relating to damages after defendant had demurred to the complaint and after time for answering the complaint had expired, and plaintiff thereafter filed a motion to amend, a judgment sustaining the demurrer and striking the amended complaint prior to a hearing on plaintiff's motion to amend is not error, since after the time for answering a pleading expires, the pleading may not be amended as a matter of right, but only in the discretion of the court, and since the proposed amendment as to damages would have been of no help as against the demurrer.

5. Pleadings §§ 26, 29—

Where it affirmatively appears from the facts alleged in a pleading that plaintiff has no cause of action against defendant, judgment sustaining defendant's demurrer and dismissing the action is proper.

APPEAL by plaintiffs from *Cowper, J.*, 8 September 1967 Civil Session of WAYNE.

Appeal by plaintiffs from a judgment sustaining a demurrer to their amended complaint, striking their second amended complaint, and dismissing the action. Plaintiffs seek to envoke the equitable jurisdiction of the court to set aside a prior judgment in favor of the present defendant against the same plaintiffs. The judgment was affirmed by this Court in *Cooperative Exchange v. Scott,* 260 N.C. 81, 132 S.E. 2d 161. In that case the Farmers Cooperative Exchange, Inc., brought an action to recover for the sale and delivery of feed and supplies to the present plaintiffs, Raymond A. Scott, doing business under the trade name of Scott Poultry Company, and his wife, Doris C. Scott, under the terms of a special secured feeder account. In the trial of that case the Farmers Cooperative Exchange, Inc., introduced into evidence and relied primarily upon a written memorandum allegedly signed by Raymond A. Scott certifying his indebtedness to the Farmers Cooperative Exchange. In his answer Raymond A. Scott admitted that the Farmers Cooperative Exchange sold to him a considerable amount of merchandise. He alleged that the purchases were made with the understanding that he would sell eggs produced by him to Southeastern Hatcheries, Inc., and that Southeastern would pay the purchase price thereof directly to the Farmers Cooperative Exchange to be credited on his account. He further alleged that the Farmers Cooperative Exchange never furnished him a statement of the account between them, that he never signed the written memorandum as to the indebtedness, and that he had not been given credit for payments made by Southeastern Hatcheries,

Inc., to the Farmers Cooperative Exchange, which exceeded the amount sued upon.

The matter was referred to a referee, and in his report he made specific findings of fact and conclusions of law and reported to the court that Farmers Cooperative Exchange, Inc., was entitled to recover an amount in excess of $25,000 from Doris C. Scott and Raymond A. Scott. The Scotts excepted to the referee's findings of fact and demanded a jury trial, which was held at the August 1962 Session of Wayne County Superior Court. The jury answered the issues in favor of the Farmers Cooperative Exchange, finding specifically that Raymond A. Scott signed and delivered the account stated as alleged in the complaint. Judgment was entered upon the verdict and on appeal no error was found in the trial. *Cooperative Exchange v. Scott, supra.*

In the case at bar Raymond A. Scott and Doris C. Scott are attempting to have the prior judgment set aside on the ground that Farmers Cooperative Exchange, Inc., the present defendant, obtained Raymond A. Scott's signature on the memorandum of account by fraud and misrepresentations. They allege that had all credits been given and over-charges eliminated the special feeder account would have been paid in full. They further allege that the defendant refused to furnish them with a fully itemized statement of account, and that they were unable to have such a statement produced at the trial of the prior action; that after the payment of the judgment in the prior action they learned as a result of investigation that Southeastern Hatcheries, Inc., had in fact sent a number of checks to the defendant for credit on the special feeder account, and that credit was not given thereon. Plaintiffs further allege that the defendant acted with the intent to deceive and defraud, and with knowledge that the payments made by Southeastern Hatcheries, Inc., had not been credited on the special feeder account. Plaintiffs contend that they are without an adequate remedy at law unless the court exercises its equitable jurisdiction and enters a judgment setting aside the judgment in the earlier case.

Plaintiffs' original complaint in the instant action was filed on 3 February 1967. On 7 March 1967 Farmers Cooperative Exchange, Inc., filed a motion to strike certain portions of the complaint, which was allowed by the court, and an amended complaint was filed on 5 June 1967. On 5 July 1967 defendant filed a demurrer to the amended complaint on the grounds that the facts alleged did not constitute a cause of action "in that it appears from the face of the complaint that the plaintiffs seek to have a prior judgment vacated on the grounds of intrinsic fraud, for which an independent action does not

lie." Before a hearing on the demurrer, and without the permission of the court, plaintiffs filed another amended complaint on 9 August 1967. This amended complaint was identical to the first amended complaint, except that it alleged and prayed for compensatory and punitive damages in excess of $7,000,000. The next day, 10 August 1967, plaintiffs filed a motion to amend their complaint. On 28 September 1967 the Honorable Albert W. Cowper, Judge Presiding, after hearing argument of counsel for both parties and having considered the complaint filed 3 February 1967, and the amended complaint filed 5 June 1967, and the demurrer filed 5 July 1967, entered an order sustaining the demurrer to the complaint and amended complaint filed on 5 June 1967 and dismissed the action at the cost of the plaintiffs, stating in the order that "it further appearing to the court that the plaintiffs filed a motion to amend the complaint on 9 *(sic)* August 1967, upon which there has been no hearing and that the plaintiff filed a purported amendment to the complaint on 9 August 1967, without authority of the court, and that said amended complaint should be stricken." Plaintiffs appealed.

Turner and Harrison by Fred W. Harrison; James R. Nance; E. C. Thompson, III; Robert L. West for plaintiff appellants.

Dees, Dees, Smith & Powell by William L. Powell, Jr., for defendant appellee.

PARKER, C.J. Plaintiffs assign as error the court's judgment sustaining the demurrer and striking the amended complaint.

In essence, plaintiffs have alleged that the judgment secured against them by the present defendant in the prior action was obtained through the use of a false statement of account which did not give the plaintiffs credit for payments made thereon. This allegation relates to the merits of the previous cause of action between the same parties. It is well settled in this and the vast majority of jurisdictions that in order to sustain a collateral attack on a judgment for fraud it is necessary that the allegations of the complaint set forth facts constituting extrinsic or collateral fraud in the procurement of the judgment, and not merely intrinsic fraud, that is, arising within the proceeding itself and concerning some matter necessarily under the consideration of the court upon the merits. *Johnson v. Stevenson,* 269 N.C. 200, 152 S.E. 2d 214; *Miller v. Bank,* 234 N.C. 309, 67 S.E. 2d 362; *Horne v. Edwards,* 215 N.C. 622, 3 S.E. 2d 1; *McCoy v. Justice,* 199 N.C. 602, 155 S.E. 452; *Mottu v. Davis,* 153 N.C. 160, 69 S.E. 63; *United States v. Throckmorton,* 98 U.S. 61, 25 L. Ed. 93.

In *McCoy v. Justice, supra,* the Court quoted with approval from Freeman on Judgments, § 1233 (5th Ed.):

"It must be borne in mind that it is not fraud in the cause of action, but fraud in its management, which entitles a party to relief. The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action is vitiated by fraud, this is a defense which must be interposed, and unless its interposition is prevented by fraud, it cannot be asserted against the judgment; 'for judgments are impeachable for those frauds only which are extrinsic to the merits of the case, and by which the Court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be corrected from within by a motion for a new trial, or to reopen the judgment, or by appeal.' The fraud must be in some manner other than the issue in controversy in the action. The rule that fraud, to be a ground for relief, must be extrinsic or collateral to the matter tried in the first action, is almost universally acquiesced in. It is merely an application of the general principle that equity will not interfere simply to give a second opportunity to relitigate that which has already been fully litigated."

The reason for this rule is expressed in the maxim *interest reipublicæ ut sit finis litium;* that there should be an end of litigation for the repose of society. The Court said in *Horne v. Edwards, supra:*

". . . This demand of public policy yields to the ends of justice where extrinsic fraud has been practiced only because it is the main characteristic of such fraud that it deprives the party of the opportunity of presenting his case, or his defense, upon the hearing, and renders the result as to him no trial at all in the legal sense. *United States v. Throckmorton, supra; McCoy v. Justice, supra.* Intrinsic fraud, as for example, perjury, or the use of false or manufactured evidence, has no such effect."

In *Pico v. Cohn,* 91 Cal. 129, 25 P. 970, cited with approval in *McCoy v. Justice, supra,* and *Horne v. Edwards, supra,* the Court said:

". . . (I)t must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation. . . . (W)hen he has a trial he must be prepared to meet and expose perjury then and there."

The facts alleged in the case at bar, if true, fall within the classification of intrinsic fraud, and are not sufficient grounds for equitable relief against the prior judgment in an independent action. An action for intrinsic fraud must be by motion in the cause in which the judgment was rendered. *Johnson v. Stevenson, supra; Miller v. Bank, supra; Horne v. Edwards, supra; McCoy v. Justice, supra.* The plaintiffs are attempting to litigate again a matter which has been tried on the merits in the Superior Court, and heard on appeal by this Court. The fraud which they allege concerns the very instrument which was sued on in the prior action. In *Thomason v. Thompson* (Ga.), 26 L.R.A. (N.S.) 536, quoted with approval in *McCoy v. Justice, supra,* it is said:

> "To set aside a verdict and judgment for fraud, where the particular fraud was in issue, because of the discovery of additional evidence to prove it, would deprive a judicial finality — a judgment — of its inherent and distinguishing characteristic."

Appellants also assign as error the court's entering a judgment sustaining the demurrer prior to a hearing on their motion to amend their complaint. The record indicates that the demurrer was filed over a month prior to the filing of plaintiffs' motion to amend the complaint. Plaintiffs filed their amended complaint without obtaining leave of the court and prior to filing their motion to amend. The record indicates that the amended complaint was filed on 9 August 1967, and that a motion to amend was filed on 10 August 1967. This Court has repeatedly held that after the time allowed for answering a pleading has expired, as in this instance, such pleading may not be amended as a matter of right, but only in the discretion of the court. *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531, and cases cited therein. Be that as it may, the proposed amendment related only to the amount of damages, and would have been of no help to plaintiffs as against the demurrer.

The judgment sustaining the demurrer also dismissed the action. This was correct, since it appeared affirmatively from the facts alleged that the plaintiffs had no cause of action against the defendant which would envoke the equitable jurisdiction of the court. *Perrell v. Service Co.,* 248 N.C. 153, 102 S.E. 2d 785; *Adams v. College,* 247 N.C. 648, 101 S.E. 2d 809. Equity will not interfere simply to give a second opportunity to relitigate that which has already been fully litigated. *McCoy v. Justice, supra.*

The judgment sustaining the demurrer and dismissing the action is

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

REALTY CO. v. HIGHWAY COMMISSION.

Case below: 1 N.C. App. 82.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 14 June 1968.

STATE v. WILLIAMS.

Case below: 1 N.C. App. 127.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 14 June 1968. Case is set for argument first week of Fall Term 1968.

HEWETT v. GARRETT.

Case below: 1 N.C. App. 234.

Petition of Mrs. Willa Branch Hewett for writ of *certiorari* to North Carolina Court of Appeals allowed 14 June 1968. Case is set for argument first week of Fall Term 1968.

STATE OF NORTH CAROLINA v. DAVID EARL HOWARD AND JOE HOWARD

No. 4

(Filed 23 August 1968)

1. Criminal Law § 104— nonsuit at close of State's evidence — consideration of evidence

Where one defendant moves for nonsuit at the close of the State's case, he is entitled to have his motion of nonsuit considered solely upon the State's evidence and without reference to the testimony and evidence of his co-defendant.

2. Criminal Law § 104— nonsuit in consolidated action at close of all evidence

Where each defendant in a consolidated action offers evidence, the court must consider all the evidence in the case in passing upon their motions for nonsuit; thus, each defendant's motion must be finally considered — not only in the light of the State's evidence — but in the light of that offered by his codefendant.

3. Homicide § 21— homicide perpetrated in course of robbery — nonsuit

In this consolidated prosecution of two defendants for first degree murder arising out of the perpetration of a robbery, there is sufficient evidence to be submitted to the jury on the issue of the guilt of each defendant.

4. Homicide § 15; Criminal Law § 50— cause of death — opinion of nonmedical witness

The opinion of a nonmedical witness as to the cause of death in a homicide prosecution is admissible (1) if the witness is qualified by experience and observation to give an opinion, and if (2) the facts to be interpreted are not of such a nature as to render valueless any opinion but that of an expert in a particular field.

5. Homicide § 15; Criminal Law § 50— cause of death — opinion of nonmedical witness

Where the testimony of medical experts is not accessible in a homicide prosecution to explain the fatal character of the wounds, a nonexpert who saw the wounds upon the body of the deceased may describe them to the jury; if his training and experience convince the court that he is qualified to do so, he may express an opinion as to whether the wounds caused the death unless they are of such a nature as to render valueless any opinion except that of an expert.

6. Homicide § 15— evidence of cause of death — opinion of coroner — mortician

Testimony of a coroner is competent as an expression of opinion on the cause of death in a homicide prosecution where (1) the witness graduated from a college of mortuary science, has been a licensed mortician for over thirty years, has attended seminars in medical schools and coroner's schools, and has examined approximately a thousand questionable deaths

in the last twenty years, and where (2) the evidence clearly reveals that the deceased had died from visible head injuries.

7. Homicide § 25— instructions on proximate cause — contention that judge "assumed" facts to be proven

The trial court in a homicide prosecution clearly instructed the jury that in order to convict either defendant of murder the State must satisfy the jury beyond a reasonable doubt either that the particular defendant had inflicted injuries on the deceased which proximately resulted in his death or that the injuries had been inflicted by the other pursuant to a conspiracy between the two defendants to rob the victim; consequently, there is no merit in defendant's contention that the portion of the charge excepted to, which portion was taken out of context, might be interpreted as an assumption by the trial judge that one or both of the defendants fractured the skull of the deceased and that the fracture caused his death.

8. Criminal Law § 111— instructions — prejudicial inquiry by court

Defendant is not prejudiced by trial judge's inquiry to counsel at the end of the charge if there was "anything further gentlemen," the defendant contending that counsel were compelled to answer "no" and thereby causing the jury to assume there was no error in the charge, although it is better practice for the court to make such inquiry of counsel out of the hearing of the jury.

9. Criminal Law § 119— requested instructions

Even if a defendant is entitled to requested instructions, the court is not required to give them verbatim, it being sufficient if they are given in substance.

10. Homicide § 25— requested instructions — defendant's duty to aid victim

Where the court instructs the jury that mere presence at the scene of the crime would place no legal obligation on either of the defendants to take overt action or come to the rescue of the deceased, it is not error for the court to refuse to give separate requested instructions thereon.

11. Homicide § 25— requested instructions

It is not error for the court to refuse to give verbatim requested instructions that if the jury believes all of the facts in the case to be as testified to by the defendant then it shall be their duty to return a verdict of not guilty, where the substance of the requested instruction was implicit in the entire charge.

12. Searches and Seizures § 1— Fourth Amendment guarantees — seizure of "mere evidence"

The Fourth Amendment to the United States Constitution secures the same protection of privacy whether the search is for "mere evidence" or for fruits or instrumentalities of the crime or for contraband; there must be, however, a nexus between the item to be seized and criminal behavior.

13. Searches and Seizures § 1— necessity for warrant — article in plain view

Neither the Fourth Amendment nor G.S. 15-27 is applicable where no search is made; the law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view.

14. Searches and Seizures § 1— seizure without warrant — limits of reasonableness

The limits of reasonableness which are placed upon searches are equally applicable to seizures, and whether a search or seizure is reasonable is to be determined on the facts of the individual case.

15. Searches and Seizures § 1; Criminal Law § 84— seizure without warrant of defendant's bloody shirt — reasonableness of seizure — admissibility of shirt

In a prosecution for murder in the first degree, a deputy sheriff's seizure of defendant's bloody shirt worn on the day of the homicide was reasonable and the shirt was properly admitted into evidence where (1) the deputy who was acting pursuant to orders from his principal, the sheriff, had probable cause to believe that the defendant had murdered the victim, (2) the shirt was in plain view in the defendant's room, the door to which was open, (3) the deputy entered the room, not for the purpose of making a general search for evidence of guilt, but in search of defendant himself, and (4) the deputy took the shirt with probable cause to believe it would prove to be evidence of defendant's guilt.

16. Homicide § 29— instruction on right of jury to recommend life imprisonment

In a consolidated prosecution of two defendants for murder in the first degree, it is proper for the trial court, despite the solicitor's initial announcement that he was not asking for an unqualified verdict of first degree murder, to instruct the jury that they might return one of four verdicts as to each defendant: (1) guilty of murder in the first degree, (2) guilty of murder in the first degree accompanied by a recommendation of life imprisonment, (3) guilty of murder in the second degree, or (4) not guilty.

APPEAL by defendants from *Peel, J.*, December 1967 Session of BEAUFORT.

Each defendant was tried upon a bill of indictment which charged that on 5 November 1967 he "did unlawfully, wilfully, and feloniously kill and murder Major Wright Lewis." Upon his affidavit of indigency the court appointed L. H. Ross, attorney, to represent defendant David Earl Howard (David Earl), and Junius D. Grimes, attorney, to represent Joe Howard (Joe). Without objection, the two cases were consolidated for trial.

Before the selection of the jury was begun, the solicitor announced that he would not ask the jury for an unqualified verdict of murder

in the first degree (which would carry the death penalty), but — as to each defendant — he "would seek a verdict of guilty as charged with a recommendation of life imprisonment" or such other lesser verdict as the evidence might justify in each case. Each prospective juror, however, was sworn and examined separately on *voir dire* in accordance with the practice in capital cases.

The evidence for the State tended to show: Late Sunday afternoon, 5 November 1967, the two defendants, David Earl and Joe, along with Blossom Moore and Margaret Williams, were at Skeeter's place in Washington. The four had been drinking. David Earl gave Joe a dollar to take the group to Brown's place on Highway No. 17. There they encountered Major Wright Lewis (Lewis), who had also been drinking. For seventy-five cents Lewis bought the two defendants and himself a drink. He paid for it with a $5.00- or $10.00-bill and put the change in his shirt pocket. After about thirty minutes, the three men left Brown's place with Blossom and Margaret and went to Dody's place, a short distance away on Gray Road. Joe parked his car, a black 1955 Ford, by an oak tree in front of a vacant parsonage about 150 feet from Dody's place. The two girls got out of the automobile and went into Dody's place, leaving the men at the car. David Earl said that he was coming in, but he never did. As Margaret got out of the car, "Joe Howard hunched David Earl and said if this man had any money he was going to get it." She did not hear David Earl say anything.

Between 6:00 and 7:00 on that Sunday evening ("It was approaching dark."), Melvin Tripp, who lived across Gray Road from the parsonage, went to his car, which he had parked "on the parsonage side," with a man whom he was taking to the hospital. He "heard leaves scuffling" and saw David Earl standing beside a black 1955 or 1956 Ford 6-7 feet from his car. David Earl, whom Tripp had known for about 14 years, said, "Don't come over here or I'll shoot." To Tripp's question, "What's wrong with you, man?" David Earl made no reply. Tripp saw in front of the Ford a pair of shoes, "toes pointing skyward," and pants, "filled out like they had something in them . . . pants legs up to about midway the calf." Nothing else was said, and Tripp drove away. He saw no one else out there at that time. When he returned home that night between 10:00 and 11:00 p.m., he parked his car at the same place and went straight into his house.

After having "danced and messed around in" Dody's place about an hour and a half, Blossom and Margaret came out. They met David Earl, who said he had started in after them. At the car, one of the

girls asked where Lewis was, and Joe said he had gone. As they were driving off, Joe hit a car parked in front of Dody's place. "The slam" brought ten to twenty people out of Dody's. Joe said that he was going to call a patrolman. He told the two girls and David Earl to wait until the officer came, but they left in another car before he arrived.

The following day, Monday, 6 November 1967, between noon and 1:00 p.m., Melvin Tripp went to his car. He observed a hat about 10 feet away; then he saw the body of a man lying face down beside the parsonage. He immediately notified the sheriff. When he returned to the scene the sheriff was there.

Deputy Sheriff Sheppard, who arrived at the scene about 1:20 p.m., found the body of Major Wright Lewis lying face down between the parsonage and a stack of cinder blocks supporting an oil drum. The body was "in that depression from the eaves drip" about eighteen inches from the building. Thirty-six feet from the body was a pool of blood "approximately eighteen inches across." The leaves had been disturbed on a line between this pool and the body. Located toward the deceased's feet was a row of cinder blocks, two of which had been knocked out of line. At the deceased's head was a cinder block on which there was a "dark red substance which was dry."

Bonner Paul, who has been Coroner of Beaufort County for the past twenty years and a licensed mortician for over thirty years, came to the scene with Sheriff Harris about 1:40 p.m. In Lewis' pockets they found only matches and a half pack of cigarettes. The left side of his face was badly distorted and pulpy; air was under the tissues, which were loose from the skull. On the right temple, over the right ear, were two lacerations. In an area approximately three inches in diameter, the skull was fractured in two different places. There were no other lacerations, abrasions or bruises on the body. From the jugular vein Paul removed two vials of blood. In his opinion, Lewis' death resulted from lacerations of the brain caused by a fractured skull.

That afternoon, after he had visited the scene, viewed the body, and talked to Tripp, Sheriff Harris directed Deputy Sheriff Davis to find David Earl and bring him to the sheriff's office. Davis did not find him at his place of employment when he went there at 3:40 p.m. About 4:00 p.m., he went to David Earl's rooming house. Davis had no warrant of any kind. He inquired of David Earl's landlady if he was in his room. She said she did not know and asked the officer to accompany her upstairs to see. They found the door of David Earl's

room open. The entire room, however, was not visible from the hall. Before entering, Davis saw a shirt, which appeared to have blood on it, lying on the bed "in plain view." When he went inside, he immediately saw that David Earl was not in the room. Davis made no search; he merely picked up the shirt and carried it away with him. He took nothing else.

About 4:30 that afternoon, David Earl surrendered himself, and a warrant charging him with the murder of Lewis was sworn out about 5:00 or 5:30 p.m. Davis talked to him at the sheriff's office.

When the solicitor offered in evidence the conversation between Davis and David Earl, the judge excused the jury and inquired into the circumstances under which the statements were made. On *voir dire,* Davis said that he gave defendant the following warning: "You have the right to remain silent and not make any statement. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before any questions have been asked, have him present or anyone else during your questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questions. If you decide to answer questions now without a lawyer present, you have the right to stop any time answering those questions. Do you understand each of these rights I have explained to you?" When David Earl said that he did understand, Davis said, "Having these rights in mind, do you wish to talk to us now?" David Earl replied that he did wish to talk. After cross-examining Davis, Mr. Ross, attorney for David Earl, said, "We have no objection to his (Davis') testimony." The record shows that "neither defendant desired to present evidence on the *voir dire.*" At the conclusion of the evidence, Judge Peel found as a fact that David Earl had been fully advised of his constitutional rights and that the statements he made to the sheriff were freely and voluntarily made without fear or compulsion.

The jury then returned, and Davis testified as follows: David Earl said that he, Joe, Blossom, and Margaret went to Dody's place Sunday evening, the 5th of November, in order to dance. He saw a white man, whom he did not know, lying on the ground. The man appeared to have been beaten up. He got within three feet of the man, but he did not touch him.

At that point in his conversation with David Earl at the sheriff's office, Davis said he produced the shirt which he had taken earlier from David Earl's room. At this point in his testimony at the trial, Davis also produced the shirt, which was then marked State's Exhibit 9, and used it to illustrate his testimony.

Continuing his testimony before the jury with reference to his conversations with David Earl, Davis said he asked him if the shirt (Exhibit 9) belonged to him. After examining it carefully, David Earl said that the shirt was his and that he had worn it the night before. When Davis pointed out to him the spots on the shirt, David Earl said that he knew nothing about them. (The foregoing testimony with reference to the shirt and its use by Davis to illustrate his testimony before the jury was without objection from either defendant.)

On the night of 6 November, about 7:30, Davis found Joe in an automobile "with a whole lot of folks" at a country store.

Before permitting Davis to testify as to the conversations he had with Joe, the court conducted a *voir dire* during which Davis testified that he had given Joe the identical warning which he had earlier given David Earl. After hearing the evidence on *voir dire* as to the warnings given Joe, Judge Peel found that he had been fully advised of his constitutional rights and that the statements which he made were "freely and voluntarily made without fear or compulsion."

After Davis had explained his rights to Joe and given him the required warning, Joe said that he fully understood what had been said to him and that he wished to talk to the officers because he had not done anything. He then accompanied Davis to the sheriff's office, where he said that he, David Earl, Blossom, Margaret, and "the white man" went to Dody's from Brown's place.

When Joe told Davis that Lewis went with David Earl and the two girls to Dody's, he did not question him further at that time; he had another talk with David Earl. This time David Earl told Davis that he, Joe, Blossom, Margaret, and "the white man" rode together from Brown's place to Dody's in Joe's black Ford; that after parking the car there, the three men got out of the front seat and walked around to the front of the vehicle, where Joe knocked Lewis down, using only his fist "as far as he knew"; that David Earl then pulled Lewis a short distance away from the front of the automobile.

When David Earl made the preceding statement the officers called in Joe, and David Earl repeated it in Joe's presence. Joe said that the statement "was a lie." In the presence of David Earl, Joe then told the officers that Blossom, Margaret, David Earl, he and Major Wright Lewis left Brown's place and went to Dody's; that they parked near Dody's and Blossom and Margaret went in; that Lewis and David Earl got out on the right side of the car, and David Earl knocked Lewis down and stomped him; that Joe remained in the car and observed proceedings through the right front

window of the car. When Joe made that statement David Earl said, "Its a lie," and there was no further conversation.

Two or three days after this confrontation by defendants, Joe sent word to Sheriff Harris that he wanted to see him. In consequence, Joe was brought to the sheriff's office, where he said that he "wanted to make a statement." He told Sheriff Harris that "he didn't want to take or be punished for something he didn't do"; that he didn't get out of the car the night that Major Wright Lewis was beat up; that David Earl was the one who knocked him down and beat him up and was stomping and kicking him; that the car window was partly down and he said, "Hey, boy, boy, what you doing? What do you mean there? What are you doing that for?"; that he never put his hands on Lewis; and that he never got out of the car until he had the wreck.

When Sheriff Harris asked Joe if he would be willing to make that statement in the presence of David Earl, he said that he would. David Earl was brought in from the jail and informed that Joe had made a statement which the sheriff wanted him to hear. Joe repeated the statement. David Earl said that it wasn't true; that he didn't touch Lewis except to pull him from in front of the car; and "that Joe took him and drug him over beside the building."

In response to the sheriff's question whether he received or took any money from Lewis, Joe said that "David Earl gave him a dollar . . . that night out there, after David Earl had beat up Major Wright Lewis." David Earl said he didn't give him a dollar.

(Each time Deputy Sheriff Davis or Sheriff Harris testified as to a statement made to him by one of the defendants, Judge Peel instructed the jury that the statement was admitted only as against the defendant making it, and it was not to be considered against the other.)

On Tuesday morning, 7 November, about 10:00, Lewis' 23-year-old son went to the place where his father's body was found. There he found, "on the ground around a bunch of leaves," his father's empty billfold, which he took to the sheriff.

The vial of blood which the coroner removed from the neck of Lewis was typed in the crime laboratory of the State Bureau of Investigation at Raleigh and found to be in Group O. The laboratory also analyzed the spots on the shirt (Exhibit 9), which Davis removed from the room of David Earl. These spots were found to be human blood in Group O.

At the conclusion of the State's evidence both defendants' mo-

tions for nonsuit were overruled. Each defendant elected to offer evidence and to testify in his own behalf after the judge had explained to him that he did not have to take the stand. Each defendant told the judge that his attorney had explained that to him "and the other things involved," and that he desired to testify.

Joe Howard's testimony tended to show: About 5.00 p.m. on 5 November 1967 he met Blossom, Margaret, and David Earl at "a joint" in Washington; that David Earl asked him to drive them to Brown's place on Highway No. 17 and said he would pay him. Joe took them there; he had no money. They found Lewis at Brown's place. He bought Joe a small drink, the last of Brown's liquor, and Lewis suggested that they go elsewhere for more whiskey. In Joe's car, the five went to Dody's place, a trip of 3-4 minutes. The men rode in the front seat of the two-door car; the girls, in the back. Joe parked in front of an old house about 150 feet from Dody's. After Lewis and David Earl got out, Joe held the seat back for the two girls. They got out and disappeared. Joe did not nudge David Earl nor did he say anything to him whatever. He remained in his car working on his signal lights. Hearing a struggle and scuffling in the leaves, he looked up to see David Earl hitting Lewis, who fell down. David Earl then kicked and stomped him. No words were spoken, and Lewis made no outcry. Joe asked David Earl what was wrong with him but received no reply. A stranger came up behind the car and said something to David Earl, who made some reply. Joe, however, was unable to understand what either said. Lewis was on the ground at the time. After the person drove away, David Earl dragged Lewis from in front of the car and laid him down between the house and an old oil drum. When he returned Joe told him he was going to leave. They had been there only about 10-15 minutes. David Earl went for the girls and met them returning to the car. When they asked where Lewis was, Joe pointed to him and said he was "around there." They looked and said nothing.

Joe never said anything to David Earl about taking any money off Lewis, and he did not move his car or get out of it until the girls came back. He never touched Lewis, and, although he knew he was hurt, he made no investigation to see how badly David Earl had hurt him.

After the girls got in the car, in attempting to leave, Joe hit Felton Smith's car. Smith came out and Joe told him, the girls, and David Earl that he was going to call a patrolman. David Earl gave him a dollar for bringing them down there and then left the scene with the girls. At 7:30 p.m. a patrolman came and stayed about 20

minutes. He gave Joe a ticket "for failing to see that an intended move could be made in safety." Joe did not tell the patrolman that Lewis was lying over by the cinder blocks.

Joe is 47 years old. He has been convicted of an assault with a deadly weapon, hit and run, driving drunk, disorderly conduct, larceny, and a number of traffic violations.

David Earl Howard's testimony tended to show: He, Blossom, Margaret, and Joe went to Brown's place on Sunday afternoon, 5 November. There Lewis bought Joe a drink. Lewis got "green money" back and put it in his shirt pocket. At about 6:00 p.m., after having been at Brown's place for about 20 minutes, Joe told David Earl that he was going to take Lewis to Dody's place (a quarter of a mile away) "to get a pint." At Joe's invitation, the others went, also. Arriving at Dody's, Joe parked the car, and the girls, who were in the back seat, got out first. Lewis, who was sitting on the outside in the front seat, got out next. Joe then said to David Earl, "If that man has got any money, I am going to get it." David Earl made no reply and "did not pay it any mind." At that time, Margaret was not there and could not have heard what Joe said to him. After Lewis and David Earl got out, Joe went behind the old parsonage. When he returned, Lewis and David Earl were talking about a mutual acquaintance. Joe told Lewis that he was ready to get that pint of whiskey so that they could get drunk. Lewis told him to wait, that he could see he was "talking to this boy." Joe hit him in the face. Lewis fell across the car and rolled to the ground, his nose bleeding. David Earl pulled him from in front of the car. When he did, Lewis grabbed his sleeve, getting blood on his shirt (Exhibit 9). That was the only time David Earl ever touched Lewis. Joe then got back into the car and was sitting there when Melvin Tripp came up and asked what was going on. David Earl told him that he had just pulled Lewis, whom Joe had knocked down, from under the car. Lewis was moaning and groaning. Tripp advised them to leave before they got into trouble. David Earl did not tell Tripp that if he came over there he would shoot him. Tripp left.

David Earl started into Dody's to get the girls just as Margaret came out. She asked him for money with which to buy some cigarettes and a pickle. He had $7.00 and he gave her a dollar. She went in, made her purchases, and returned with the change. As they prepared to leave, Blossom asked Joe where Lewis was. Joe said that he had gone down the road somewhere. David Earl observed that Lewis' body was not where he had put it. He scratched his head and said,

"Wonder where he went to?" When he asked Joe where the man went Joe said, "He left, went down there some place."

In attempting to leave Dody's place, Joe hit Smith's car. Shortly thereafter David Earl gave Joe a dollar, and he and the girls left before the patrolman arrived. At no time did David Earl take anything from Lewis, and he never saw Joe take anything.

David Earl is 22 years old. He has been convicted of robbery in New York and larceny of an automobile in North Carolina.

At the conclusion of his own evidence, and at the conclusion of all the evidence, each defendant renewed his motions for judgment of nonsuit. The motions were overruled.

The jury's verdict as to each defendant was "guilty of murder in the first degree with recommendation of life imprisonment." From the judgment that he be imprisoned in the State's prison for the term of his natural life, each defendant appealed.

T. W. Bruton, Attorney General, and Harry W. McGalliard, Deputy Attorney General, for the State.

L. H. Ross for David Earl Howard, defendant appellant.

Junius D. Grimes, Jr., for Joe Howard, defendant appellant.

SHARP, J.

Each defendant assigns as error the court's refusal to grant his motions of nonsuit. The theory of the State's case is that the defendants murdered Lewis in the perpetration of a robbery (G.S. 14-17), and that each was present aiding and abetting the other in the commission of that felony. Each defendant contends that the other killed and robbed Lewis without his assistance or connivance; that he was merely present, took no part in the assault and robbery, and did not share in the proceeds.

[1-3] Had either defendant rested at the close of the State's case, he would have been entitled to have his motion of nonsuit considered solely upon the State's evidence and without reference to the testimony and evidence of the other defendant. *State v. Frazier and State v. Givens,* 268 N.C. 249, 150 S.E. 2d 431. Since, however, each offered evidence, in passing upon the motions for nonsuit, we must consider all the evidence in the case. G.S. 15-173; *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897. Thus, each defendant's motion must be finally considered not only in the light of the State's evidence but also in the light of that offered by his codefendant. *State v. Norton,* 222 N.C.

418, 23 S.E. 2d 301. The preliminary statement of facts manifests the sufficiency of the evidence to overcome each defendant's motion of nonsuit.

Both defendants also assign as error the ruling of the court which permitted the coroner, Bonner Paul, to testify that in his opinion Lewis' death resulted from "the laceration of the brain caused by a fractured skull." When the State tendered Paul as an expert "in the cause of death when there is evidence of violence," defendants objected. The court overruled the objection and found Paul to be "expert in the field of coroner's work and in the examining of bodies to determine cause of death when there is some evidence of violence." Defendants did not except to this finding. They did, however, object and except to Paul's opinion testimony as to the cause of Lewis' death.

The State's evidence with reference to the witness' training in "coroner's work" tended to show: Paul graduated from a college of mortuary science in 1936, and since then has attended seminars at North Carolina Memorial Hospital in Chapel Hill and Bowman Gray School of Medicine in Winston-Salem. During the last five years he has regularly attended coroners' schools. While on duty in the Navy he graduated from the Hospital Corps School at Portsmouth, Virginia. In the last twenty years, he has "examined approximately a thousand questionable deaths."

Paul's qualifications and experience clearly qualify him as an expert mortician. Notwithstanding, defendants contend that he lacked sufficient medical training to give an opinion as to the cause of Lewis' death, and that his testimony was highly prejudicial to them.

[4] The authorities differ as to when an undertaker, or other witness who is not a medical expert, may express an opinion as to the cause of death. 23 C.J.S. *Criminal Law* § 878(2), p. 458-459 (1961); 32 C.J.S. *Evidence* § 546(92) (1964); 31 Am. Jur. 2d *Expert and Opinion Evidence* § 105 (1967); Annot., Admissibility of opinion evidence as to cause of death, disease, or injury, 136 A.L.R. 965 (1942), and Supplementary Annot. in 66 A.L.R. 2d 1082 (1959). See the discussion of the problem in *State v. Smith,* 221 N.C. 278, 20 S.E. 2d 313. The general rule, however, is that the opinion of a nonmedical witness as to the cause of death is admissible if the witness is qualified by experience and observation to give an opinion, and the facts to be interpreted are not of such a nature as to render valueless any opinion but that of an expert in a particular field. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753; 31 Am. Jur. 2d *Expert and Opinion Evidence* § 99 (1967). In *Jordan v. Glickman,*

219 N.C. 388, 14 S.E. 2d 40, this Court said: "We do not subscribe to the doctrine that the cause of death can be proven only by the opinion of a physician, or other expert witness." *Id. at* 391, 14 S.E. 2d at 42. In *Gillikin v. Burbage, supra* at 325, 139 S.E. 2d at 760, it is said: "There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." In such case, evidence is admitted upon the ground that it "is more in the nature of a fact than an opinion." Annot., 136 A.L.R. 965, 1005 (1942).

[5, 6] In a homicide case it is, of course, always best to have testimony of medical experts "as to the fatal character of wounds" if such evidence is available. *Revels v. State,* 64 Fla. 432, 59 So. 951. Where, however, such evidence is not accessible, a nonexpert who saw the wounds upon the body of the deceased may describe them to the jury. If his training and experience convince the court that he is qualified to do so, he may express an opinion as to whether the wounds caused the death — unless they are of such a nature as to render valueless any opinion except that of an expert. In any event, where the injuries are of such a character that any person of ordinary intelligence would know that they caused the death, the witness' expressed opinion cannot be held for prejudicial error. In *Foley v. Crawford,* 125 Kan. 252, 264 P. 59, an ambulance driver, who found a body at the bottom of an elevator shaft, testified over objection that the deceased died of a broken neck. The court said: "It did not take an expert to testify that the boy's death had been caused by his neck being broken. Any intelligent person who examined the body could have testified to that fact." *Id.* at 255, 264 P. at 61.

In this case, all the evidence tends to show: Prior to the time he alighted from Joe's automobile at Dody's place, Lewis was uninjured. Although he had been drinking, he was still able to make the rounds of places where liquor could be bought. At Dody's, he was knocked down by one of the defendants, dragged for an appreciable distance, and left beside an abandoned parsonage. There he was found dead the next morning, his skull fractured and his brain lacerated. A bloody cinder block was beside his head.

It did not take a doctor to determine that he had died from the visible head injuries. Paul's evidence was competent, but the State's case did not depend upon it. *State v. French,* 225 N.C. 276, 34 S.E. 2d 157. Without the benefit of his opinion, the jury would undoubtedly have arrived at the same conclusions he did. Defendants' assignments of error based on exceptions to the admission of this evidence are overruled.

[7] David Earl took no exception to the judge's charge to the jury. Joe assigns as error the following portion of the charge: ". . . The court further instructs you that the injury inflicted by the defendants, or either of them, must be the proximate cause of the deceased's death."

Taken out of context, as it is in the assignment of error, the foregoing statement might be interpreted as an assumption by the trial judge (a) that one or both of the defendants fractured Lewis' skull and (b) that the fracture caused his death. Considered in its relation to the entire charge, however, it is inconceivable that the jury understood the judge to be telling them that he thought these were facts which had been proven. Throughout the charge, he made it quite clear that, in order to convict either defendant of murder, the State must satisfy the jury beyond a reasonable doubt either that the particular defendant had inflicted injuries on the deceased which proximately resulted in his death or that the injuries had been inflicted by the other pursuant to a conspiracy between the two defendants to rob Lewis. This assignment of error is not sustained.

[8] Joe's other assignment of error to the charge is that, when he concluded, the judge inquired of counsel, "Anything further gentlemen?" The solicitor, Mr. Ross and Mr. Grimes, all responded, "No." Joe now argues that counsel were compelled to answer, "No"; that this answer caused the jury to assume that there was no error in the charge and that this assumption prejudiced defendant. We are unable to follow this reasoning. Although it is better practice for the court to make such an inquiry of counsel at the bench, where the jury cannot hear any colloquy which might result, we can imagine no prejudice to either of these defendants from the court's question.

[9-11] Joe's remaining assignment of error to the charge is that the court did not give the following requested instructions:

(a) "That it was not the duty of or legal obligation of defendant Joe Howard to take any overt action or come to the rescue or defense of the deceased Major Wright Lewis.

(b) "That if the jury believes all of the facts in these cases to be as testified to by the defendant, Joe Howard, then it shall be their duty to return a verdict of not guilty on all counts."

Even if a defendant is entitled to requested instructions, the court is not required to give them verbatim. It is sufficient if they are given in substance. *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, 96 A.L.R. 2d 1422, *cert. denied,* 368 U.S. 851, 82 S. Ct. 85, 7 L. ed. 2d 49. The judge gave the substance of requested instruction (a)

when he charged the jury that "mere presence" at the scene of the crime "would place no legal obligation on either of the defendants . . . to take any overt action or come to the rescue of the deceased Major Wright Lewis." The fact that the court included both defendants in the same instruction was not prejudicial to either.

Requested instruction (b), although not given *ipsissimis verbis,* was implicit in the entire charge. Had it been given as requested, it would not have enhanced Joe's position. His testimony exculpated him, and had the jury believed it — or had it raised in their minds a reasonable doubt of his guilt — under the charge, they would necessarily have acquitted him. The court instructed the jury that, unless they were satisfied beyond a reasonable doubt (1) that Joe, while perpetrating or attempting to perpetrate a robbery, inflicted injuries on Lewis which proximately caused his death; or (2) that he and David Earl had conspired to rob Lewis, and while both were actively participating in robbing or attempting to rob Lewis, one or both of them inflicted injuries upon him thereby causing his death, they would acquit Joe Howard. Had the instruction been given as requested, the jury might have been led to believe that, unless they believed all of defendant's testimony, they should find him guilty. The failure to give the requested instruction cannot be held to be prejudicial error. *State v. Faust, supra.*

[5] David Earl's brief makes it clear that his appeal is based upon the contention that the State obtained the shirt, which he was wearing on the evening of 5 November 1967 (Exhibit 9), by an unlawful search and seizure, and that its admission into evidence was error entitling him to a new trial.

G.S. 15-27 provides in pertinent part that ". . . no facts discovered . . . or evidence obtained without a legal search warrant in the course of any search, *made under conditions requiring the issuance of a search warrant,* shall be competent as evidence in the trial of any action." (Emphasis added.) Since Deputy Sheriff Davis, who took the shirt from David Earl's room in his absence, had no search warrant, the question is whether one was required. A precis of the facts surrounding the seizure of the shirt follows:

Sheriff Harris, Davis' principal, first learned of the death of Lewis about 1:20 p.m. on Monday, 6 November 1967. Harris arrived at the parsonage, where Tripp had discovered the body, about 1:40 p.m. Harris learned from Tripp the facts about which Tripp testified at the trial, that is: Between 6:00 and 7:00 p.m. on the preceding evening Tripp, who lives across Gray Road from the abandoned parsonage, went to his car, which he had parked at the par-

sonage. He heard "leaves scuffling" and heard David Earl, whom he had known for 14 years, say, "Don't come this way; I'll shoot." Then he saw David Earl standing beside a black Ford, and, sticking out in front of that car, he saw a pair of shoes, toes pointed skyward, and "two pants legs up to about midway the calf." He asked David Earl what was wrong with him. When he got no reply, Tripp left. Upon his return, between 10:00 and 11:00 p.m., he found David Earl and the black Ford gone. The next day, between 12:00 noon and 1:00 p.m., when he went back to his car, he discovered the body of Lewis lying by the parsonage. He left in his automobile to notify Sheriff Harris, who came to the scene and observed Lewis' body, the pulpy face, fractured skull, and the bloody cinder block nearby. Harris also saw the pool of blood and the line of disturbed leaves between it and the body.

Obviously Lewis had met a violent death. Sheriff Harris had probable cause to believe that he had been murdered and that David Earl was implicated in the murder. By telephone and radio, he instructed his deputy, Davis, "to pick up" David Earl and bring him to the sheriff's office. Davis went to defendant's place of employment, Moss Planing Mill, where he learned that David Earl had been there that day but was no longer there. At 3:40 p.m., he left Moss Planing Mill and went to defendant's place of residence, arriving there about 4:00 p.m. The landlady accompanied him to David Earl's room, the door to which was open. From the hall, Davis could not see the entire room, but he could see a bloody shirt on the bed. He entered the room, saw that David Earl was not there, picked up the shirt, and departed at once. He "got up with the defendant about four thirty. The warrant was sworn out . . . in the neighborhood of five or five thirty or later."

[12] The shirt which the officer seized was not contraband nor was it an instrumentality or fruit of the crime for which the officer sought David Earl; it was "mere evidence." The present rules governing the application of the Fourth Amendment to the United States Constitution make no distinction between the seizure of these items. The Fourth Amendment secures "the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must — of course — be a nexus — automatically provided in the case of fruits, instrumentalities or contraband — between the item to be seized and criminal behavior. Thus, in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of po-

lice purposes will be required." *Maryland Penitentiary v. Hayden,* 387 U.S. 294, 306-07, 87 S. Ct. 1642, 1650, 18 L. ed. 2d 782, 792.

Before the officer saw David Earl's bloody shirt, he had probable cause to believe that defendant had murdered Lewis and that he would evade arrest if not immediately taken into custody. The sight of the bloody shirt strengthened that belief. Davis, therefore, had the right to arrest defendant without a warrant, G.S. 15-41(2), and to enter his room for that purpose. Since the door was wide open and no forcible entry was made, the provisions of G.S. 15-44 and the decision in *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140, are inapplicable.

Davis entered the room, not for the purpose of making a general search for evidence of guilt, but in search of defendant himself. Indeed, he made no search at all. While lawfully in the room looking for his suspect, the officer could properly examine and seize "suspicious objects in plain sight." *Harris v. United States,* ..... U.S. ....., 88 S. Ct. 992, 19 L. ed. 2d 1067. He took the shirt with probable cause to believe that it would prove to be evidence of defendant's guilt. *People v. Gilbert,* 63 Cal. 2d 69, 47 Cal. Rptr. 909, 408 P. 2d 365. See Appendix to the Opinion of the Court in *Gilbert v. California,* 388 U.S. 263, 274, 87 S. Ct. 1951, 1957, 18 L. ed. 2d 1178, 1187. If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful. *Harris v. United States, supra; Ker v. California,* 374 U.S. 23, 83 S. Ct. 1623, 10 L. ed. 2d 726; *United States v. Horton,* 328 F. 2d 132 (3d Cir.).

[13, 14] Neither the Fourth Amendment nor G.S. 15-27 is applicable where no search is made. The law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view. *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25; *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95; *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *Ker v. California, supra; Harris v. United States, supra.* Of course, the limits of reasonableness which are placed upon searches are equally applicable to seizures, *State v. Chinn,* 231 Ore. 259, 373 P. 2d 392, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. *Cooper v. California,* 386 U.S. 58, 87 S. Ct. 788, 17 L. ed. 2d 730; *Preston v. United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. ed. 2d 777.

[15] In this case, we hold that the officer's seizure of the shirt was

reasonable and that it was properly admitted in evidence. *Harris v. United States, supra; Ker v. California, supra.*

[16] We note that, despite the solicitor's initial announcement that he was not asking for an unqualified verdict of murder in the first degree, the court charged the jury that they might return one of four verdicts as to each defendant: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree accompanied by a recommendation of life imprisonment; (3) guilty of murder in the second degree; or (4) not guilty. Thus did the court avoid the error which caused a new trial in *State v. Denny,* 249 N.C. 113, 105 S.E. 2d 446.

In the instant case, the court's instruction made it quite clear that the first issue in this case was whether a defendant was guilty of murder in the first degree, and, that if convinced beyond a reasonable doubt that he was, the second question for the jury's consideration was whether his punishment should be death or life imprisonment. After reading G.S. 14-17 to the jury, the court charged that, if they found a defendant guilty of murder in the first degree, the jury had an unbridled discretionary right — if exercised at the time of rendering their verdict in open court — to recommend that his punishment be imprisonment for life; that no conditions were attached to, and no qualifications or limitations imposed upon, that right; and, if they so recommended, that life imprisonment would be his punishment. He further charged the jury that "the solicitor for the State stated in open court at the beginning of the trial that he is not seeking the death penalty in this case and . . . (he and) private prosecution for the State have not contended in their arguments that you should return a verdict of guilty of murder in the first degree without the recommendation of life imprisonment. . . ."

In the trial below, as to each defendant,

No error.

JOSIE M. WELLS, GUARDIAN OF REDMOND S. WELLS, v. LILLIAN KENT DICKENS; PAUL V. PARKS, JR.; AND THE PLANTERS NATIONAL BANK & TRUST COMPANY AND LILLIAN KENT DICKENS, ANCILLARY AND CO-EXECUTORS OF THE ESTATE OF PEARL K. WELLS

No. 277

(Filed 23 August 1968)

1. Trusts §§ 13, 17— resulting trust — oral agreement by grantee in a deed to hold land in trust

Where the grantee in a deed promises at or before acquiring legal title to hold the property conveyed for the benefit of a third person, or declares

that he will hold the land in trust for such third person, a valid express trust is thereby created even though the deed contains no provision with reference to any right of such third person; such trust may be established by parol evidence which is clear, strong and convincing.

2. Wills § 2— contract to devise to third party beneficiary

An agreement that a third party beneficiary shall have land at the death of the promisor implies his promise to devise or convey the property so as to effectuate the contract between the promisor and the promisee.

3. Trusts § 10; Wills § 40— trust beneficiary having general power of appointment by will — possible appointees

Where the income beneficiary of a trust is given a general power of appointment to dispose of the *corpus* of the trust by her will as if she owned the *corpus* free of the trust, she may devise the property to her own estate or to any persons or institutions of her choice.

4. Wills § 64— definition of equitable election

An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by the same paper.

5. Wills § 64— purpose of doctrine of equitable election

The doctrine of equitable election rests upon the principle that one claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction.

6. Wills § 64— purpose of doctrine of election as applied to wills

The doctrine of election as applied to wills is based on the principle that one cannot take benefits under the will and at the same time reject its adverse or onerous provisions.

7. Wills § 64— doctrine of elections applied to wills

The doctrine of election applies where a will purports to dispose of property belonging to the beneficiary and, inferentially, to bequeath or devise other property in lieu of it.

8. Wills § 64— doctrine of election applied to wills

An election is required only when the will confronts a beneficiary with a choice between two benefits which are inconsistent with each other.

9. Wills § 64— doctrine of election applied to wills

The doctrine of equitable election applies when a testator purports to devise specific property not owned by him to a person other than the true owner and provides other benefits for the owner of such specific property, but the doctrine does not apply if it appears that the testator erroneously considered the specific property devised to be his own.

10. Wills § 64— doctrine of election — choice between property devised and property testatrix had contracted to devise

Where testatrix devised to third persons specific property which she allegedly held in trust for plaintiff and which she allegedly contracted to

devise to plaintiff, and testatrix exercised a general power of appointment in devising to plaintiff a fee in other property in which plaintiff would have taken an equitable life estate under a trust if testatrix had not exercised her power of appointment, testatrix' will requires plaintiff to elect between the property devised to him and the property testatrix had contracted to devise to him.

11. Wills § 64— intent to put devisee to an election may be inferred from dispositions in the will

It is not required that testator spell out his intention to put a devisee to an election when the nature of his dispositions manifest that intent.

12. Wills § 64; Insane Persons § 10— doctrine of election enforceable against one under disability

The doctrine of election can be enforced against persons under disability.

13. Wills § 64— election implied from devisee's dealings with property devised

Where testatrix devised specific property to third persons in breach of her contract to devise the property to plaintiff, but in lieu thereof testatrix devised under a power of appointment a fee to plaintiff in other property in which plaintiff would have had an equitable life estate under a trust if testatrix had not exercised her power of appointment, plaintiff implied an election to accept the fee devised to him by (1) obtaining a judgment declaring that he owned the property devised to him by testatrix in fee, freed of the trust, (2) obtaining a judgment awarding him a portion of the rents accruing from the property devised to him during the year of testatrix' death and accepting such rents, and (3) failing to contend that he had not accepted the devised property in an action brought against him by testatrix' personal representative to recover the federal estate tax attributable to the property devised to him by testatrix.

14. Wills § 64; Insane Persons § 4— guardian of incompetent cannot make election for ward without court approval

The guardian of an incompetent cannot make an election in behalf of the ward to take under or against a will without the direction and approval of a judge of the Superior Court.

15. Wills § 64; Insane Persons § 4— election for one under disability — petition of guardian — hearing by court — appointment of special master — order by court

When an election is required of one under disability, upon petition of the guardian or other interested party, the judge will hear evidence sufficient to enable him to determine which election is in the ward's best interest, and if he deems it necessary the judge may appoint a special master to take an account, hear evidence, and report his findings to the court; the judge will then make findings of fact and enter an order directing which election the guardian shall make.

16. Wills § 64— election between devise and unadjudicated claim

When a beneficiary is required to elect between a devise or bequest and property devised to a third person to which he has an unadjudicated claim, the devisee-claimant is not required to elect until his claim has

been adjudicated in his favor, but the obtaining of a judgment establishing title in the claimant constitutes his election to take the property for which he sued.

17. Wills § 64; Insane Persons § 4— election by incompetent between devise and unadjudicated claim — permission by court to pursue claim

When an incompetent beneficiary is required to elect between a devise and property devised to a third person to which he has an unadjudicated claim, the guardian of the incompetent beneficiary must secure the consent of the court before proceeding with an action to adjudicate the ward's claim.

18. Parties §§ 3, 8— action to establish trust in devised lands — joinder of additional beneficiaries

In an action to establish a trust in lands allegedly devised to defendants in breach of testatrix' contract to devise the property to plaintiff, his brother and sister, plaintiff's brother and sister should be made parties so that defendants' title to the property may be adjudicated in one suit.

19. Parties § 3; Descent and Distribution § 1; Executors and Administrators § 6— action to establish trust in devised lands — executors not proper parties

In an action to establish a trust in lands allegedly devised to defendants in breach of testatrix' contract to devise the property to plaintiff, his brother and sister, the testatrix' executors are not proper parties since the title to land of decedents does not vest in their executors but vests in their heirs at law or devisees.

BRANCH and HUSKINS, JJ., took no part in the consideration or decision of this case.

APPEAL by plaintiff from *May, S.J.*, 30 January 1967 Civil Session of WILSON, docketed and argued as Case No. 273 at the Fall Term 1967.

Action to establish a trust in lands allegedly devised to the individual defendants in breach of testatrix' contract to devise the property to plaintiff, his brother and sister.

The following facts are not in dispute: Plaintiff, Redmond S. Wells (R. S. Wells) is incompetent as the result of congenital injuries. He brings this action by his guardian, Josie M. Wells. R. S. Wells, Alice Wells Romanek, and William M. Wells are the children born to the marriage of Josie M. Wells and William M. Wells, Sr. (Wells).

In 1941, Wells obtained a divorce from Josie M. Wells and married Pearl K. Wells (testatrix). Until the death of Wells in 1961 they lived together in Nevada, where testatrix continued to reside until her death in 1962. No children were born of this marriage.

By an instrument dated 3 February 1956, Wells created an *inter vivos* trust (Pearl K. Wells Trust) for the benefit of testatrix. Dur-

ing her lifetime, she was entitled to the income from the corpus, which consisted largely of farmland in North Carolina, and the trustee, Planters National Bank & Trust Company, had the power to invade the corpus for her support. At her death, the trust was to terminate, and the remaining corpus become the property of Wells' three children "share and share alike absolutely and in fee simple." Notwithstanding this limitation over, Wells gave to his wife "the power to dispose of the entire corpus of this trust, free of the trust, by her will, but only by making specific reference to this power, as she may see fit, with the same effect as if she were the owner of said corpus free of the trust."

On 6 February 1956, Wells amended the Pearl K. Wells Trust by a provision that the undivided interest of R. S. Wells "in the trust assets remaining at the termination of the trust shall vest in Planters National Bank & Trust Company of Rocky Mount, North Carolina, as trustee for a trust known as the 'R. S. Wells Trust,'" which Wells had created on 4 February 1956. The income from this trust was for "the proper support" of R. S. Wells and his legal dependents during his life. At his death, the corpus was to be distributed to his heirs and distributees.

On 7 September 1961, Wells died testate, domiciled in Nevada. His will, dated 4 February 1956, devised and bequeathed to defendant Bank as trustee one-half of his "adjusted gross estate as finally determined for federal estate tax purposes, less the aggregate value of other property which qualified for the marital deduction. . . ." In the same item, he referred to the power of appointment he had given his wife in the instrument creating the Pearl K. Wells Trust and stated, "These provisions are reimposed by this will." The remainder of his net estate Wells devised to his three children. He provided, however, that the share of R. S. Wells should be managed and disposed of under the terms of the R. S. Wells Trust. In satisfaction of the marital-deduction devise, Wells' executor conveyed certain farmlands located in North Carolina, including the farms identified as the "Barron farm," the "Kansas-Weaver-Langley farm," and the "Moore farm," to the Pearl K. Wells Trust.

On 28 June 1962, testatrix died a resident of Nevada. Defendant Bank is her ancillary administrator in North Carolina. Her will, dated 3 May 1961, contained the following provisions:

"SEVENTH: During my lifetime my husband gave me a gift of certain real property known as the Cobb Farm in North Carolina. . . . I give, devise and bequeath the Cobb Farm, share and share alike, to my sister, Lillian Kent Dickens, and to her son, Paul V.

Parks, Jr., or if one be deceased then I give, devise and bequeath the Cobb Farm to the survivor of them." (The transcript contains no evidence as to the value of this farm.)

"EIGHTH: A power of appointment was created for me under the Last Will and Testament of my husband, William Mercer Wells, and I hereby exercise that power of appointment. This power of appointment shall be deemed exercised under this paragraph whether or not I predecease my husband, William Mercer Wells. Pursuant to that power of appointment, I hereby give, devise and bequeath any farmland in North Carolina, except the Cobb Farm which I have heretofore provided for distribution to my sister and her son, to the three children of my husband, William Mercer Wells, share and share alike. . . ." The factual statement in *Bank v. Wells,* 267 N.C. 276, 279, 148 S.E. 2d 119, 121, disclosed that the property which plaintiff acquired by this devise was valued at $91,208.33 for federal-estate-tax purposes.

The Cobb Farm was conveyed in fee simple to testatrix by Wells by deed of gift, dated 6 February 1956 and recorded in Book 605, page 626, Wilson County Registry.

Plaintiff alleges: In consideration of Wells' conveyance of the Cobb Farm to her, "prior to and contemporaneously with the conveyance," testatrix agreed that, subject to her right to use the property during her lifetime, she would hold it for the use and benefit of Wells' three children, to wit: W. M. Wells, Jr., Elizabeth Wells Romanek, and Redmond S. Wells, share and share alike. Testatrix agreed "to transfer or appoint the same" to Wells' children and, pursuant to this understanding, Wells and testatrix executed "mutual wills" disposing of their estates in accordance with this agreement. Testatrix formally signed a will devising the Cobb Farm in accordance with this trust agreement. Thereafter, in breach of such agreement and in breach of the trust under which the Cobb Farm was conveyed to her, she executed a will purporting to convey the Cobb Farm to defendants Lillian Kent Dickens and Paul V. Parks, Jr.

Defendants, The Planters National Bank & Trust Company and Lillian Kent Dickens, are co-executors of the estate of testatrix, having been "issued ancillary letters testamentary by the Clerk of the Superior Court of Nash County." Answering the complaint in their capacity as ancillary co-executors, they disclaimed any interest in the subject matter of the action. The individual defendants, Paul V. Parks, Jr., and Lillian Kent Dickens, in their answer, deny that testatrix agreed to hold the Cobb Farm for the benefit of Wells' three children. They also allege that "plaintiff alone is not the real

party in interest in this case" and that he cannot pursue the action without the joinder of his brother and sister.

As a second further answer and defense they allege (1) that testatrix had exercised her power of appointment contained in the Pearl K. Wells Trust indenture by devising to plaintiff, his brother, and his sister in fee simple all of the farmlands included in the marital-deduction trust; (2) that plaintiff accepted the benefits accruing to him by the exercise of testatrix' power of appointment and thereby estopped himself to attack her devise of the Cobb Farm (which was not a part of the trust corpus) upon any ground whatever.

As a third further answer and defense, defendants allege: On 5 October 1964, R. S. Wells, by his guardian, Josie M. Wells, brought an action in Nash County Superior Court against defendant Bank for a judgment declaring that he owned his share of the property, over which testatrix had exercised her power of appointment, in fee simple freed of the R. S. Wells Trust. The result was that the Supreme Court of North Carolina rendered a judgment in favor of plaintiff. (*Wells v. Trust Co.,* 265 N.C. 98, 143 S.E. 2d 217, decided 23 July 1965.) By electing to take the property freed of the trust under the will of Pearl K. Wells, the plaintiff was bound to recognize the entire will, including the devise of the Cobb Farm to defendant.

On 2 January 1967, Judge Cowper allowed defendants' motion for a severance of issues and directed a separate trial of the plea in bar raised by defendants' third further answer and defense. At the trial before Judge May the parties waived a jury trial. Defendants' evidence consisted of a certified copy of the record and opinion in the case of *Wells v. Trust Co.;* a copy of the final judgment in that action, which the Superior Court of Nash County entered in accordance with the opinion of the Supreme Court; and paragraph six of the plaintiff's complaint, which alleged that Wells conveyed the Cobb Farm to testatrix on 6 February 1965 by deed of gift. Plaintiff offered no evidence.

Judge May found the facts to be as detailed above. In addition, he found:

"The plaintiff accepted the benefit of the devise to him by Pearl K. Wells by the Final Judgment in the case of *Wells v. Trust Company* in the Superior Court of Nash County September 16, 1965, paragraph 4, as follows:

" 'That the property interest acquired by the plaintiff Redmond S. Wells, as an appointee under the general power of appointment

exercised under paragraph Eighth of the Will of Pearl K. Wells passed to said plaintiff absolutely and in fee simple, free of the R. S. Wells Trust.' "

Based on the foregoing facts, Judge May concluded as a matter of law: (1) Plaintiff had the option to renounce the appointment made to him by testatrix' will, take an equitable life estate under the Pearl K. Wells Trust, and attack defendant's title to the Cobb Farm, or accept the appointment. (2) Plaintiff was put to an election, and, by his guardian, he elected to take under testatrix' will. (3) By accepting the devise which testatrix made to him under her power of appointment, plaintiff is estopped to assert any claim to the Cobb Farm "based upon any alleged oral agreement between W. M. Wells and Pearl K. Wells in 1956."

Judge May entered judgment declaring defendants Parks, Jr., and Dickens to be the owners in fee simple of the Cobb Farm and decreeing that plaintiff take nothing by this action. Plaintiff excepted and appealed.

For additional background information, see the statement of facts in the opinions in the two former appeals involving the Pearl K. Wells estate. *Wells v. Trust Co.*, 265 N.C. 98, 143 S.E. 2d 217; *Bank v. Wells*, 267 N.C. 276, 148 S.E. 2d 119.

Poyner, Geraghty, Hartsfield & Townsend, and William R. Allen, III, for plaintiff appellant.

Battle, Winslow, Scott & Wiley, and F. E. Winslow for defendant appellees.

SHARP, J.

Assuming the truth of plaintiff's allegations, the first question presented by this appeal is: Does the will of testatrix impose upon plaintiff the obligation to choose between a one-third interest in fee in the Cobb Farm and the fee in the one-third undivided interest in the property devised to him in Item 8 of testatrix' will?

The complaint alleges: (1) Wells conveyed the Cobb Farm to testatrix by deed of gift. Before and at the time of the conveyance she agreed with him that she would hold the land for the benefit of Wells' three children, subject to her use of it during her lifetime, and that she would devise the farm to the three children share and share alike. (2) In breach of the trust, testatrix devised the Cobb Farm to defendants Dickens and Parks.

[1, 2] At this stage in the litigation no evidence tending to prove

the allegations has been offered, and the alleged trust is denied. The complaint, however alleges the creation of a valid express trust. "When the grantee in a deed, conveying the legal title to land, promises, at or before so acquiring the legal title, to hold it for the benefit of a third person, or declares that he will hold the land in trust for such third person, a valid, express trust is thereby created though the deed contains no provision with reference to any right of such third person. . . . Such trust may be established by parol evidence which is clear, strong, and convincing." *Electric Co. v. Construction Co.*, 267 N.C. 714, 719, 148 S.E. 2d 856, 859-60. An agreement that a third-party beneficiary shall have land at the death of the promisor implies his promise to devise or convey the property so as to effectuate the contract between the promisor and the promisee. *Ledingham v. Bayless*, 218 Md. 108, 145 A. 2d 434, and the authorities cited therein at 116, 145 A. 2d at 439.

[3] The record evidence offered by defendant and the facts found by the court establish that testatrix devised to defendants the Cobb Farm and to plaintiff a one-third interest in fee in all the North Carolina farm property included in the corpus of the Pearl K. Wells Trust over which she had the power of appointment. Had she not exercised her power, at the time of her death, the one-third interest in the property, which she devised to plaintiff in fee, would have vested in defendant Bank as trustee for plaintiff for life, remainder in fee to plaintiff's heirs at law. Testatrix, however, had an unlimited power of appointment; she could have devised the property to defendants, to her estate, to any persons or institutions of her choice. *Bank v. Wells*, 267 N.C. 276, 148 S.E. 2d 119.

[4-8] The doctrine of equitable election, as applied to wills, has been stated many times in our decisions. In *Haley v. Pickelsimer*, 261 N.C. 293, 302, 134 S.E. 2d 697, 704, it is said:

"In *Elmore v. Byrd*, 180 N.C. 120, 122, 104 S.E. 162, Walker, J., in a statement often quoted in subsequent decisions, says: 'An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property *already his own*, which is attempted to be disposed of in favor of a third party by virtue of the same paper. The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction; he cannot accept and reject the same writing.' (Our italics). In *Lamb v. Lamb*, 226 N.C. 662, 665, 40 S.E. 2d 29, Seawell, J., in accord with prior cited cases, states: 'The doctrine

of election, as applied to wills, is based on the principle that a person cannot take benefits under the will and at the same time reject its adverse or onerous provisions; cannot, at the same time, hold under the will and against it. (Citations). The intent to put the beneficiary to an election must clearly appear from the will. (Citations). The propriety of this rule especially appears where, in derogation of a property right, *the will purports to dispose of property belonging to the beneficiary* and, inferentially, to bequeath or devise other property in lieu of it.' (Our italics). Thus, as stated in *Honeycutt v. Bank,* 242 N.C. 734, 744, 89 S.E. 2d 598: 'An election is required only when *the will* confronts a beneficiary with a choice between two benefits which are *inconsistent with each other.*' "

[9] Nothing else appearing, when a testator purports "to devise *specific property,* not owned by him, to a person other than the true owner, and provides other benefits for the owner of such specific property, such beneficiary is put to his election. *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806; *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183. Even so, if it appears that the testator erroneously considered the specific property so devised to be his own, no election is required. *Byrd v. Patterson, supra* [229 N.C. 156, 48 S.E. 2d 45]; *Benton v. Alexander,* 224 N.C. 800, 32 S.E. 2d 584; *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162." *Honeycutt v. Bank,* 242 N.C. 734, 744, 89 S.E. 2d 598, 606. *Accord, Lovett v. Stone,* 239 N.C. 206, 79 S.E. 2d 479.

[10] Plaintiff's allegations that testatrix held the Cobb Farm, which she devised to defendants, in trust for plaintiff, his brother, and his sister, establish that testatrix attempted to devise specific property to others than the true owners. When she devised to plaintiff a fee in other property, of which she could have deprived him entirely and in which he would have taken only an equitable life estate had she not exercised her power, testatrix provided for him, the owner of the specific property she purported to devise to defendants, a substitute benefit. (Plaintiff's brother and sister, however, took no new estate by testatrix' appointment; she devised them the same estate they would have taken under the Pearl K. Wells Trust had she not exercised her power.)

Under plaintiff's allegations, testatrix could not have considered the Cobb Farm as her own, for he avers that she entered into an express contract with Wells to devise the Cobb Farm to his three children. Obviously, therefore, in devising trust property to defendants in fee simple, free from the trust and in contradiction of its

terms, she repudiated the trust. *Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806.

[10, 11] The circumstances attending the devise of the Cobb Farm to defendants and of plaintiff's share in the remainder of the Pearl K. Wells Trust to him in fee do not appear upon the face of the will but, when they are known, the terms of the will clearly reveal testatrix' intention to put plaintiff to an election. Although it is always desirable that a testator spell out his intention to put a devisee to an election, this is not required when the nature of his dispositions manifests that intent. See *Wilson v. Safe Deposit & Trust Co.,* 183 Md. 245, 37 A. 2d 321, 152 A.L.R. 892.

[10, 12] The doctrine of election can be enforced against persons under disability, *Earnhardt v. Clement,* 137 N.C. 91, 49 S.E. 49, *McQueen v. McQueen,* 55 N.C. 16, *Robertson v. Stephens,* 36 N.C. 247. The will required plaintiff to elect between the one-third interest he claims in the Cobb Farm and the property which testatrix devised him in Item 8 of her will. Thus the answer to the first question is YES.

The second question presented is: Has plaintiff made a binding election to take a fee simple interest in the property which testatrix devised him in lieu of a one-third interest in the Cobb Farm?

[13] The trial judge found as a fact that plaintiff had accepted the fee testatrix devised to him. He held as a matter of law that in so doing plaintiff had made his election and estopped himself from asserting any claim to the Cobb Farm. If plaintiff were competent, his dealings with the devised property (as conducted by his guardian) would imply his election to accept the devise, 97 C.J.S. *Wills* § 1272 (1957), and support the court's findings of fact:

(1) In the action for a declaratory judgment, which plaintiff (by his guardian, Josie M. Wells), Alice Wells Romanek, and William M. Wells, Jr., instituted on 5 October 1964 against defendant Bank as trustee under the Pearl K. Wells Trust and as ancillary administrator of Wells' estate in North Carolina, defendant Bank and defendant Dickens as co-executors of testatrix' estate in North Carolina, defendant Dickens individually *et al.,* plaintiff made specific allegations as to his rights under testatrix' will. He sought a judicial decree that under Item 8 he acquired his share of the property therein devised in fee, freed of the R. S. Wells Trust. He thereby evidenced an intention to take under the Item-8 devise if the court decided in accordance with plaintiff's contentions. 97 C.J.S. *Wills* § 1276 (1957); 57 Am. Jur. *Wills* § 1542 (1948). Plaintiff prevailed in that action

when this Court construed the will in accordance with his position. *Wells v. Trust Co., supra.* Had plaintiff lost, the unsuccessful assertion of his claim would not have amounted "to a conclusive election for or against it, the theory being that where such a claim is proven groundless it is conclusively shown that the beneficiary was not in possession of two inconsistent rights and hence was under no duty to make an election. . . ." 57 Am. Jur. *Wills* § 1542 (1948). Extended discussion of the effect of plaintiff's participation in the action is unwarranted in view of his incompetency. See, however, Annot., Election by beneficiary to take under or against will as predicable upon initiation of, or participation in, court proceedings, 166 A.L.R. 316, 330-332 (1947) and Annot., 93 A.L.R. 2d 8, 43-45 (1964).

(2) In *Wells v. Trust Co., supra,* plaintiff, his brother, and his sister sought a decree that they were entitled to the whole of the rents which accrued from the trust property during the year of testatrix' death. The decision was that the rents from the property be apportioned between testatrix' personal representatives and the remaindermen, that is, plaintiff, his brother, and his sister. Doubtlessly, these rents have been paid to the remaindermen. When the beneficiary chooses to accept one of two inconsistent benefits, such choice is tantamount to the rejection of the other. *Trust Co. v. Burrus,* 230 N.C. 592, 55 S.E. 2d 183.

(3) On 20 April 1965, the personal representatives instituted an action in Wake County to recover from plaintiff the pro rata part of the federal-estate tax attributable to the property he received under Item 8 of testatrix' will. A judgment — which this Court upheld on 11 May 1966 in *Bank v. Wells,* 267 N.C. 276, 148 S.E. 2d 119 — was rendered against plaintiff for his proportionate share of the tax, $21,956.72 with interest from varying dates on sums making up that total. We take judicial notice of our records in prior interrelated actions, *Haley v. Picklesimer, supra.* The record in that case shows no contention by plaintiff that he had not accepted the Item-8 devise.

[14] Thus, were plaintiff competent, the answer to the second question would be YES, and the ruling of the court that plaintiff was estopped to claim an interest in the Cobb Farm would be sustained. Plaintiff, however, is an incompetent, and his guardian could not make an election for him without the direction and approval of the judge of the Superior Court. This she has not obtained; the answer to the second question, therefore, must be No. *Weeks v. Weeks,* 77 N.C. 421; *Flippin v. Banner,* 55 N.C. 450; *McQueen v. McQueen, supra.* See *Price v. Price,* 133 N.C. 494, 510, 45 S.E. 855, 860. "[T]here

is no dissent from the proposition that in the absence of express statutory authority, the guardian or committee of an incompetent cannot make an election in behalf of the ward to take under or against the will of a deceased person. . . . The election in behalf of the infant or incompetent must be made by or with the consent of a court having jurisdiction of the ward's estate. . . ." 25 Am. Jur. *Guardian and Ward* § 104 (1940); 97 C.J.S. *Wills* § 1247 (1957); 5 Page, Wills § 47.18 (Bowe-Parker rev. ed. 1962); Gardner, Wills § 174 (1903); 1 Jarman, Wills ch. XVI, § VII, p. 554 (6th ed. 1910); Pritchard, Wills and Administration § 754 (1894); Thompson, Law of Wills § 477 (2d ed. 1936); 2 Underhill, Law of Wills § 737 (1900); Annot., Election on behalf of incompetent to take under or against will, 147 A.L.R. 336 (1943) supplementing 74 A.L.R. 452 (1931).

[15] When an election is required of one under disability, upon the petition of his guardian, or other interested party, the judge will hear such evidence as will enable him to determine which election is in the ward's best interest. If he deems it necessary, the judge may appoint a special master to take an account, hear evidence, and report his findings and recommendations to the court. After he has ascertained the facts, explored the consequences to the ward of the alternative choices, and determined which choice is in the ward's best interest, the judge will make appropriate findings of fact and enter an order directing the guardian what election to make.

In *Flippin v. Banner, supra,* an election was required of an infant whether he would claim under or against a will. Battle, J., speaking for the Court, said, "As to the defendant Robert W. George, who is an infant, there must be a reference to the master, to enquire and ascertain the value of both interests, and then the Court will direct what election shall be made for him." *Id.* at 455. In *McQueen v. McQueen, supra* at 20, the same judge said, "That the parties who are required to elect in this case are infants, will not prevent an election from being decreed. . . . The Court will in such cases refer it to the master to enquire and ascertain the value of both interests, and then direct what election shall be made." In *Weeks v. Weeks, supra* at 424, Rodman, J., for the Court, said: "In case any of the parties put to an election are under a disability, the court will order a reference to ascertain what is to their advantage, and if an account be necessary for that purpose, will order one."

[16] Until plaintiff brought this action the court had no knowledge that he claimed any interest in the Cobb Farm. His guardian has apparently proceeded upon the assumption that no election was required of her ward, and that he could take both a fee in his share

of the trust property and one-third of the Cobb Farm if he could establish his claim. He cannot. *Noyes v. Noyes,* 233 Mass. 55, 123 N.E. 395. He must elect, but he cannot elect until the validity of his claim to the Cobb Farm is established. At the present time he has no estate in the Cobb Farm. According to the records in the office of the Register of Deeds of Wilson County, testatrix owned in fee simple the land, which she devised to defendants. Plaintiff now has nothing but a mere claim that he is one of the three beneficiaries of a parol trust — a claim which he will be required to establish by evidence which is clear, strong, and convincing, and which might be defeated when brought to trial. To put the donee of a benefit under a will to an election, two things are essential: the testator must give property of his own, and he must profess to dispose of property belonging to the donee. *Haley v. Pickelsimer, supra; Lamb v. Lamb,* 226 N.C. 662, 40 S.E. 2d 29; *Elmore v. Byrd,* 180 N.C. 120, 104 S.E. 162.

In *Haley v. Pickelsimer, supra,* this Court held that a minor plaintiff's unsuccessful prior action to establish rights based on an alleged contract for her benefit between testator and her mother constituted neither a dissent from the will nor a forfeiture of the bequest made to her therein. *Accord, Langan Realty Co. v. Dixon,* 46 S.D. 170, 191 N.W. 444.

In *Lamar v. McLaren,* 107 Ga. 591, 34 S.E. 116, the testator devised stock in a number of drugstores to certain individuals and directed his executors to operate the stores for five years after his death and to distribute the profits annually among his legatees. Henry J. Lamar, one of the executors and legatees, claimed to have been a partner in the businesses and entitled to a one-third interest therein. The executors sought the direction of the court, *inter alia,* whether the said Henry J. Lamar was "put to his election to choose either under said will or against said will, *or whether the fact of said alleged ownership* by him and claim by him constituted a case for election under said will." *Id.* at 592, 34 S.E. at 116. (Emphasis added.) The trial court declined to permit Henry J. Lamar to submit evidence to establish his interest as a partner in the businesses and decreed that he be put to his election whether he would claim under the will, as a legatee, or against the will as a partner. Upon appeal, the Supreme Court held that the will clearly manifested the testator's intent to dispose of the entire drug business which he had conducted and that Henry J. Lamar could not occupy the position of both surviving partner and legatee. The other legatees, however, denied that he had an interest in the businesses. The court said: ". . . Until this issue had been passed upon and it had been adjudicated that he in fact had an interest in such business, he should not have been

called upon to make an election. Unless he owned an interest in the property which the testator affected to dispose of, the principle of election did not apply. For, in order to put the donee of a benefit under a will to an election, two things are essential: first, the testator must give property of his own; second, *he must profess to dispose of property belonging to his donee.* . . . (Devisee) must have legal title to both benefits and have the right to enforce either at his election. . . . Now, if Henry J. Lamar, Jr. were required to elect between his legacy under the will and his *mere claim* to an interest in the business of H. J. Lamar & Sons, that is, between his legacy and a lawsuit, and he should elect to take his claim, or the court should force him so to elect, and he should, upon a subsequent trial for the enforcement of his claimed partnership interest, fail, for any reason, to establish the same, then there would be no one to compensate, as in such event there would be no defeated or disappointed legatees, but, on the contrary, the other legatees would get the very property he claimed. Inasmuch, therefore, if Henry J. Lamar, Jr. does not in fact own an interest in the business of H. J. Lamar & Sons, one of the essentials of an election is wanting and the rule is inapplicable, we direct that he be not called upon to make an election until after there has been in this case an adjudication of the question whether or not he is in fact the owner of an interest in the property of the business of H. J. Lamar & Sons, disposed of by the will, and then only in the event this issue is determined in his favor." *Id.* at 604-05, 34 S.E. at 121. *Accord, Rieves v. Smith,* 184 Ga. 657, 192 S.E. 372, 112 A.L.R. 368.

In *Holliday v. Pope,* 205 Ga. 301, 53 S.E. 2d 350, the plaintiff alleged that the testatrix contracted to devise him certain real estate in consideration of his agreement to make his home with her and render her such assistance as she required. The testatrix devised the specific property, which the plaintiff alleged she had agreed to give him, to the defendant, and gave the plaintiff other property. In plaintiff's suit against the devisee and executor for specific performance of the testatrix' alleged contract, he contended that the plaintiff could not maintain the action because he had "not renounced his legacy under the will." Relying upon *Lamar v. McLaren, supra,* the court said: "The petitioner now has a lawsuit, a mere claim, which might be defeated when brought to trial. . . ." The decision was that he would be required to elect "only when by a judgment of the court the petitioner acquires legal title to the property which he seeks; *and by the very act of praying for and obtaining such a decree of title the petitioner will have thereby made an election to renounce his legacy under the will* . . . [T]he petitioner is not re-

quired to make an election at this time, and the election to take the title by specific performance of the contract when that is an accomplished fact will deny to him any right or title in the property given him under the will." *Id.* at 311-12, 53 S.E. 2d at 357. (Italics ours.)

A different conclusion was reached in *Elmore v. Covington,* 180 Tenn. 128, 172 S.W. 2d 809, wherein the court said that claimant-devisees "will not be permitted to bargain with a dead man"; that they must elect between accepting the devise and *prosecuting* a suit for damage for breach of contract to make a will.

[16] In our opinion, the Georgia court, in *Holliday v. Pope, supra,* has found the correct solution to the problem which arises when a beneficiary is required to elect between a devise or bequest and property devised to a third person to which he has an unadjudicated claim. The devisee-claimant is not required to elect until his claim has been adjudicated in his favor, but, when this has been done, "obtaining such a decree of title" constitutes his election to take the property for which he sued. This is also the solution suggested by the author of Annot., Necessity of election between will and contract by testator to leave property at death, 152 A.L.R. 898 (1944), wherein it is said: ". . . In the ordinary non-contract case, where the devisee is required to elect merely as between his own property and that which the will offers in exchange, a fair choice is presented, for it is plain that he will receive either one or the other. But, if, in the case of a contract claimant who has not actually received or accepted what the will offers, the doctrine of election is to be so applied as to require him to reject wholly and finally the provisions of the will before seeking to establish the contract — that is, if he is required to choose in advance between a meager certainty and the expense and uncertainties of litigation founded on parol evidence — a fair choice is not presented. As so applied, the 'equitable' doctrine of election may become inequitable; it has the merit of discouraging litigation, but not the merit of encouraging honorable dealing. Armed with a doctrine extended to that point, a testator may easily drive a hard bargain in avoidance of his contracts.

"It should be sufficient that the claimant is not permitted to take both under the will and against it, and that in arriving at a solution of his problem no substantial injury is occasioned to other distributees. The matter might be dealt with in a manner analogous to that permitted in the case of contracts claimed to be subject to a right of rescission. If the will and the claimed contract are irreconcilable and the claimant takes under the will, he abandons the contract; but if

he attempts to establish the alleged contract (as a rescinder attempting to establish fraud) and fails therein, he should be permitted to take what the will gives him, with or without an imposition of equitable terms." *Id.* at 898-99. See statement of Ruffin, J., in *Dunlap v. Ingram,* 57 N.C. 178, 188.

[17] Since plaintiff has not made a binding election, and since he must elect between the fee devised him in Item 8 and the interest he claims in the Cobb Farm (assuming he is able to establish that Claim), plaintiff's guardian must obtain the court's direction as to which choice she will make. It follows that she must secure the consent of the court to continue the prosecution of this action further, for, if she obtains a judgment establishing the trust which she has alleged, the election is made. If she loses, however, plaintiff will still retain the devise.

In order to decree the election which the guardian shall make, the court must determine, as a question of fact, which choice is in her ward's best interest. Necessarily, therefore, the judge must consider the relative value of plaintiff's interest in the two properties and the income therefrom, as well as any other relevant factors which may bear upon the question. See Annot., Factors considered in making election for incompetent to take under or against will, 3 A.L.R. 3d 6 (1965). *Inter alia,* pertinent consideration here would include plaintiff's chances of obtaining a judgment establishing the trust he has alleged; the cost of the litigation; the effect of such a judgment upon plaintiff's liability for State inheritance and federal-estate taxes — liabilities which have heretofore been established for the devised property; and the financial consequences of incorporating the Item-8 property into the corpus of the R. S. Wells Trust.

To evaluate plaintiff's claim to the Cobb Farm, the judge must inquire into the evidence upon which plaintiff will rely to establish the allegations of the complaint in this action.

The judgment of the Superior Court will be vacated and the case remanded for proceedings in accordance with this opinion. Any statements in *Price v. Price,* 133 N.C. 494, 510, 45 S.E. 855, 860, which may seem to conflict with the conclusion which we have reached were not necessary to the decision of that case. In *Price,* the jury's verdict established that the testator's will complied with his contract to devise property in suit. Therefore, no question of election was involved. See comment on *Price* in Annot., 152 A.L.R. 898, 901 (1944).

[18] Alice Wells Romanek and William M. Wells, Jr., as pointed out by defendants, were not made parties to this action. In the event the court should authorize plaintiff to proceed with this action, it

would appear desirable that they be made parties to the end that the individual defendants' title to the Cobb Farm may be adjudicated in one suit. *Allred v. Smith,* 135 N.C. 443, 47 S.E. 597; Annot., Privity between co-tenants for purposes of doctrine of res judicata, 169 A.L.R. 179 (1947); 1 McIntoch, N. C. Practice and Procedure § 643 (2d ed. 1956).

[19] The costs of this appeal will be divided equally between plaintiff and the individual defendants. Upon the allegations of the complaint, we perceive no theory upon which the executors of Pearl K. Wells are proper parties to this action. "Title to land of decedents does not vest in their executors but in their heirs at law or devisees." *Hinkle v. Walker,* 213 N.C. 657, 658, 197 S.E. 129. See *Parker v. Porter,* 208 N.C. 31, 179 S.E. 28; *Williams v. Hooks,* 200 N.C. 419, 157 S.E. 65.

Reversed and remanded.

BRANCH and HUSKINS, JJ., took no part in the consideration or decision of this case.

STATE v. DAVID EDWARD WHITE, FRANCIS PAUL WHITE, WILLIAM HARRIS NICHOLS

No. 86

(Filed 23 August 1968)

1. **Criminal Law §§ 156, 181— State may petition for certiorari to review post-conviction judgment**

   The State, as well as a prisoner, may petition for *certiorari* to review a final judgment in proceedings under the Post-Conviction Hearing Act, G.S. 15-217 *et seq.*

2. **Criminal Law § 181— post-conviction proceedings are not substitute for appeal**

   Proceedings under the Post-Conviction Hearing Act are not a substitute or an alternative to direct appeal.

3. **Criminal Law § 181— Post-Conviction Act — error which could have been presented on appeal**

   The Post-Conviction Hearing Act does not license a collateral attack upon any ruling which could have properly been presented by a direct appeal from the judgment pronounced in the original trial.

4. **Criminal Law § 181— scope of Post-Conviction Act**

   The Post-Conviction Hearing Act incorporates *habeas corpus, coram nobis,* and any other common law or statutory remedy under which a prisoner may collaterally attack his sentence. G.S. 15-217.

5. Criminal Law § 181— claims justiciable under Post-Conviction Act

Only claims which have not been previously adjudicated are justiciable under the Post-Conviction Hearing Act.

6. Constitutional Law § 30— constitutional guarantees of persons accused of crime — recognition by State

North Carolina has fully recognized its obligation to protect every right guaranteed by both the state and federal constitutions to all those whom it accuses of crime.

7. Criminal Law § 181— claims justiciable under Post-Conviction Act

The Post-Conviction Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control prevented him from claiming them earlier.

8. Criminal Law § 181— post-conviction proceedings — claims which could have been presented on appeal

Alleged errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time or reasserted in post-conviction proceedings.

9. Criminal Law §§ 84, 181; Searches and Seizures § 1— post-conviction proceedings — evidence allegedly obtained by unconstitutional search and seizure

A prisoner may not attack his conviction in a post-conviction proceeding upon the asserted ground that the trial court admitted evidence which was obtained by unconstitutional search and seizure, since this alleged error could have been reviewed on direct appeal.

HUSKINS, J., took no part in the consideration or decision of this case.

ON *certiorari* issued upon application of the Attorney General to review a judgment of *Hubbard, J.*, in post-conviction proceedings at the April 1967 Session of PITT, docketed and argued as Case No. 87 at the Fall Term 1967.

Petitioners, William Harris Nichols, David Edward White, and Francis Paul White, were jointly tried at the 20 June 1966 Mixed Session of Pitt upon a bill of indictment charging them (1) with feloniously breaking and entering the Harris Supermarket of Greenville on 18 March 1966, and (2) with having in their possession without lawful excuse implements of housebreaking, to-wit: a pry bar, two crowbars, one eight-pound sledge hammer, two punches and two chisels.

At the trial, Nichols, an indigent, was represented by M. E. Cavendish, attorney, whom the court appointed to defend him. The other two defendants were represented by Milton C. Williamson, an attorney employed by them.

The evidence for the State tended to show: During the early

morning hours of 18 March 1966, Sergeant R. B. Elks of the Greenville Police observed a 1955 Ford automobile containing three men stop at the front door of the Harris Supermarket. The two passengers got out, and Elks saw the glass in front of the supermarket shake. The front door popped open about a foot and a half, and the men immediately got back into the automobile without having entered the store. The car was driven away. Elks followed the car for about six blocks and stopped it "about 1:52 a.m." upon the arrival of Officer Cannon, whom he had called for assistance. David Edward White, the driver, and Francis Paul White were in the front seat; Nichols, in the back. The three were arrested for breaking into the Harris Supermarket and placed in the police car. Upon Elks' request, David White gave him the car keys so that the Ford could be moved. Officer Cannon drove the car off the street and locked it. The officers retained the keys.

After taking the men to jail, Elks, Cannon, and three other officers returned to the Harris Supermarket. There they observed marks on the metal door where it had been pried open. Elks' testimony leaves the time of the officers' return to the supermarket uncertain. He first said it was "about 1:15 or 1:30." He then said "it was sometime after 1:00, it was a short time." Later, he said it was "shortly after 2:50." He also testified, however, that the automobile was moved to the police station about 30 minutes after the petitioners were taken to jail. There it was searched by Elks, Cannon, and Officer Briley. At that time, a warrant (presumably for breaking into Harris Supermarket) had been served upon the three petitioners. Elks testified that the warrant was served "about 1:00 a.m." In the automobile, the officers found gloves, tape, chisels, crowbars, hammers, a bag of corks, and several punches. An eighteen-inch crowbar, wrapped in tape, was "under the right side of the front seat"; two crowbars were in the trunk. "A set of four gloves" was found on the back seat and "a set of two gloves" under the right front seat. In the trunk of the car was a bag containing an eight-pound sledge hammer, two chisels, and two punches. In the glove compartment, the officers found friction tape and a bag containing a number of cork stoppers.

Prior to the introduction of the foregoing evidence, none of the defendants made a motion to suppress it on the ground that it was obtained by a warrantless search. The defendants did, however, interpose an objection to the admission into evidence of each item found in the automobile. The objections were overruled, and exceptions to the rulings entered in the record.

The State's evidence also tended to show: On 11 March 1966,

David Edward White had called at the office of the Harris Supermarket and inquired if he could get his wife's check cashed there. The manager, who was busy, asked him to wait, but he left.

Defendant Nichols offered no evidence. Defendants White offered evidence which tended to show: They are residents of Laurel, Maryland. On 15 March 1966, David Edward White had rented the automobile in which he, his brother, Francis Paul White, and Nichols, a casual acquaintance, had taken a trip to Myrtle Beach, South Carolina. They spent Tuesday night at a truck stop in Virginia and arrived at Myrtle Beach the following day. They did not sleep Wednesday night. On Thursday morning, they left Myrtle Beach and were en route to Maryland when Officer Elks stopped them. A few minutes before, David Edward White had attempted to awaken his two passengers so that one of them might take the wheel or help him stay awake. When they got out of the car, however, each staggered to such an extent that he realized neither was in a condition to drive.

At the time of their arrest, defendants (who had taken with them only the clothes they were wearing) had not opened the trunk of the rented car. None of them knew that the tools were in the vehicle. The automobile was searched without their permission.

The week before, David Edward White, who operates a feed company at Laurel, Maryland, had been in North Carolina attempting to collect some past-due accounts. During the trip he had investigated Greenville as a place to live; he had gone into Harris Supermarket "to find out the procedures of living here, and operating with those procedures."

The jury found each defendant guilty as charged. On the count of unlawful possession of implements of housebreaking, each received an active sentence to be served in the State's prison — Nichols, 8-10 years; David Earl White, 5-7 years; Francis Paul White, 5-7 years. Upon the count of breaking and entering, the judgment as to Nichols was confinement "in the State's prison for not less than 8 nor more than 10 years, sentence to begin at the expiration of sentence imposed for possession of burglary tools." This sentence, however, was suspended for five years upon good behavior. On the second count, both Whites received a sentence of 5-7 years to begin at the expiration of the sentence imposed upon the first count. These sentences were suspended upon the same conditions as those imposed upon Nichols.

Nichols and Francis Paul White gave notice of appeal to the Supreme Court. The latter, in open court and in writing, withdrew

his appeal on 1 September 1966. David Edward White did not give notice of appeal. At the June Term 1966, M. E. Cavendish, at his request, was relieved as counsel for Nichols, and J. W. H. Roberts, attorney, was appointed to represent Nichols upon his appeal to the Supreme Court.

Nichols' appeal was docketed in this Court as Case No. 92 at the Fall Term 1966. None of his six assignments of error related to the admissibility of the implements of housebreaking which the officers found in their search of the automobile. That case on appeal was devoid of any indication that objection had been made to the admission of the evidence, and Nichols made no contention that the search was unlawful. In a per curiam opinion, filed 21 September 1966, *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21, this Court found no error in the trial.

In October 1966, while serving the sentences imposed, the three defendants filed petitions for post-conviction review under G.S. 15-217 *et seq.* Each averred that his constitutional rights had been violated at the trial in that evidence procured through an illegal search and seizure had been used to convict him of the unlawful possession of implements of housebreaking. No other grounds for relief were alleged.

Upon the representation of each that he was indigent, on 4 November 1966, the court appointed petitioners' present counsel, A. Louis Singleton, to represent them in the post-conviction proceedings. At the 28 January 1967 Session of Pitt, the three petitioners, who were present in open court with their counsel, stipulated that their petition related only to their conviction on the count charging the possession of implements of housebreaking without lawful excuse, and that they were not asking that their conviction and sentence for storebreaking be vacated.

In his answer to defendants' petition, the solicitor for the State admitted that the search of the automobile in which petitioners were riding at the time they were arrested was without a warrant. He denied, however, that the search was illegal. Upon the hearing he contested petitioners' right to relief upon two principal grounds: (1) Petitioners may not collaterally attack the legality of the search in post-conviction proceedings, since the correctness of the trial court's ruling, which admitted the evidence obtained by the search, was reviewable as an incident of the trial by direct appeal to the Supreme Court. Petitioners White waived their right to question the judge's ruling by failing to appeal; Nichols waived his right by failing to raise the question upon his appeal. (2) No search warrant was re-

quired since the search was made (a) as an incident of a lawful arrest for a felonious breaking which the officer had seen petitioners commit, (b) for the implements with which the breaking had been effected, and (c) as soon as possible after the two arresting officers had transported the three petitioners to jail, returned to the scene for their Ford and moved it to the jail, where it could be safely and more conveniently searched.

The transcript of petitioners' trial was introduced in evidence at the post-conviction hearing and is a part of this case on appeal. It indicates that objections were duly made to the introduction of the seized items. After considering the transcript (the only evidence introduced at the hearing) and the argument of counsel, Judge Hubbard made findings in accordance with the facts as stated above. Upon those findings, he held as a matter of law that: (1) the search of the automobile in which the petitioners were arrested was not made incident to the earlier arrest for breaking and entering and, being a warrantless search, was illegal; (2) the introduction into evidence of the items procured by the search was a substantial denial of petitioners' constitutional rights; (3) post-conviction proceedings provide an appropriate remedy to adjudicate the question which petitioners now raise; (4) none of the petitioners knowingly waived his constitutional rights, either at trial or subsequent to said trial; and (5) petitioners have the right to petition for redress as to one conviction without seeking a new trial on both counts.

Judge Hubbard thereupon entered judgment awarding petitioners a new trial upon the count charging the unlawful possession of implements of housebreaking and authorizing the release of each upon bond in the amount of $5,000.00. (The Attorney General informs us that petitioners White gave the required bond, and that petitioner Nichols was delivered to the State of Maryland upon a detainer which that state had filed against him.) The State of North Carolina excepted to the judgment awarding petitioners a new trial and petitioned this Court for certiorari, which was granted.

T. W. Bruton, Attorney General; Theodore C. Brown, Jr., and Ralph A. White, Jr., Staff Attorneys for the State.

Gaylord & Singleton for defendant appellees.

SHARP, J.

[1] The State, as well as a prisoner, may petition for certiorari to review a final judgment in proceedings under the Post-Conviction Hearing Act (Act), G.S. 15-217 — G.S. 15-222. *State v. Merritt,*

264 N.C. 716, 142 S.E. 2d 687; *State v. Burell,* 254 N.C. 317, 119 S.E. 2d 3; G.S. 15-222. See N. C. Sess. Laws 1967, Ch. 523.

[9] In this proceeding, petitioners sought and obtained post-conviction review upon the allegation that the trial judge had erroneously admitted evidence obtained by an unlawful search and seizure. One of the three petitioners (Nichols) had appealed his conviction to this Court without assigning the admission of the evidence as error; the other two did not appeal. Post-conviction review was had entirely upon the transcript of the original trial, and one superior court judge has purported to grant petitioners a new trial for errors assertedly committed by another — errors which were properly reviewable upon appeal. At the threshold, therefore, we are confronted with this basic question: May petitioners attack their conviction in a post-conviction proceeding upon the asserted ground that the trial court admitted evidence which had been illegally obtained in violation of the Fourth Amendment to the United States Constitution?

[2] This Court has consistently held that proceedings under the Act are not a substitute or an alternative to direct appeal. *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343; *State v. Graves,* 251 N.C. 550, 112 S.E. 2d 85; *State v. Wheeler,* 249 N.C. 187, 105 S.E. 2d 615; *State v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. Since July 1965, when the Act was rewritten, G.S. 15-217 has provided: "The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, or any remedy of direct review of the sentence or conviction, but, except as otherwise provided in this article, it comprehends and takes the place of all other common-law and statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment, and shall be used exclusively in lieu thereof."

[3] In the first proceeding under the Act to come before this Court, *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513 (1953), Ervin, J., pointed out that it did not license a collateral attack upon any ruling which could have properly been presented by a direct appeal from the judgment pronounced in the original trial: "It is not designed to add to the law's delays by giving an accused two days in court where one is sufficient for the doing of substantial justice under fundamental law. It is not devised to confer upon an accused, who is defended by counsel of his own selection or competent counsel appointed by the court, a legal privilege, at his own election, to have his rights arising under the common law and the statutes adjudicated at a time of the State's choosing in the original criminal action,

and his rights arising under the constitutions of his State and Nation adjudicated at a subsequent time of his own choosing in another proceeding. It is enacted to provide an adequate and available post-trial remedy for persons imprisoned under judicial decrees who suffered substantial and unadjudicated deprivations of their constitutional rights in the original criminal actions resulting in their convictions because they were prevented from claiming such constitutional rights in the original criminal actions by factors beyond their control." *Id.* at 51, 74 S.E. 2d at 528-29.

In *State v. Cruse,* 238 N.C. 53, 76 S.E. 2d 320 (1953), Devin, J., again emphasized that the Act did not "afford to a person heretofore convicted of crime the right to present to this Court assignments of error in the trial in which he was convicted and from which he did not appeal. . . . The statute provides a procedure by which a person convicted of crime may thereafter obtain a hearing upon the question whether he was denied due process of law. It affords an opportunity to inquire into the constitutional integrity of his conviction." *Id.* at 58, 76 S.E. 2d at 323.

In *State v. Wheeler,* 249 N.C. 187, 105 S.E. 2d 615 (1958), this Court reversed a judgment of the Superior Court in post-conviction proceedings which denied a new trial to the petitioners, who were "without counsel or witnesses" at the trial in which they were convicted and sentenced. In noting that the purpose of the Act was to redress the deprivation of constitutional rights such as those, the Court — speaking through Higgins, J. — said, "The Post Conviction Hearing Act is not a substitute for appeal. It cannot be used to raise the question whether errors were committed in the course of the trial. The inquiry is limited to a determination whether the petitioners were denied the right to be represented by counsel, to have witnesses, and a fair opportunity to prepare and to present their defense. . . ." *Id.* at 191-92, 105 S.E. 2d at 620; *accord, State v. Graves, supra.*

In *State v. Wilson,* 269 N.C. 297, 152 S.E. 2d 223, an indigent, unable to perfect his appeal because of inability to pay counsel, filed a petition for a post-conviction hearing under the Act upon grounds which should have been asserted upon appeal. The hearing judge correctly disposed of the petition by directing counsel to apply to this Court for *certiorari.* We granted the petition, and — upon appeal — ordered a new trial. Similarly, in *State v. Roux,* 263 N.C. 149, 139 S.E. 2d 189, counsel for the petitioner in post-conviction proceedings was directed to apply to this Court for *certiorari* to review the petitioner's trial when it was manifested that the petitioner, an indigent without counsel, had withdrawn his appeal because he did

not know that "he had a constitutional right to have the State provide him with means to secure a full appellate review of his trial. . . ." *Id.* at 157, 139 S.E. 2d at 195. *Accord, State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225.

[4, 5] The Act as now written incorporates *habeas corpus, coram nobis,* and any other common law or statutory remedy under which a prisoner may collaterally attack his sentence (G.S. 15-217, Ch. 352, Sess. Laws 1965). Thus, a petitioner sentenced upon a plea of guilty to a crime not charged in the bill of indictment received his discharge in *McClure v. State,* 267 N.C. 212, 148 S.E. 2d 15. See also *State v. Burell, supra,* in which the petitioner alleged that sentence had been imposed upon him by a court without jurisdiction. However, only claims as to which there have been no prior adjudication are justiciable under the Act.

This is the first post-conviction proceeding to come to us in which a judge has awarded a prisoner a new trial for alleged errors which could have been reviewed upon direct appeal from the judgment pronounced. Nor have we, upon granting certiorari to review a judgment denying post-conviction relief, reviewed asserted errors in a criminal trial which were brought forward for the first time in a post-conviction proceeding. In *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343, we allowed certiorari to review a judgment denying a new trial to the petitioner serving a life sentence for murder. The hearing judge, upon plenary and convincing evidence, had found facts which disproved the petitioner's contention that he had been deprived of an opportunity to prepare his defense. The judge had also considered and overruled the petitioner's assertions that his constitutional rights had been violated when evidence was introduced at the trial that fingerprints found on objects at the scene of the crime compared with his fingerprints, which had been taken while he was in custody and before he had procured counsel. In affirming the judgment denying the petitioner a new trial, we reiterated and re-emphasized that the Act was not a substitute for appeal. However, for the consolation of the petitioner, who had not appealed his conviction, we pointed to both state and federal authorities holding that the fingerprint-evidence had not violated his constitutional rights.

In the present proceeding, the hearing judge apparently took the view that federal habeas corpus is now available to State prisoners to challenge illegal searches or seizures in cases arising after the decision in *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 108, and that we therefore should afford petitioners a corresponding collateral review "for a full airing of federal claims." See *Linkletter v.*

Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. ed. 2d 601; *Fay v. Noia,* 372 U.S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837; *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L. ed. 2d 408.

We are, of course, aware that petitioners — despite their "procedural default" in the State court — may yet, in a federal habeas corpus proceeding, pursue their claim that they were convicted by illegally obtained evidence. Indeed, were a prisoner to have both direct and collateral review in the State court of his claim that he was deprived of constitutional rights in his trial, he might still have a de novo "evidentiary hearing" in federal habeas corpus proceedings if the district judge concludes that the facts found by the State court were not "reliable findings." Mr. Chief Justice Warren, in *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L. ed. 2d 770, has said that the district judge "may, and ordinarily should, accept the facts found in the hearing (in the state court). *But he need not.* In every case he has the power, *constrained only by his sound discretion,* to receive evidence bearing upon the applicant's constitutional claim." *Id.* at 318, 83 S. Ct. at 760, 9 L. ed. 2d at 789. (Italics ours.) Since the Supreme Court of the United States has the last word in questions involving the Federal Constitution, it would serve no useful purpose were we here to marshal the arguments which weigh against a decision that an inferior federal court may order the release of one held pursuant to a judgment of a court of this State, or to voice our foreboding as to its ultimate effect upon our federal system and the administration of justice.

[6, 7] North Carolina has fully recognized its obligation to protect every right guaranteed by both the state and federal constitutions to all those whom it accuses of crime. At state expense it furnishes an attorney to any indigent charged with a serious crime. G.S. 15-4.1, G.S. 15-5. Prior to trial, it affords to every defendant full opportunity to assert and establish constitutional or other objections to the grand jury which returned the bill of indictment against him, G.S. 9-23; *Miller v. State, supra.* If the State offers a defendant's confession, and objection is made that it was involuntary or "the product of constitutionally impermissive methods," the judge must — in the absence of the jury — hear evidence, find facts, and determine the question in a preliminary inquiry. *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868; *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. When a defendant moves to suppress or objects to evidence upon the ground that it was obtained by illegal search and seizure, the state must likewise establish the legality of a warrantless search upon *voir dire.*

State v. Pike, 273 N.C. 102, 159 S.E. 2d 334. After conviction, every defendant has the unqualified right to appeal. G.S. 15-180; *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651; *State v. Graves, supra; State v. Cruse, supra.* Any indigent may appeal as a pauper and, if he has been convicted of a felony or of an offense less than the felony charged, the State pays the cost of the appeal. G.S. 15-181. The Post-Conviction Act provides every defendant adequate opportunity for the adjudication of claimed deprivations of constitutional rights which prevented him from obtaining a fair trial, provided factors beyond his control prevented him from claiming them earlier.

We are convinced that our laws fully meet the requirements of due process, and that we should not disrupt the administration of justice in North Carolina by changing the orderly procedures established by the legislature to review a convicted defendant's claims that his constitutional rights have been violated. Furthermore, in view of the present instability of longstanding decisions and the diversity in the views of the different federal district court judges, any change which we might make in our procedure in an effort to satisfy the federal courts would not necessarily accomplish that purpose. An additional hearing would merely provide a prisoner with one more inconclusive state remedy, for the Supreme Court has held (1) "that the federal habeas judge may in his discretion deny relief to an applicant who had deliberately by-passed the orderly procedure of State courts and in so doing has forfeited his state court remedies," *Fay v. Noia, supra* at 438, 83 S. Ct. at 849, 9 L. ed. 2d at 869, and (2) that the federal district judge may try the facts anew whenever he supposes that the state court judge has not "reliably found the relevant facts." *Townsend v. Sain, supra* at 318, 83 S. Ct. at 759, 9 L. ed. 2d at 788.

In *Anderson v. Gladden,* 234 Ore. 614, 383 P. 2d 986, *cert. denied,* 375 U.S. 975, the Supreme Court of Oregon denied relief under its post conviction act to a petitioner who had failed, prior to his trial, to challenge the bill of indictment on the ground that Indians had been systematically excluded from the grand jury which returned it. O'Connell, J. (concurring with Denecke, J., in the majority opinion), said: "It is possible that under *Fay v. Noia* . . . the writ of habeas corpus is still available to petitioner in the federal courts, but I do not think that this should concern us. . . . [T]he legislative assembly has expressed the policy of this state with respect to the application of the principle of res judicata in post-conviction proceedings. . . . That is a salutary rule. If the United States Supreme Court feels differently, it is privileged to open the federal

courts to provide additional relief. But we are not required to make our procedure conform to that policy." *Id.* at 628-29, 383 P. 2d at 993.

The inexpediency of a series of reviews, in each of which a prisoner asserts a particular violation of his constitutional rights, has nowhere been better stated and demonstrated than in *In re Sterling*, 63 Cal. 2d 486, 47 Cal. Rptr. 205, 407 P. 2d 5. In *Sterling*, the petitioners' conviction of gambling had been affirmed on appeal. Thereafter, in habeas corpus proceedings in the state court, they attempted again to attack the judgment on the ground that the evidence upon which they had been convicted was obtained by an unconstitutional search and seizure. The Supreme Court of California held that habeas corpus was not available to challenge the use of evidence thus obtained, and that habeas corpus did not provide "a second appeal." Traynor, C.J., speaking for a unanimous court, asserted — as do we — that his state's appellate procedure afforded every defendant a fair opportunity for an adjudication of all claimed deprivations of his constitutional rights. Reasoning that the use of illegally seized evidence — unlike an involuntary confession — carried no risk of convicting an innocent person, that the purpose of the exclusionary rule was to deter unconstitutional methods of law enforcement, and that that purpose is adequately served when a state provides an orderly procedure for raising the question at or before trial and on appeal, he said: "The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *Id.* at 487-88, 47 Cal. Rptr. at 207, 407 P. 2d at 7.

Noting the intimations in *Mapp v. Ohio, supra* at 659, 81 S. Ct. at 1693, 6 L. ed. 2d at 1092 (fn. 9), and *Fay v. Noia, supra* at 438, 83 S. Ct. at 848, 9 L. ed. 2d at 869, that a petitioner's deliberate bypassing of orderly state procedures *could* deprive him of federal habeas corpus relief, Traynor, C.J., said: "Pursuit of (state) remedies will give a defendant a full adjudication of his claim and also lay the groundwork for immediate federal review. Under these circumstances, to authorize additional state collateral remedies would result only in needless repetition and delay. We have recognized the need to accomodate the state system to the existence of a federal collateral remedy . . . but such accomodation does not require the abandonment of procedures vital to the orderly administration of justice by the state courts. Preservation of a defendant's constitutional rights lies not in multiple state remedies that will ordinarily pro-

duce the same result, but in one effective state remedy plus an awareness on the part of all state officials that ultimate federal review is available. We expedite the availability of that federal remedy by the compilation of a full and adequate record and by insisting that one state remedy is ordinarily enough." *Id.* at 489, 47 Cal. Rptr. at 208, 407 P. 2d at 8. *Accord, In Re Lokey,* 64 Cal. 2d 626, 51 Cal. Rptr. 266, 414 P. 2d 394, *cert. denied,* 385 U.S. 888; *In Re Shipp,* 62 Cal. 2d 547, 43 Cal. Rptr. 3, 399 P. 2d 571, *cert. denied,* 382 U.S. 1012; *In Re Lessard,* 62 Cal. 2d 497, 42 Cal. Rptr. 583, 399 P. 2d 39. *In Shipp, supra,* the California court had previously said that the issue of a coerced confession raised at the trial "could not be embalmed for the purpose of transmigration to post-conviction procedures. To condone such piecemeal presentation and to sanction split adjudication between trial and post-conviction process would be to place a premium on covert retention of issues for post-judgment litigation in the event of defeat upon trial and appeal." *Id.* at 556, 43 Cal. Rptr. at 10, 399 P. 2d at 578.

[8, 9] We adhere to our former decisions. Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. See *People v. Eastman,* 33 Misc. 2d 583, 228 N.Y.S. 2d 156, *affirmed,* 18 App. Div. 2d 1102, 239 N.Y.S. 2d 972; *Ciucci v. People,* 21 Ill. 2d 81, 171 N.E. 2d 34; *cf. People v. Hamby,* 32 Ill. 2d 291, 205 N.E. 2d 456; *Collier v. Commonwealth,* 387 S.W. 2d 858 (Ky. Ct. App.). The answer to the question propounded at the beginning of this opinion is, therefore, No. Thus, we do not consider the question whether the instruments of housebreaking introduced into evidence at the trial were obtained by an unconstitutional search and seizure.

The judgment of the court below is reversed, and the cause remanded to the Superior Court for the entry of an order remanding petitioners to the custody of the warden of the State's prison.

Reversed.

HUSKINS, J., took no part in the decision or consideration of this case.

BESS WOODARD CAMPBELL v. JOHN R. JORDAN, JR., TRUSTEE OF THE ESTATE OF MOSES W. WOODARD, DECEASED; MOSES W. WOODARD, III; NANCY ELIZABETH WOODARD AND MARY WHITE WOODARD McDONALD

No. 522

(Filed 23 August 1968)

1. Wills § 28— interpretation of a will

In interpreting a will, the testator's intent is gathered from the entire instrument.

2. Trusts § 10— agreement by beneficiaries to postpone trust termination

Even though under the terms of a will a trust is to terminate at a certain time, the beneficiaries may, by agreement, postpone its termination.

3. Trusts § 10— agreement that trustee continue to administer vested interests in trust corpus — action by remaining beneficiaries to compel trust termination as to vested interest

Where under the terms of a testamentary trust a portion of the trust corpus vested in the children of a deceased income beneficiary in fee simple, free of the trust, the remaining income beneficiaries have no standing to object to an agreement whereby the trustee continues to administer the vested interest of the children as if it remained a part of the trust corpus absent a showing of injury; therefore, the remaining income beneficiaries may not compel the trustee to terminate the trust as to the deceased beneficiary's children by conveying to them their share of the trust corpus.

4. Trusts § 6— trustee's discretion to convey corpus to beneficiary

Where testator's will created a trust for the benefit of his wife, son and daughter during their lives, with the estate ultimately vesting in fee in the issue of the son and daughter, a provision of the will giving the trustee authority to convey to a beneficiary any part or all of the beneficiary's share of the trust corpus if the trustee deems it necessary or best for the *cestui* and consistent with the welfare of testator's family and estate *is held* not to give the trustee unbridled discretion to convey trust assets to a beneficiary, but the beneficiary must show substantial economic need or circumstances indicating that his best interest requires a conveyance before the trustee can invade the corpus in his behalf.

5. Trusts § 5; Wills § 28— construction of trusts — settlor's intention in paramount

A settlor's intention is always paramount to the wishes of a beneficiary and, unless his purpose is contrary to law or public policy, the courts will give it effect.

LAKE, J., took no part in the consideration or decision of this case.

APPEAL by defendants Woodard and McDonald from *Canaday, J.*, 18 September 1967 Civil Session of WAKE.

Action for a declaratory judgment to construe the will of Moses W. Woodard (testator). The basic facts are admitted and stipulated.

Testator died 27 April 1915. Surviving him were his wife, Elizabeth Woodard (wife), a son, Moses W. Woodard, Jr. (Woodard, Jr.), and a daughter, Bess Woodard Campbell (plaintiff). Woodard, Jr., died 6 January 1959, survived by three children, defendants Moses W. Woodard, III, Nancy Elizabeth Woodard, and Mary Woodard McDonald (appellants), all of whom are of age. Wife died 7 November 1960, leaving a will in which she devised all of her property to plaintiff. Plaintiff, who was born 4 February 1885, has no lineal descendants.

Testator's will, which was dated 14 August 1913 and duly probated 4 May 1915, devised his residuary estate to Joseph G. Brown in trust for his wife, son, and daughter. Brown (and any successor trustee or trustees) was given plenary and discretionary power to manage, sell, convey, invest and reinvest the corpus of the trust. The present trustee, defendant John R. Jordan, Jr., was duly appointed by the Clerk of the Superior Court of Wake County on 20 October 1966. The trust estate consists of two lots of commercial property in the City of Raleigh. Tract No. 1 is located at the corner of Fayetteville and E. Martin streets and is known as 301-3-5-7-9 Fayetteville Street and 4 and 6 E. Martin Street. Tract No. 2 extends from Fayetteville Street to Salisbury Street; it is 224 Fayetteville Street and 223 S. Salisbury Street. Rentals from the store buildings on these properties constitute the estate's income.

Testator's will (summarized and quoted below) empowered the trustee "to dispose of such trust estate and the income therefrom as follows: —"

A. Until the marriage, or death of wife unmarried, "to divide semi-annually the net income . . . into as many equal shares as there shall be wife of mine then alive and unmarried, and son of mine then alive or son of mine dead but with lineal descendants then alive and daughter of mine then alive or daughter of mine dead but with lineal descendants then alive, and to pay such shares of income to such wife, son and daughter or the lineal descendants of such deceased son or daughter . . . per stirpes. . . .

"Upon the marriage or death of my said wife her interest in said trust estate shall cease and determine and shall go and belong to my said son and daughter and their lineal descendants in the same manner as is hereinafter provided for the holding and disposing of the original shares of said son and daughter in said trust estate."

B. (Plaintiff) During the life of daughter Bessie "to divide semi-annually the net income from said trust estate into as many equal shares as there shall be daughter of mine then alive and wife

of mine, then alive and unmarried, and son of mine then alive or son of mine dead but with lineal descendants then alive and to pay such shares of income to such daughter, wife and son or the lineal descendants of such deceased son . . . per stirpes. . . .

"Upon the death of my said daughter leaving lineal descendants surviving her, said trustees shall divide the corpus of said trust estate into as many equal shares as there shall be such daughter deceased and wife of mine alive, and unmarried, at that time and son of mine then alive or son of mine dead but with lineal descendants then alive and shall pay, deliver and convey absolutely and in fee simple one of said shares per stirpes, to such lineal descendants as my said daughter shall have so left her surviving, upon which payment the trust as to that share shall cease and determine.

"Upon the death of said Bessie without leaving any lineal descendants surviving her, then her interest in said trust estate shall cease and determine and shall go and belong to my said wife and son and his lineal descendants in the same manner as is herein provided for the holding and disposing of the original shares of my said wife and son in said trust estate."

C. During the life of Woodard, Jr., "to divide semi-annually the net income from said trust estate into as many equal shares as there shall be son of mine then alive and wife of mine then alive and unmarried and daughter of mine then alive or daughter of mine dead but with lineal descendants then alive and to pay such shares of income to such son, wife and daughter or the lineal descendants of such . . . daughter . . . per stirpes. . . .

"Upon the death of my said son leaving lineal descendants surviving him the said Trustee shall divide the corpus of such trust estate into as many equal shares as there shall be such deceased son and wife of mine alive and unmarried at that time, and daughter of mine alive or daughter of mine dead but leaving lineal descendants alive at that time and shall pay, deliver and convey absolutely and in fee simple one of said shares per stirpes to the lineal descendants which the said Moses shall have so left him surviving, upon which payment the trust as to that share shall cease and determine.

"Upon the death of said (son) without leaving any lineal descendants surviving him, then his interest in said trust estate shall cease and determine and shall go and belong to my said wife and daughter and such daughters' lineal descendants in the same manner as is herein provided for the holding and disposing of the original shares of said wife and daughter in said trust estate.

"ITEM 6th * * *

"The said trustees (if they in their judgment deem it necessary or best for the welfare of the cestui que trust, and consistent with the welfare of my family and estate) may from time to time, advance, deliver and convey absolutely and in fee simple, free from the trust, to my said wife if unmarried or to my said daughter after she arrives at the age of twenty-one years or to my said son after he arrives at the age of twenty-one years, any part or all of the share of the corpus of the trust estate above provided for his or her benefit and thus terminate the trust so far as it affects the property so advanced, delivered and conveyed and the receipt of such cestui que trust shall be a complete release and discharge of said Trustees for so doing. But in case of such advancement the amount so advanced shall be counted in estimating the amount of the corpus of the estate for division and charged up to the share of the person so receiving the same and deducted from the payment on division to his or her lineal descendants; and in estimating the income for division, interest shall be counted on such advancement at the rate of 3% per annum and be charged up to the share of income of the person so advanced and be deducted from the payment of income to the party so advanced or to his or her lineal descendants."

Upon the death of Woodard, Jr., his children, the appellants, were entitled to have the trust estate divided and to receive a one-third part of it free of the trust. However, they were of the opinion that to partition by sale valuable rental property on Raleigh's Fayetteville Street would reduce their income, the income of the other beneficiaries, and the value of the remaining corpus. Appellants therefore requested the trustees to maintain the corpus of the trust intact and to continue to administer it as before. Since 4 May 1915, the trust established by testator's will has been administered by successive trustees. Since the death of testator's wife, the trustee has paid the net income from the estate, one-half to plaintiff and one-half to appellants.

On 31 March 1967, plaintiff instituted this action for a construction of testator's will. She alleged, *inter alia,* that the children of her deceased brother are entitled to one-third of the corpus of the trust estate; that she is entitled to two-thirds — one-third in her own right and one-third as the sole beneficiary under her mother's will; that the trustee has the "mandatory duty" to terminate the trust as to these two one-third interests by conveyances in fee simple to her and to appellants. She prays that the will be thus construed and the trustee ordered to make conveyances in accordance with such

construction. Answering, defendant trustee denied that plaintiff is entitled as she alleged, but he joined in her prayer for "the interpretation of the testamentary trust and the direction of the court in regard thereto." Appellants, answering the complaint, admit that a one-third undivided interest in the trust estate is vested in them and that, upon demand, they would be entitled to a conveyance thereof. They aver, however, that a division of the trust property would not only reduce the beneficiaries' total income but would decrease the value of the trust corpus, and, for that reason, they desire the continuation of the status quo. They controvert plaintiff's conclusion that she acquired a vested right in the corpus of trust estate by the will of her mother and that the trustee has a mandatory duty to terminate the trust in whole or in part. On the contrary, they allege that plaintiff had been receiving an annual income of $18,000.00 a year from the trust; that she has no needs which would justify the trustee in invading the corpus under Item 6 of the will; and that any attempt on his part to do so would amount to an abuse of discretion.

When the case came on for trial the parties waived a jury trial. Judge Canaday found facts substantially as detailed above, and made the following conclusions of law: (1) Upon the death of Woodard, Jr., on 6 January 1959, a one-third undivided share of the trust estate vested in his three children, defendant appellants, "in fee simple," free and clear of trust. (2) Upon the death of testator's wife, an additional one-sixth interest in the estate vested in appellants in fee simple, free and clear of trust. At that time, plaintiff also became entitled to the income from one-half of the trust estate, which defendant trustee now holds for her use and benefit. (3) Defendant trustee has the authority, in his discretion, to terminate the trust and convey to plaintiff her one-half undivided share of the estate "in fee simple, free and clear of trust." (4) "It is the mandatory duty" of defendant trustee to terminate the trust as to the one-half undivided share of appellants Woodard and McDonald and to convey their share to them in fee simple, free and clear of trust.

After making the foregoing conclusions of law, the court ordered defendant trustee to convey to defendant appellants their one-half undivided interest in the trust property and decreed (1) that defendant trustee, in his discretion, had the authority to convey to plaintiff the other one-half interest in the trust property, free and clear of trust, and (2) that "upon conveyance of the aforesaid one-half undivided share to plaintiff," the trustee had "the power, authority and duty" to terminate the trust. From this judgment, the lineal descendants of Woodard, Jr., appealed.

Upon the oral argument, and in the brief of defendant trustee, it was disclosed that, on 31 October 1967, the trustee executed a deed conveying to plaintiff a one-half undivided interest in the corpus of the trust and a similar deed for the other one-half interest to appellants. He delivered these deeds to the Clerk of the Superior Court of Wake County to be held by him pending the outcome of this appeal.

Boyce, Lake & Burns for plaintiff appellee.

William R. Hoke for John R. Jordan, Jr., trustee, defendant appellee.

Purrington, Joslin, Culbertson & Sedberry for Moses Woodard, III, Nancy Elizabeth Woodard and Mary White Woodard, additional defendant appellants.

SHARP, J.

Appellants' assignments of error present these questions: (1) May plaintiff, over the objection of defendant appellants, require the trustee to convey to them their one-half undivided interest in the corpus of the trust created by the will of Moses W. Woodard, and to terminate the trust as to defendant appellants? (2) Does the trustee have absolute discretion under the will to terminate the trust during the lifetime of plaintiff by conveying to her a one-half interest in the corpus of the estate irrespective of whether such conveyance is "necessary or best for the welfare of the cestui que trust (plaintiff), and consistent with the welfare of . . . (the) family and estate" of the testator? The answer to these questions requires an interpretation of the will.

[1] In interpreting a will, the testator's intent is gathered from the entire instrument. Despite its circumlocution and apparently conflicting provisions — some of which seem to be the result of attempts at clarification —, when we consider the will of Moses W. Woodard from its four corners, his purpose emerges. The trustee was directed to provide for testator's wife during her widowhood and for his son and daughter during the lifetime of each. During the joint lives of the three, the trustees (or trustee) to whom his estate was committed were directed to divide its income into three equal parts, and to distribute it semi-annually to each. Upon the death of either the son or daughter leaving lineal descendants, his or her share immediately vested in that child's lineal descendants. Upon the death of the other without lineal descendants, his share vested in the lineal descendants of the other, and the trust ended.

[2, 3] The first of the three beneficiaries to die was Woodard, Jr. Upon his death on 6 January 1959, a one-third interest in the corpus of the trust vested in his lineal descendants, appellants, and the *testamentary* trust terminated as to that share. They then had the absolute right — had they desired to exercise it — to hold that share in severalty and to require a conveyance in fee simple from the trustee. In effect, they became tenants in common with the trustee and had the right to partition. However, so long as the trust continued as to either of the other beneficiaries, and no prejudice to them resulted, there was no legal impediment to an agreement between appellants and the trustee that he continue to administer their vested interest as if it were still a part of the entire trust corpus. After the death of Woodard, Jr., as to appellants' one-third part, the trustee acted as their appointed agent and not under the will. "Even though a trust is to terminate, by the terms of the will at a certain time, the beneficiaries may, by agreement, postpone its termination." 96 C.J.S. *Wills* § 1047, p. 673 (1957); Bogert, Trusts & Trustees § 1010 (1962).

Appellants' election to have the trustee continue to handle the property for them appears to have been the exercise of good business judgment and to have inured to the benefit of all the beneficiaries of the estate. Plaintiff, who cannot compel the trustee to exercise his discretionary powers under the will to terminate the trust and convey to her a share in the trust estate, has no legal right to require a division of the estate. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639. Thus — absent a showing of injury (which does not appear) — she has no standing to object to the arrangement between appellants and the trustee by which he continues to administer the property as a unit. The answer to the first question is No.

Upon the death of wife on 7 November 1960 all her rights in the trust estate terminated. She, therefore, had no interest in the estate which she could transfer by will. Thus, no part of testator's estate passed to plaintiff under the will of her mother. Thereafter, however, plaintiff was entitled to the income from one-half the estate, and appellants were entitled to a conveyance of their one-half interest in fee had they desired it.

Plaintiff is now 83 years old; she has no lineal descendants. Upon her death "without leaving any lineal descendants surviving her," the will provides that her interest in the trust estate will "cease and determine" and go as provided in the will "for the holding and disposing of the original shares" of testator's wife and son. The effect of that provision was that, after the death of Woodard, Jr., leaving lineal descendants, during the lifetime of testator's wife and daugh-

ter there remained three interests in the trust estate, two of which the trustee was *required* to administer. After the death of wife, the estate consisted of two shares. Upon the death of plaintiff, her share will also end and the entire trust estate will belong to appellants as the lineal descendants of Woodard, Jr. Testator decreed that the interest of each of the three original beneficiaries should terminate with his death and that the estate should ultimately vest in fee in the issue of son and/or daughter. It transpired that son had issue and daughter did not.

[4] Plaintiff may not, as a matter of right, require the trustee to convey to her, free of the trust, any part of the trust estate. However, since the day on which she became 21 years of age, the trustee has had the authority, if he deemed it "necessary or best for the welfare of the *cestui que trust* (plaintiff), and consistent with the welfare of testator's family and estate" to convey to plaintiff in fee simple, free from the trust, any part or all of the share of the *corpus* of the trust estate provided for her benefit. In 1951, she and her mother, who was then alive and unmarried, demanded that the trustees (W. G. Mordecai and First Citizens Bank and Trust Company) convey to each of them one-third of the trust corpus free from the trust. The corporate trustee was willing to make the conveyance; the individual trustee refused. Plaintiffs then instituted an action against the trustees to require them "to exercise a discretionary power granted by the will." They alleged that the conveyances which they had requested were "best for their welfare," and that the individual trustee, in refusing to exercise his discretionary power in their favor, had acted arbitrarily and with improper motives, to-wit, prejudice. At that time, plaintiff and her mother lived together "in a substantial dwelling" owned by plaintiff in Pinehurst, and the annual income of each from the trust estate had been $6,718.30. As a result of a new lease, however, in the immediate future it was to be at least $14,000.00 annually.

Upon a waiver of jury trial, Judge Bone found that the individual trustee had not abused his discretion or acted arbitrarily but, on the contrary, he had acted with discretion, reasonableness, and good judgment; that it was not then necessary nor best for the welfare of either plaintiff or her mother, nor consistent with the welfare of the family and the estate of the trustor, Moses W. Woodard, that a one-third part of the corpus of the trust estate be distributed to each of the plaintiffs; that the conclusion of the individual trustee that the trustees ought not to convey one-third of the trust corpus to each of the plaintiffs at that time was the correct one and consistent with the intentions of the trustor, Moses W. Woodard.

On appeal, this Court affirmed the judgment of Bone, J. It was noted, however, "that the judgment is not to be construed to preclude the trustees from exercising the discretionary power in the future if they jointly conclude that its exercise is 'necessary or best for the welfare of the *cestui que trust,* and consistent with the welfare of . . . (the) family and estate' of the testator." *Id.* at 474, 64 S.E. 2d at 646.

[4] The final question presented is whether the trustee may, without any showing by plaintiff that "it is necessary or best" for her welfare and consistent with the welfare of the trust estate and testator's family, convey to her any part of the trust estate? In other words, may he make an arbitrary decision upon any ground which appeals to him, or must plaintiff show substantial economic need or circumstances indicating that her best interest require a conveyance before the trustee can invade the corpus in her behalf? We think it abundantly clear that testator did not intend to give his trustee the unbridled discretion to divide his estate in contravention of his testamentary plan or to invade the corpus in behalf of any beneficiary except in case of necessity or circumstances clearly denoting that such invasion was best for the beneficiary's personal welfare. The beneficiary's necessity or welfare does not include the personal satisfaction she might derive from owning the property in fee and being able to devise it to persons of her choice.

That testator did not contemplate an arbitrary division and termination of his trust estate in contravention of his plan for the ultimate distribution of his property is evidenced by the requirement of Item 6 of the will that any advancement "be counted in estimating the amount of the corpus of the estate for division and charged up to the share of the person so receiving the same and deducted from the payment on division to his or her lineal descendants; and in estimating the income for division, interest shall be counted on such advancement at the rate of 3% per annum and be charged up to the share of income of the person so advanced and be deducted from the payment of income to the party so advanced or to his or her lineal descendants." From this, it is apparent that testator contemplated only advancements and conveyances which were necessary to meet specific and reasonable requirements. The will does not authorize a conveyance for the mere purpose of terminating the trust or of making a division of the estate which — 53 years after testator's death — the trustee might think more equitable than the one testator had made.

Plaintiff, who has been receiving approximately $18,000 a year

from the trust estate, has made no contention that she is faced with any economic emergency which requires an invasion of the trust corpus. Should a genuine necessity arise, the trustee's discretionary power will be equal to the emergency. In the meantime, however, a termination of the trust by the conveyance to plaintiff of a one-half undivided interest in the trust estate — as presently contemplated by the trustee — would be an unreasonable departure from the terms of the trust.

In *In Re Murray,* 142 Me. 24, 45 A. 2d 636, the court construed a will which authorized trustees to pay from the principal of the estate "such sums as in their absolute discretion may be needed for the comfortable support and maintenance" of testator's widow. In surcharging the trustees, who had advanced sums of money to the widow upon her request when she had money on deposit in the bank, the court said: "The term 'discretion' has been defined as deliberate judgment, — the discernment of what is right and proper. It implies soundness of judgment — judgment directed by circumspection.

"* * *

" 'If a trust is created for beneficiaries in succession, the Trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.' Restatement of Law of Trust, § 232, and note (b) thereunder; also section 183." *Id.* at 30-31, 45 A. 2d at 638-39.

In *Kemp v. Paterson,* 4 App. Div. 2d 153, 163 N.Y.S. 2d 245, *affirmed,* 6 N.Y. 2d 40, 188 N.Y.S. 2d 161, 159 N.E. 2d 661, the trust agreement authorized the trustee to pay to *B* all of the net income annually during the rest of her life and so much of the principal sums of this trust from time to time as the trustees may deem for the best interest of said *B*. Pursuant to this provision the trustees decided to distribute all of the principal of the trust to *B*. The remaindermen objected, and the court declined to permit the termination of the trust. The court said, "While undoubtedly, in a sense (the termination of the trust), will serve the beneficiary's 'best interest,' the latter words must be interpreted not in the broadest meaning but in a manner which is consistent with the trust deed. Her 'best interest' must be judged within the framework of the status bestowed upon her by the settlor, the status of a life beneficiary, not of a recipient of the entire trust *res*.

"In creating a trust, the settlor was not merely designating trustees as conduits through whom a gift could be made to the daughter whenever it would be to her advantage. The trust represented a plan of the settlor that included not only the beneficiary (*B*), but also

remaindermen. In adding a flexible provision for the invasion of principal for the 'best interest' of the beneficiary, the settlor was not injecting a facile means for destroying the trust." *Id.* at 156, 163 N.Y.S. 2d at 248.

[5] A settlor's intention is always paramount to the wishes of a beneficiary and, unless his purpose is contrary to law or public policy, the courts will give it effect. *Trust Co. v. Taliaferro*, 246 N.C. 121, 97 S.E. 2d 776; 4 Strong, N. C. Index, Wills § 27 (1961).

The judgment of the court below is vacated, and the case is remanded to the Superior Court for the entry of judgment in accordance with this opinion.

Error and remanded.

LAKE, J., took no part in the decision or consideration of this case.

S & W REALTY & BONDED COMMERCIAL AGENCY, INC., v. DUCKWORTH & SHELTON, INC.

No. 276

(Filed 23 August 1968)

1. Brokers and Factors § 6— right to commissions

Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner.

2. Brokers and Factors § 6— right to commissions — procuring cause of a sale

The broker is the procuring cause of a sale if the sale is the direct and proximate result of his efforts or services.

3. Brokers and Factors § 6— "procuring cause" defined

The term "procuring cause" refers to a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms.

4. Brokers and Factors § 6— determination of broker's commission

The owner is not permitted to reap the benefits of the broker's labor without just reward if he has requested a broker to undertake the sale

of his property and accepts the results of services rendered at his request; the owner is liable for the reasonable value of those services, or the listing agreement can make the payment of commissions dependent upon the broker's obtaining a certain price for the property.

5. Brokers and Factors § 6— right to commission — where broker does not find prospect

The rule that the broker is entitled to compensation where the owner of the listed property reduces the price and sells it to the broker's prospect does not apply when the broker did not find the prospect to whom the owner sold the property.

6. Corporations § 4; Evidence § 31— corporate minutes — best evidence — oral testimony

The minutes of a corporation, which are required by G.S. 55-37, are the best evidence of its acts; when it is shown that no minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony.

7. Corporations § 12— right of officer to compensation

An officer of a corporation has no right to compensation for services rendered the corporation in the absence of an express contract to pay for them.

8. Brokers and Factors § 6— broker's oral contract of employment with corporate defendant — sufficiency of evidence

In an action by plaintiff realty corporation to recover a commission of 5% of the purchase price of realty allegedly sold by the plaintiff on behalf of the defendant owner of the realty, testimony by the officers and stockholders of the plaintiff, who were also officers and minority stockholders of the defendant corporation, that there was an oral contract of employment between plaintiff and defendant to sell the realty at a price of $100,000, which testimony was not objected to, *is held* sufficient to constitute a *prima facie* showing of a contract between the parties, and defendant corporation's motion for nonsuit was properly denied.

9. Trial § 33— instructions — application of law to evidence

Instructions which fail to apply the law to the evidence are error. G.S. 1-180.

10. Brokers and Factors § 2— termination of employment

When no time is specified in his contract, if a broker fails to find a purchaser or to make the sale within a reasonable time, his contract of employment is at an end.

11. Corporations § 12— contract between officer and adversely interested director — validation

A contract between a corporation and a director having an adverse interest may be validated if, after a full disclosure, the transaction is specifically approved by a majority of the voting shares other than those owned or contracted by the adversely interested directors. G.S. 50-30(b), (1) and (2).

12. Brokers and Factors § 6— action for commissions — failure to submit to jury issues arising on the evidence

In an action by plaintiff realty corporation to recover a commission allegedly arising from the sale by plaintiff of property owned by the defendant corporation, there was sufficient evidence to require the submission of the following issues to the jury, and the failure to do so was error: (1) that the original contract of employment between the parties to sell the property for $116,500 had terminated prior to the sale of the property for $100,000 and that the contract had no bearing upon the rights of plaintiff's recovery; (2) that the plaintiff, in order to recover at all, must satisfy the jury by the greater weight of the evidence that the directors of defendant-corporation expressly employed the plaintiff to negotiate a sale of the property for $100,000 and that the directors validated the contract pursuant to G.S. 50-30(b), (1) and (2); and (3) that, pursuant to the contract, the plaintiff did procure the sale of the property.

13. Brokers and Factors § 6— instructions on broker's amount of damages — reasonable value of services

In an action by a realty corporation to recover a commission allegedly earned by the sale of defendant's property, instructions on the amount of compensation to which plaintiff was entitled to recover are erroneous where (1) the trial court referred to a terminated contract of employment as the basis of defendant's liability to plaintiff, the evidence showing instead that the sale was made pursuant to a subsequent oral contract of employment in which no rate of commission was stated, and where (2) the court failed to charge the jury that it was not bound to fix the compensation at a rate of 5% of the sale, which rate was testified to by the plaintiff as the standard commission in the area on the sale of commercial property, but that the plaintiff was entitled to recover, if at all, only the reasonable value of the services it rendered, based upon the skill, time, effort and cost expended in procuring the sale.

APPEAL by defendant from *Hasty, J.*, 18 September 1967 Schedule "A" Session of MECKLENBURG.

Action to recover a brokerage fee.

Plaintiff alleges: The name of plaintiff corporation has been changed to S & W Realty and Insurance Agency. Defendant corporation listed with plaintiff for sale certain properties which defendant "owned in the City of Charlotte located on and adjacent to West Trade Street and agreed to pay a commission of 5% of the purchase price of said property in the event an acceptable offer was obtained on said property." On 8 July 1965, plaintiff sold the property to the Belk Investment Company for $100,000.00. It is, therefore, entitled to recover $5,000.00, which defendant refuses to pay. Answering, defendant denied that it made the alleged contract and that plaintiff made the sale to Belk's Investment Company. It further averred that plaintiff is a corporation solely owned and operated by R. C. Shelton, Sr., and R. C. Shelton, Jr., who are also

officers and directors of defendant Corporation; that, because of the fiduciary relationship existing between the officers and directors of the two corporations, defendant could not make a contract to pay plaintiff a commsision unless its directors and stockholders gave their express consent, and that no such consent was given.

Both plaintiff and defendant offered evidence. That of plaintiff tended to show:

For the sale of commercial property in Charlotte during 1965, the usual compensation of brokers and real estate agents was 5%. At all times pertinent to this litigation, Shelton, Jr., owned 48% of the stock in defendant corporation; Shelton, Sr., owned 1%; and Fred L. Taylor, 51%. Shelton, Sr., was president of plaintiff corporation, a stockholder, and a member of its board of directors. Since March 1966, Shelton, Jr., has been with plaintiff. He is secretary-treasurer, a stockholder, and a member of the board of directors of plaintiff-corporation.

The minutes of the annual meeting of defendant's stockholders and directors on 23 November 1962 show: (1) The three stockholders were present. (2) The following directors and officers were elected: F. L. Taylor, president; R. C. Shelton, Jr., vice-president; R. C. Shelton, Sr., secretary-treasurer; and David Whitesell, assistant secretary. (The evidence contains no further mention of Whitesell, who was not a stockholder.) (3) "After general discussion, motion was duly made, seconded and adopted that: S & W Realty Company be authorized to offer Belk the 217-219 Trade and Arcade properties for $139,500.00 and would consider an offer of a minimum of $116,500.00. That S & W Realty Company be paid a commission of 5% of sales price. Further that; *(sic)* the Pegram Street properties could be sold for a minimum of $10,000.00 net after commission of 5% to S & W Realty Company."

The Trade and Arcade properties referred to in the preceding minutes (Trade Street property) were adjacent to land owned by Belk Brothers Department Store in Charlotte (Belk's). Shelton, Sr., offered it to Belk's for $116,500.00. The offer was not accepted although LeRoy Robinson, one of Belk's agents with whom he dealt, told Shelton, Sr., that the store wanted the property. During 1963, 1964, and 1965, the continuous efforts of Shelton, Sr., to sell the property to Belk's for $116,500.00 were unsuccessful. Shelton, Jr., took no part in these negotiations. During 1965 defendant's stockholders and directors decided to offer the Trade Street property to Belk's for $100,000.00. No minutes recording this decision were produced. According to Shelton, Sr., however, "There was bound to have

been a meeting to authorize this sale," but he could not "recall the exact place." At that meeting, however, nothing was said about a 5% commission, but Shelton said, "If I'm exclusive agent for a piece of property I don't have to go back and reiterate I am due 5 per cent commission." He did know that "the meeting was called to confirm the sale which S & W Realty had made to Joe Robinson for Belk Industries." He himself employed Mr. Ervin (Paul R. Ervin, attorney) to represent him in the sale of the property to Belk's, and he authorized Ervin to make the proposition on behalf of S & W Realty Company. Defendant's directors did not authorize him to make it on behalf of defendant. "S & W Realty was exclusive agent at that time as there had never been anything changed from the meeting in 1962. . . . We decided when we met that the proposition would be made, we authorized Mr. Ervin to make it."

Shelton, Jr., testified: "My father, as representative of S & W, was authorized to offer it to them (Belk's) for $100,000.00. Mr. Ervin . . . was asked by the Board of Directors of the defendant to accompany my father. So, yes, he did represent the defendant. . . . Nothing was said at this 1965 meeting of the board of directors and stockholders of Duckworth & Shelton concerning a 5 per cent commsision."

Prior to the time Shelton, Sr., and Mr. Ervin made the $100,000.00 proposition to Mr. Robinson, there had been no deal with Belk's. On 21 April 1965, Mr. Ervin conferred with Mr. Joe H. Robinson and, through him, submitted the $100,000.00 proposition to Belk's. On that same day he wrote Taylor's attorney, Mr. Louis A. Bledsoe, Jr., that he believed Belk's would accept the offer; that defendant "would be obligated to Mr. R. C. Shelton, Sr., for a 5% commission on a sale of the property"; and that "the tax implications" of the sale suggested a dissolution of defendant corporation. The letter also referred to Taylor's offer to sell his stock in defendant for $40,000.00.

On 3 May 1965, Mr. Ervin wrote Mr. Joe H. Robinson that his firm represented Duckworth and Shelton, Inc., and had been authorized by its client to offer its Trade Street property to Belk's "for a period of thirty days," for a total price of $100,000.00. On 18 May 1965, Mr. Robinson wrote Ervin that Belk's accepted "the offer of Duckworth & Shelton, Inc., to sell this property for a total of $100,000.00." On 3 June 1965, Ervin wrote Bledsoe asking him to have Taylor sign the deed to Belk's so that the sale could be closed. "We can then," he wrote, "litigate about the matters which are in dispute."

On 2 July 1965, the Sheltons and Taylor, with their respective

attorneys, Ervin and Bledsoe, Jr., held a special meeting of the directors of defendant corporation and adopted a resolution introduced by Shelton, Jr., which (1) authorized the complete liquidation and dissolution of the corporation and (2) approved and ratified "the actions of the officers of the corporation in negotiating for the sale of the real property which the corporation owns which is located on or near East Trade Street, Charlotte, N. C., to Belk Investment Company . . . for the sum of $100,000.00. . . ."

The final meeting of the stockholders and directors of the defendant corporation was held on 1 July 1966. The minutes show that deeds for their pro rata interest in the Pegram property, which had not been sold, had been delivered to the stockholders; that after paying the debts of defendant, the balance of the $100,000.00 received from the sale of the Trade Street property — less the sum of $10,195.45 — had been distributed to the stockholders. Pending the adjudication of plaintiff's claim for the $5,000.00 commission in suit and the claim of Shelton, Sr., for $4,633.25 "for commissions from the collection of rents and handling of the corporation's property," the sum of $10,195.45 is being held by Ervin and Bledsoe in a trust account in their joint names.

Witnesses for defendant were Joe H. Robinson, vice-president of Belk's, and Fred L. Taylor, the majority stockholder in defendant corporation.

Mr. Robinson testified: When he "came with Belk's" in the fall of 1964, he was informed that Belk's wished to acquire defendant's Trade Street property. In consequence, he contacted Shelton, Sr., and told him that Belk's would pay $100,000.00 for it and that it would not pay a real estate commission on the sale. Shelton, Sr., said "that he wanted more for his property," but Robinson told him that $100,000.00 was Belk's limit. Shelton, Sr., said he would consider the offer and confer later. Hearing nothing further from him, Robinson telephoned Taylor and told him that Belk's would still pay $100,000.00 for the property; that it would buy the stock of defendant corporation or handle the transaction in any way the owners of the property preferred. Taylor told him that "he would personally inject himself into the matter" and that he would sell his interest in the property "regardless." The next event was a phone call from Ervin, who inquired if Belk's was willing to pay $100,000.00 for the property. Robinson said YES, and thereafter the sale was concluded. Since he was familiar with the ownership of defendant corporation, Robinson did not ask Mr. Ervin whom he represented.

Mr. Taylor testified: At the 23 November 1962 meeting of de-

fendant's directors, Shelton, Sr., said that he felt that he could sell the property to Belk's for $139,500.00 "in a few months." Within six months, however, he reported to Taylor that he was not getting anywhere and asked his help. Taylor contacted Belk's Mr. Gibson Smith and, in the discussion, told him that he could acquire the property by acquiring stock in defendant corporation. Although Taylor saw Shelton, Sr., every thirty days from early 1964 until 11 January 1965, he made no further report to Taylor of any negotiations with Belk's.

On or about 13 February 1965, in a meeting held in Mr. Ervin's office, Taylor and the two Sheltons authorized Ervin, on behalf of defendant, to negotiate the sale of the Trade Street property with Belk's for $100,000.00. No such authority was given to plaintiff. Ervin was the only one directed to negotiate the sale, and no commission on the sale was authorized for anyone. On 15 February 1965, Mr. Bledsoe, as attorney for Taylor, wrote to Mr. Ervin giving him authority for thirty days to negotiate with Belk's the sale of the East Trade Street property "in order to give Mr. Fred L. Taylor the proposed sale price of $40,000.00 for his stock in Duckworth & Shelton, Inc."

The next information which Taylor received about the sale was contained in a copy of a letter of 21 April 1965 which Ervin wrote to Bledsoe. Another conference was then held in Mr. Ervin's office. They "discussed that matter pro and con. The subject of the commission to be paid to Mr. R. C. Shelton, Sr., or S & W Realty was not discussed at that meeting. Mr. Shelton got up and left the meeting. The subject of a commission was mentioned to (Taylor), in the letter referred to as plaintiff's Exhibit 2 (letter of 21 April 1965 from Ervin to Bledsoe), and (Taylor) told Mr. Ervin that (he) would not go along with the payment of a commission and that (he) would go along with the sale (only) if it were $100,000.00 net to the corporation."

There was never a meeting of the board of directors or the stockholders of defendant corporation in which it was agreed that plaintiff would receive a commission for selling the Trade Street property to Belk's for $100,000.00; nor was any representative of plaintiff ever authorized to offer the property to Belk's for $100,000.00. Mr. Ervin was directed to present the offer.

On 14 July 1965, Taylor, as president of defendant, received a letter from Ervin threatening suit if the corporation did not immediately pay plaintiff $5,000.00 for its services "in handling" the sale to Belk's. At Taylor's instance, Bledsoe wrote Mr. Ervin that the

stockholders and directors of defendant sold the property to Belk's through him and that defendant would not pay plaintiff a commission on the sale.

Defendant's motions for nonsuit were overruled. Issues were submitted to the jury and answered as follows:

"1. Did the plaintiff and defendant enter into a contract whereby the plaintiff was to sell real property belonging to the defendant, as alleged in the complaint? ANSWER: Yes.

"2. If so, did the plaintiff procure a purchaser able, willing, and ready to perform at the minimum price of $116,500? ANSWER: No.

"3. Was the plaintiff the procuring cause of the sale of the property? ANSWER: Yes.

"4. What amount, if any, is plaintiff entitled to recover of the defendant? ANSWER: $5,000.00."

From the judgment entered upon the verdict, defendant appeals, assigning as error, *inter alia,* the failure of the court to grant its motion of nonsuit and certain portions of its charge to the jury.

Ervin, Horack & McCartha by Paul R. Ervin and William E. Underwood, Jr., for plaintiff appellee.

Berry and Bledsoe by Louis A. Bledsoe, Jr., and C. Ralph Kinsey, Jr., for defendant appellant.

SHARP, J.

In this case, plaintiff alleges one brokerage contract; defendant's minutes, upon which plaintiff relies, show another; plaintiff's evidence shows a third. Understandingly, the issues do not bring the case into sharp focus.

These facts are conceded by both parties: On 23 November 1962, defendant agreed that it would pay plaintiff a 5% commission if plaintiff sold defendant's Trade Street property to Belk's for $116,500.00 or more. Plaintiff was never able to effect a sale upon those terms. Approximately two and one-half years later defendant sold the property to Belk's for $100,000.00 in negotiations conducted by an attorney, Mr. Paul Ervin. The case was submitted to the jury to determine whether plaintiff was the procuring cause of the sale and, if so, what was the reasonable value of its services.

[1-3] Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a

price acceptable to the owner. *Cromartie v. Colby,* 250 N.C. 224, 108 S.E. 2d 228; *Martin v. Holly,* 104 N.C. 36, 10 S.E. 83. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commsision provided the case is not taken out of the rule by the contract of employment. *Trust Co. v. Goode,* 164 N.C. 19, 80 S.E. 62. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services. The term *procuring cause* refers to "a cause originating or setting in motion a series of events which, without break in their continuity, result in the accomplishment of the prime object of the employment of the broker, which may variously be a sale or exchange of the principal's property, an ultimate agreement between the principal and a prospective contracting party, or the procurement of a purchaser who is ready, willing, and able to buy on the principal's terms." 12 C.J.S. *Brokers* § 91, p. 209 (1938). *Accord,* 12 Am. Jur. 2d *Brokers* § 190 (1964).

[4] The law does not permit an owner "to reap the benefits of the broker's labor without just reward" if he has requested a broker to undertake the sale of his property and accepts the results of services rendered at his request. In such case, in the absence of a stipulation as to compensation, he is liable for the reasonable value of those services. *Thompson v. Foster,* 240 N.C. 315, 82 S.E. 2d 109; *Thomas v. Realty Co.,* 195 N.C. 591, 143 S.E. 144; *Reams v. Wilson,* 147 N.C. 304, 60 S.E. 1124. Of course, the listing agreement can make the payment of commissions dependent upon the broker's obtaining a certain price for the property. See Annot., 46 A.L.R. 2d 848, 859 (1956); *Thompson v. Foster, supra.*

[5] The foregoing decisions, however, do not fit the facts of this case. This is not a situation in which an owner, who has listed real estate with the broker at a specified price, reduces the price and sells it to the broker's prospect. When that occurs, clearly the broker is entitled to compensation. *Cromartie v. Colby, supra; Thompson v. Foster, supra; Lindsey v. Speight,* 224 N.C. 453, 31 S.E. 2d 371; *Trust Co. v. Goode, supra; Martin v. Holly, supra.* Here, plaintiff-broker did not find the prospect to which defendant-owner sold the property nor did it initiate Belk's interest in the property. As every individual involved in the affairs of plaintiff and defendant well knew, Belk's wanted the land because it adjoined its property. Mr. Robinson, one of Belk's vice-presidents, testified that in 1964 he had told both Shelton, Sr., and Taylor that Belk's wanted the property; that it would pay $100,000.00 for it but no more. Belk's was defendant's prime prospect and — so far as this evidence reveals —

its only one. In making the sale, the directors' sole problem was how to exploit the strategic location of defendant's property and to get Belk's top dollar for it as soon as possible.

Defendant's assignment of error that the judge erred in failing to grant its motion of nonsuit raises the question whether the evidence will support a finding that defendant employed plaintiff to negotiate the sale of its property to Belk's for $100,000.00 and that plaintiff procured the sale.

[6] To establish its contract of employment to sell the property to Belk's for $100,000.00, plaintiff does not rely upon corporate minutes but upon the oral testimony of its two stockholders. A corporation is required to keep minutes of the proceedings of its shareholders and board of directors. G.S. 55-37. They are the best evidence of its acts. *Pegram-West v. Insurance Company,* 231 N.C. 277, 56 S.E. 2d 607; *Respess v. Spinning Co.,* 191 N.C. 809, 133 S.E. 391. However, when it is shown that no minutes were made of a particular meeting, or that they are incomplete, the proceedings may be proved by parol testimony. *Tuttle v. Building Corp.,* 228 N.C. 507, 46 S.E. 2d 313; Robinson, North Carolina Corporate Law and Procedure § 49 (1964).

The absence of the minutes authorizing the offer of the property to Belk's for $100,000.00 is not explained in the evidence. Notwithstanding the foregoing rule, Shelton, Jr., testified without objection that, at a meeting of the board of directors, Shelton, Sr., "as representative of S & W was authorized to offer it (the land) to them (Belk's) for $100,000.00; that defendant's directors asked Ervin to accompany Shelton, Sr., to Belk's "in his capacity." Also without objection, Shelton, Sr., testified that defendant's board of directors had directed Ervin to make the offer to Belk's through S & W Realty Company; that he himself employed Ervin to help him consummate the sale; and that it was he who directed him to make the offer to Belk's through plaintiff corporation, which "was exclusive agent at that time as there had never been anything changed from the meeting in 1962." He added, "We were continually discussing the property with Belk's up until the property was sold."

The only minutes in evidence which relate to the sale of the Trade Street property contain the resolution of 23 November 1962 and the resolution of 2 July 1965, which approved the action of defendant's officers "in negotiating for the sale" of the Trade Street property to Belk's "for the sum of $100,000.00 as a part of the plan of liquidation and dissolution of the corporation."

[7] An officer of a corporation has no right to compensation for

services rendered the corporation in the absence of an express contract to pay for them. *Credit Corporation v. Boushall,* 193 N.C. 605, 137 S.E. 721; *Caho v. R. R.,* 147 N.C. 20, 60 S.E. 640. Certainly, plaintiff-corporation was not an officer of defendant corporation, but Shelton, Jr., and Shelton, Sr., two of the three directors and stockholders of defendant-corporation, were also the sole directors and stockholders of plaintiff-corporation. Thus, in the transaction in suit, all plaintiff's stockholders (two realtors now composing a corporation, G.S. 55-3-1) have an interest adverse to defendant-corporation. No corporate veil can conceal this interest. If the Sheltons, through plaintiff-corporation, obtain a realtor's commission upon the sale of the property, which they owned as stockholders in defendant-corporation, they will profit over and above their distributive share in the distribution of defendant's assets. Their gain will be at the expense of Taylor, a director and the majority stockholder, who testified that defendant never employed plaintiff to negotiate a sale with Belk's for $100,000.00.

The brokerage services which plaintiff-corporation alleges it rendered defendant-corporation were within the scope of the duties of the directors and officers of defendant-corporation, which was patently formed for the purpose of buying and selling real estate. Its only assets upon dissolution were the net proceeds of the sale to Belk's and a lot valued at $15,000.00. The reason for the rule which prohibits an officer of a corporation from maintaining an action against it for services rendered within the scope of his duties as such officer absent an express contract to pay for those services is equally applicable to the dealings between these two closely held corporations. Before plaintiff-corporation can recover commissions in this case it must prove an express contract of employment whereby defendant employed it to sell the Trade Street property to Belk's for $100,000.00. The testimony of Shelton, Jr., and Shelton, Sr., although largely a statement of their conclusions that plaintiff and defendant had entered into a contract, went in without objection; it constitutes a *prima facie* showing of a contract of employment between plaintiff and defendant.

[8] We hold that plaintiff's evidence was sufficient to withstand defendant's motions for nonsuit.

We next consider defendant's assignments of error to the charge. After having instructed the jury as to the burden of proof, the court gave the following instruction as to the third issue: "The procuring cause, members of the jury, is the approximate cause, the cause originating a series of events which without breaking their conti-

nuity result in the accomplishment of the prime object. . . . (contentions omitted) . . . Now, members of the jury, if the plaintiff has satisfied you by the greater weight of the evidence that the effort, if any, which it put forth or expended in offering or trying to sell the property to Belk was the procuring cause, as I have defined procuring cause to you, of the sale of the property to Belk Investment Company, it would be your duty to answer this third issue 'yes.' If you fail to so find, it would be your duty to answer the third issue 'no.' "

[9] The foregoing instructions, which defendant assigns as error, were inadequate. *Inter alia,* they failed to comply with G.S. 1-180 in that the court made no attempt to apply the law to defendant's evidence.

In effect, we have here the anomalous situation in which two stockholders and directors of defendant are suing defendant upon an oral contract which must be established by their testimony, which is unsupported by any minutes, and which is denied by the majority stockholder. Defendant contends that its three directors knew that they could sell the property to Belk's at any time they were willing to take $100,000.00 for it; that under these circumstances, the contract which plaintiff declares was not just and reasonable to the corporation; that Taylor would never have consented to pay a realtor to make a sale which was, in effect, already made; that the corporation could not have made such a contract without Taylor's consent — which was not given; and that defendant-corporation authorized Ervin to act for it in effecting the sale. Whom Ervin represented is one of the disputed facts in the case. Plaintiff contends that he represented it exclusively. Defendant contends that he represented the Sheltons individually as stockholders and directors (in this case, inseparable statuses) and that, in acting for them in that capacity, he acted for defendant-corporation under authority of the directors.

[10] In April 1965, the contract which defendant had made with plaintiff on 23 November 1962 was at an end. It was then obvious to the directors that plaintiff would be unable to sell the property to Belk's for $116,500.00. When no time is specified in his contract, if a broker fails to find a purchaser or to make the sale within a reasonable time, his contract of employment is at an end. 12 C.J.S. *Brokers* §§ 66(c), 88 (1938); 12 Am. Jur. 2d *Brokers* § 57 (1964). See *Parkey v. Lawrence,* 284 S.W. 283 (Tex. Civ. App.)

[11] No legal bar prevented defendant from employing Shelton, Sr., — individually or through his corporation — to sell its property

to Belk's and to pay the reasonable value of its services. A new and express contract of employment, however, was required. Furthermore, the provisions of G.S. 55-30 were applicable to the contract. Presumably, however, in this case, if the jury finds in accordance with the Sheltons' testimony that the directors of defendant employed plaintiff-corporation to effect a sale to Belk's for $100,000.00, such a finding would bring the contract within the provisions of G.S. 50-30(b), (1) and (2). These sections validate a contract between a corporation and a director having an adverse interest if, after a full disclosure, the transaction is specifically approved by a majority of the voting shares other than those owned or contracted by the adversely interested directors. Taking plaintiff's evidence as true, and giving plaintiff the benefit of every inference of fact which may reasonably be drawn from the evidence — as we are required to do in passing upon a motion for nonsuit —, Taylor was one of the directors who "authorized" plaintiff to sell the property to Belk's for $100,000.00. The transcript does not reveal the manner in which the directors are authorized to do business. G.S. 55-28(d).

[12] The judge should have instructed the jury (1) that the contract of 23 November 1962 had terminated in April 1965, that plaintiff could base no recovery upon it, and that it had no bearing upon the value of the services for which plaintiff sues; (2) that in order to recover, plaintiff must satisfy the jury by the greater weight of the evidence (a) that the directors of defendant-corporation made an express contract with plaintiff whereby it employed plaintiff to negotiate a sale of its Trade Street property to Belk's for $100,000.00, (b) that the contract came within the provisions of G.S. 50-30(b), (1) and (2), or (3); and (c) that, pursuant to the contract, plaintiff did procure the sale to Belk's.

[13] On the issue of damages, the court instructed the jury as follows: "Even though the plaintiff failed to obtain a purchaser willing, able and ready to take the property at the price stipulated, $116,500.00, in the contract between the plaintiff and defendant, plaintiff may still recover the reasonable value of his services, if such services were the procuring cause of the sale of the property."

Defendant's exception to the foregoing portion of the charge must likewise be sustained. It erroneously referred to the contract of 23 November 1962 as the basis of defendant's liability to plaintiff, and it inadequately dealt with the question of damages. Testimony that commissions for the sale of commercial property in Charlotte were 5% of the sales price was offered and admitted as evidence bearing upon what sum was ordinarily considered reasonable compensation

for plaintiff's services as a broker. Even though the jury found plaintiff to be entitled to compensation for its services with reference to the sale to Belk's, it was not bound to fix plaintiff's compensation at this rate, and the court should have so instructed the jury. *Thomas v. Realty Co., supra.*

As heretofore pointed out, plaintiff did not procure Belk's as a prospect nor did it interest Belk's in the property. Defendant contends that plaintiff's evidence showed that little work was required to make the sale to Belk's once defendant's director-stockholders had decided to accept its offer to pay $100,000.00 for the property; that the sale was effected when, by a telephone call, Mr. Ervin gave Mr. Robinson this information; that if Shelton, Sr., did anything at all, he merely accompanied Mr. Ervin on a visit to Robinson; that if plaintiff paid Ervin for these services there is no evidence what the fee was.

If plaintiff is entitled to recover compensation in connection with the sale, it is entitled to recover only the reasonable value of the services it rendered after defendant reduced the price of the land to $100,000.00. In fixing this amount, the jury may properly consider the skill required and the time, effort, and cost expended in procuring the sale.

For the errors indicated, there must be a new trial. Prior thereto, plaintiff would be well advised to seek permission to recast its pleadings to conform to its evidence.

New trial.

RAY A. CHILDERS AND WIFE, DOROTHY B. CHILDERS, v. PARKER'S INC.

No. 448

(Filed 23 August 1968)

1. Statutes § 7— construction of amendments — presumptions of legislative intent

In construing a statute with reference to an amendment it is presumed that the legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it.

2. Statutes § 7— construction of amendments — presumptions as aid to interpretation

Although the conclusion is that every amendment to an existing statute had a purpose, the presumption that a departure from the old law was intended is merely an aid to interpretation, not an absolute rule.

3. Statutes § 7— amendment of ambiguous statute — presumptions

Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision.

4. Mortgages and Deeds of Trust § 32— deficiency judgments — G.S. 45-21.38 — applicable only to mortgage securing vendor

As originally enacted, the provisions of G.S. 45-21.38, which barred recovery of deficiency judgment on purchase-money notes secured by a mortgage or deed of trust if the note disclosed that it was for purchase money of real estate, *are held* applicable only to purchase-money mortgages and deeds of trust given by the vendee to the vendor and not to a note and deed of trust securing a third party who lent the vendee the purchase price of the land described in the deed of trust.

5. Mortgages and Deeds of Trust § 32— G.S. 45-21.38 — effect of 1961 amendment

The 1961 amendment to G.S. 45-21.38, which made the section applicable only to mortgages and deeds of trust given "to secure *to the seller* the payment of the balance of the purchase price of real property," did not change the original meaning of the statute; it merely made specific that which had theretofore been implicit.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by plaintiffs from *Bone, E.J.*, 20 March 1967 Session of FORSYTH, docketed and argued at the Fall Term 1967 as Case No. 467.

Action to recover damages against a vendor for failure to insert in a note, allegedly prepared under its direction, a provision that it was given "for purchase money of real estate" as provided by G.S. 45-21.38.

Plaintiffs' evidence tends to establish these facts: By warranty deed dated 18 March 1959, Parker's, Inc., conveyed to plaintiffs lot No. 58 of Lake Hills, a subdivision which defendant owned in Forsyth County. The deed was signed by H. Bryce Parker, President (Parker), who owned all the stock in defendant corporation except two qualifying shares. Parker was an attorney-at-law, and the deed shows on its face that it was "drawn by H. Bryce Parker." The purchase price of the lot was $4,000.00. Defendant's realtor waived his $500.00 commission on the sale, and defendant credited plaintiffs with this amount as their down payment. The balance of $3,500 was arranged in the transaction hereinafter detailed.

At the time of the sale, Parker was guardian for George Patton Schimmeck, a minor (Schimmeck). Plaintiffs executed and delivered to Parker, as guardian of Schimmeck, a note for $3,500.00 dated 23 March 1959, which recited "a good and valuable consideration, to-wit, a loan of money . . . secured by a deed of trust of even date

herewith on valuable real estate." It was payable in three annual installments with interest at 6%. The deed of trust to Harvey A. Lupton, trustee for Parker, guardian for Schimmeck, covered lot No. 58 of Lake Hills, and recited that it secured a note "for loan of money." A notation on the deed of trust showed that it was "drafted by Parker and Lucas, by H. Bryce Parker." The deed and deed of trust were recorded simultaneously on 2 April 1959. The consideration for the note was a check dated 20 March 1959 in the amount of $3,500.00 drawn by Parker, guardian for Schimmeck, to the order of plaintiffs. The check bore the notation, "a loan." Plaintiffs endorsed this check and left it with Parker, who deposited it to their credit in the Wachovia Bank and Trust Company. They also drew and left with him their check, dated 27 March 1959, in the amount of $3,500.00, payable to Parker personally. Except for the note and deed of trust, the various instruments bear different dates. Each, however, was delivered at the same time as a part of a single transaction.

When Parker died in October 1959, his associate in the practice of law, Phillip E. Lucas (Lucas), was appointed guardian for Schimmeck. At that time, no payment had been made on the note, and none was made thereafter. In consequence, Lucas called upon Lupton, trustee, to foreclose the deed of trust. The trustee sold the property at public auction 24 February 1961. After crediting the net proceeds of the sale, $1,751.64, on plaintiffs' note, Lucas brought suit against plaintiffs to recover the balance due on the note. At the 8 October 1962 Term of Forsyth, plaintiffs stipulated that they were "legally indebted and obligated" to Schimmeck in the amount of $2,180.96, and a consent judgment was entered against them for that amount, with interest from 22 March 1961. By periodic payments, plaintiffs thereafter satisfied the judgment in full. On 21 June 1963, they instituted this action to recover the amount paid on this judgment, "$2,421.72, plus court costs and attorney's fees."

In addition to the basic facts detailed above, plaintiffs allege that in preparing the note and deed of trust, upon which Lucas secured the deficiency judgment against plaintiffs, Parker acted as the agent of defendant; that Parker failed to show in the instruments that "the same represented purchase money of real estate"; that because of this omission, plaintiffs have sustained the loss for which they seek to recover. Answering, defendant denied that the note and deed of trust were given for the purchase price of land and alleged that plaintiffs are estopped to bring this action because (1) Parker, who failed to make the insertion, was also the guardian of Schim-

meck; (2) plaintiffs confessed judgment in favor of Schimmeck instead of defending his action against them.

Upon defendant's motion for a nonsuit, made at the conclusion of plaintiffs' evidence, Judge Bone entered a judgment dismissing the action.

Roberts, Frye & Booth for plaintiff appellants.

Jenkins and Lucas and W. Scott Buck for defendant appellee.

SHARP, J.

This is the second suit which plaintiffs have instituted against defendant on account of Parker's failure to insert in plaintiffs' note a recital that it was given for the balance of purchase money of real estate. It is also plaintiffs' second appeal from a judgment of nonsuit. The first action, instituted prior to the time plaintiffs' liability to Lucas had been established, was dismissed because prematurely brought. *Childers v. Parker's, Inc.*, 259 N.C. 237, 130 S.E. 2d 323. Plaintiffs' liability to Lucas now having been established and discharged, their exception to the judgment of nonsuit from which they presently appeal presents this question: Did G.S. 45-21.38, as it was worded on 23 March 1959, apply to a note and deed of trust securing a third party who lent the vendee (his debtor) the purchase price of the land described in the deed of trust? At that time, exclusive of the words in parenthesis, G.S. 45-21.38 provided in pertinent part:

"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: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out."

The Legislature, by Session Laws 1961, Ch. 604, effective 2 June 1961, amended G.S. 45-21.38 by inserting the words in parenthesis. Thus, the section now applies *ipsissimis verbis* only to mortgages and deeds of trust given "to secure *to the seller* the payment of the balance of the purchase price of real property." (Italics ours.)

Plaintiffs' contentions are that, prior to the 1961 amendment, G.S. 45-21.38 applied to *all* "purchase money deeds of trust" — not only those given to a vendor but also to a lender who provided the purchase price — if the note showed on its face that it represented the "balance of the purchase price of real property" described in the instrument securing the debt; that the failure of Parker, who prepared the note and deed of trust for defendant-vendor, to insert this information in the note and deed of trust caused the loss for which plaintiffs seek to recover, and imposes liability upon defendant. Defendant's contention is that plaintiffs' note was not for purchase money but money borrowed.

[1-3] In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. 82 C.J.S. *Statutes* § 384, p. 897 (1953). The presumption is that the legislature "intended to change the original act by creating a new right or withdrawing any existing one." 1 Sutherland, Statutory Construction § 1930 (Horack, 3d ed. 1943). Plaintiffs argue that the 1961 amendment limiting the application of G.S. 45-21.38 to the *vendors* of real estate substantiates their contention that prior thereto the section applied to all "purchase money" notes and deeds of trust. Although the conclusion is that every amendment to an existing statute had a purpose, the presumption that a departure from the old law was intended is merely an aid to interpretation — not an absolute rule. "In some cases, the purpose of the variation may be to improve the diction, or to clarify that which was previously doubtful." 50 Am. Jur. *Statutes* § 275, p. 263 (1944). Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision. 1 Sutherland, Statutory Construction § 1930 (1968 Cum. Supp. to Horack's 3d ed., 1943). Even "the action of the legislature in amending a statute so as to make it directly applicable to a particular case is not a conclusive admission that it did not originally cover such a case." Black, Interpretation of Laws § 167, p. 578 (2d ed. 1911).

To sustain their contention that the security instrument in suit was a purchase-money deed of trust within the meaning of G.S.

45-21.38 prior to 1961, plaintiffs rely upon *Dobias v. White,* 239 N.C. 409, 80 S.E. 2d 23 (1954). In *Dobias,* it was held that a deed of trust given by a vendee to his vendor to secure the purchase price of land other than those described in the security instrument, could not qualify as a purchase-money deed of trust under G.S. 45-21.38. The Court said, "This is true because a deed of trust is a purchase money deed of trust only if it is made as a part of the same transaction in which the debtor purchases the land, embraces the land so purchased, and secures all or part of its purchase price." *Id.* at 412, 80 S.E. 2d at 26. Plaintiffs point out that in listing the indicia of a purchase-money deed of trust, the Court omitted a requirement that it be given by the vendee to the vendor. Plaintiffs argue, therefore, that the note and deed of trust which they gave to Parker, as guardian of Schimmeck, was a purchase-money deed of trust within the meaning of the statute even though it secured money borrowed from a third person to pay the vendor for the land. The definition in *Dobias,* however, cannot be used as a slide rule to solve the problem here. The credit transaction there involved was between vendor and vendee, not between vendee and a third-party lender. The sole basis of decision was that the deed of trust covered "land other than that purchased from the plaintiffs by the defendants." Furthermore, the Court did not say that a deed of trust having the listed requisites was necessarily a purchase-money security; it said that a deed of trust lacking them was not. It made no attempt to define the circumstances in which a deed of trust on land "secures all or a part of its purchase price."

Plaintiffs also argue that *Supply Co. v. Rivenbark,* 231 N.C. 213, 56 S.E. 2d 431, *Chemical Co. v. Walston,* 187 N.C. 817, 123 S.E. 196, and like cases bolster their position that Lucas would not have been entitled to a deficiency judgment had Parker noted in the "evidence of indebtedness" that it was "for the balance of purchase money of real estate." These cases hold that when a deed to the vendee and his mortgage to the vendor for the unpaid purchase price — or to a third party for money loaned to pay the vendee the purchase price — are delivered and recorded as a part of the same transaction, no lien against the vendee can take precedence over "the purchase money mortgage." *Chemical Co. v. Walston, supra* at 825, 123 S.E. at 200. The theory is that "[t]he title does not rest in the vendee but merely passes through his hands, and during such instantaneous passage no lien against the vendee can attach to the title superior to the right of the holder of the purchase money mortgage." *Supply Co. v. Rivenbark, supra* at 214, 56 S.E. 2d at 432. These cases apply to the general rule. They are, however, of no more assistance in determin-

ing the question before us than is the so-called definition of a purchase-money mortgage in *Dobias*. These decisions, which protect the mortgagee, are based upon the just and sensible proposition that prior creditors should not be enriched at the expense of one whose money has enabled a debtor to acquire additional security.

Ladd & Tilton Bank v. Mitchell, 93 Ore. 668, 184 Pac. 282, 6 A.L.R. 1420 (1919), presented the same question which confronts us. The Oregon statute, Section 426, L. O. L. (now Ore. Rev. Stat. 88.070), provided:

" 'When judgment or decree is given for the foreclosure of any mortgage, hereafter executed, to secure payment of the balance of the purchase price of real property, such judgment or decree shall provide for the sale of the real property, covered by such mortgage, for the satisfaction of the judgment or decree given therein, and the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same.' "

Like G.S. 45-21.38 prior to 1961, the Oregon statute was not specifically limited to mortgages executed by the vendee to the vendor. The court held, however, that the legislature did not intend the law to apply to security instruments given to third-party lenders because a mortgage given to secure a third-party lender is not a true purchase-money mortgage. The Oregon legislature, the court said, had in view the mortgage which is defined by Black's Law Dictionary as "a mortgage given, concurrently with a conveyance of land, by the vendee to the vendor, on the same land, to secure the unpaid balance of the purchase price." The court also noted that *purchase money* passes from the vendee to the vendor; that as between vendee and a third-party lender who furnishes the consideration the vendee pays the vendor, the term is *borrowed money.* See Black's Law Dictionary (4th ed., 1951) pp. 1162, 1399.

A failure to limit the application of § 426 to the true purchase-money mortgage, the court reasoned, would be to thwart "the beneficent purpose of the law" to protect the purchaser by discouraging the over-evaluation of real estate. "[I]t was not the intent of the lawmakers to render it more difficult for such a purchaser to obtain a loan and pay the cash for a home, and receive the benefit of any lower price of realty that might be made on account of such cash payment. . . . (If) the lender could only look to the property upon a foreclosure proceeding, then the person wishing to purchase a home or other real property would be hampered and his credit impaired, and it might well be said that, 'The last state of that man is worse than the first.' " *Id.* at 675-76, 184 P. at 284, 6 A.L.R. at 1424.

In interpreting a similar statute, California's First District Court of Appeal followed the Oregon decision. *Peterson v. Wilson,* 88 Cal. App. 2d 617, 199 P. 2d 757, 6 A.L.R. 2d 258 (1948). This decision, however, was disapproved by the Supreme Court of California fifteen years later in *Bargioni v. Hill,* 59 Cal. 2d 121, 28 Cal. Rptr. 321, 378 P. 2d 593 (1963). See 53 Calif. L. Rev. 151 (1965); 51 Calif. L. Rev. 1 (1963); 48 Calif. L. Rev. 48 (1960); 37 Calif. L. Rev. 690. We note, however, that after the decision in *Bargioni v. Hill,* the California Legislature promptly amended its statute by restricting its application to "a deed of trust, or mortgage, given to the vendor to secure payment of the balance of the purchase price of real property." Calif. Civ. Proc. Code § 580b (West 1955) *as amended* (Supp. 1967).

[4] We find the reasoning of the Oregon court convincing, and there are additional grounds for the same interpretation of G.S. 45-21.38. Neither the California nor the Oregon statute contains its requirement that the note show that it is for the purchase money of real estate in order to defeat a deficiency judgment. Nor does either provide that the vendee may recover from the vendor if he suffers a loss because vendor failed to insert in the note a provision disclosing its purchase-money character. These unique features of G.S. 45-21.38 manifest the legislative intent that the statute as originally enacted should apply only to purchase-money mortgages and deeds of trust given by the vendee to the vendor, and that its application to third parties be limited to assignees of the seller. These provisions were obviously designed to protect a vendor's assignee, who would not know the nature of the transaction. Furthermore, a vendor does not ordinarily prepare the note and deed of trust which his vendee gives to a third-party lender who furnishes the money which pays his purchase price. He usually does, however, prepare the security instruments when they are to be executed to him. Had the legislature intended the statute to apply to security instruments which the vendee gave a third-party lender, it would undoubtedly have provided that the mortgagor might recover his loss from either a seller or lender who prepared the note and failed to insert a disclosure that it represented the purchase price of land. We cannot assume that the legislature intended the statute to apply to both vendor and third-party lender when it placed the duty of inserting the purchase-money disclosure only upon a seller preparing the security instruments for the vendee's signature.

[5] We hold therefore that the 1961 amendment did not change the original meaning of G.S. 45-21.38; it merely made specific that which had theretofore been implicit. See Currie and Lieberman, Pur-

chase Money Mortgages, Etc., 1960 Duke Law J. 1, 18; *General Petroleum Co. v. Smith,* 62 Ariz. 239, 157 P. 2d 356, 158 A.L.R. 364.

The situation here is clouded by the dual positions occupied by Parker, who was not only the president and attorney of defendant, the corporate vendor, but also the guardian of Schimmeck, whose money he loaned to plaintiffs to buy land from his corporation. Indubitably, however, Schimmeck was a third-party lender. Plaintiffs were bound to have known this, for even a hasty glance at the note and deed of trust, which they signed, would have revealed to them the details of the transaction.

The judgment of nonsuit is

Affirmed.

HUSKINS, J., took no part in the decision or consideration of this case.

BRYAN BUILDERS SUPPLY, A CORPORATION, v. NORFLEET W. MIDYETTE AND WIFE, SHIRLEY K. MIDYETTE

No. 688

(Filed 23 August 1968)

1. Contracts § 6— unlicensed contractor — action upon construction contract

Upon plaintiff contractor's stipulation that it was not licensed to construct buildings at the alleged contract price, the court properly dismissed plaintiff's action for the balance due under the construction contract and properly retained the owner's counterclaim for breach of the contract and faulty work.

2. Professions and Occupations; Constitutional Law § 12— purpose of statute requiring licensing of building contractors

The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing $20,000 or more, is to protect the public from incompetent builders.

3. Contracts § 6— unlicensed contractor — action for breach of contract — building exceeds statutory minimum cost

When an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in G.S. 87-1, he may not recover for the owner's breach of the contract.

4. Contracts § 12— operation of void contracts

A void contract is no contract at all; it binds no one and is a mere nullity.

5. Contracts § 6— construction contract — unlicensed contractor — action by innocent owner

A construction contract entered into by a contractor in violation of G.S. 87-1 *et seq.* is not totally without effect, for the innocent owner may maintain an action for breach of the contract by the unlicensed contractor.

6. Contracts §§ 25, 29— unlicensed contractor — breach of contract — action for damages or for recovery of advance payments

Where an unlicensed contractor has not performed the construction work in accordance with its contract, the innocent owner may sue for damages resulting from a breach of the contract or, in the alternative, to recover payments made in advance for performance which was not rendered as promised.

7. Contracts § 29— breach of contract — nominal damages

In a suit for damages for breach of contract, proof of the breach would entitle plaintiff to nominal damages at least.

8. Damages § 2; Quasi Contracts § 2— unjust enrichment — implied contract rules apply

In a suit brought under the doctrine which prohibits unjust enrichment, the measure of recovery and the rules governing implied contracts apply.

9. Damages § 2; Quasi Contracts § 2— breach of implied contract — nominal damages

Implied contract is the basis for recovery on *quantum meruit;* proof of the breach of such contract entitles the plaintiff to nominal damages at least.

10. Contracts §§ 27, 29; Quasi Contracts § 2— breach of contract — proof of damages — nominal damages

In a counterclaim against an unlicensed contractor for breach of a construction contract, nonsuit is properly denied notwithstanding the owners' evidence of damages, both as to breach of contract and the value of the actual benefit received from the construction, is minimal, since the owners are entitled to recover nominal damages upon showing breach of contract or a failure of consideration in any amount.

11. Appeal and Error § 31— broadside assignment of error to the charge

Assignment of error that the court failed to explain and apply the law to the evidence as required by G.S. 1-180 will be rejected as broadside.

12. Appeal and Error § 31— assignment of error on failure to charge

An assignment based on failure to charge should set out the appellant's contention as to what the court should have charged.

13. Contracts § 28— instructions on waiver of breach of construction contract

In a counterclaim against an unlicensed contractor for breach of a construction contract, failure of the court to instruct the jury that the

owners had "accepted the house for occupancy in its defective condition" is not error where there is no evidence to support a charge that the owners had waived their right to object to the defects.

14. Contracts § 28— construction contract by unlicensed contractor — action for breach of contract by innocent owners — instructions

In a counterclaim against an unlicensed contractor for breach of a construction contract, an instruction that the contract between the parties was totally void and that neither could base a cause of action upon it is erroneous, since the owners, being members of the class for whose protection G.S. 87-1 *et seq.* were enacted and not being *in pari delicto* with the contractor, are entitled to maintain an action for breach of the contract.

15. Appeal and Error §§ 25, 50— error in charge favorable to objecting party

A party may not complain of error in the charge which is favorable to him.

16. Appeal and Error § 4— theory of trial in lower court

A litigant may not acquiesce in the trial of his case in the Superior Court on one theory and complain on appeal that it should have been tried upon another.

17. Quasi Contracts § 2— construction contract by unlicensed contractor — quantum meruit recovery not allowed — offset against sums due from owner

An unlicensed contractor who is not entitled to recover for the breach of a construction contract which he entered in violation of G.S. 87-1 *et seq.* may not recover the value of the work and services furnished under that contract on the theory of *quantum meruit* or unjust enrichment, but such contractor may offset, as a defense against damages due the owner, any sums which the owner otherwise owes him.

HUSKINS, J., took no part in the consideration or decision of this case.

APPEAL by Bryan Builders Supply, Inc., from *Clark, S.J.*, May 1967 Civil Session of BLADEN, docketed and argued at the Fall Term 1967 as Case No. 696.

As originally instituted, this action was a claim by a contractor against the owners for the balance allegedly due for construction of a house. The builder, Bryan Builders Supply, a corporation (Bryan), is therefore shown as the plaintiff in the caption and Norfleet W. Midyette and wife, Shirley K. Midyette (owners), are shown as the defendants. Subsequent events, as hereinafter detailed, changed the status of the parties.

On 27 March 1964, Bryan entered into a written contract with owners whereby, for the sum of $27,300.00, it agreed to construct a house on their property according to plans and specifications attached to the contract. Construction was begun during the latter part of March 1964 and owners moved into the house in November 1964.

They have paid Bryan $22,700.00 on the contract price. Of this sum, $20,000.00 was borrowed from Peoples Savings and Loan Association of Whiteville, which had approved a construction loan of $25,000.00. However, after the house was completed, it declined to lend more than $20,000.00.

On November 27th, Bryan filed a lien for $7,508.70 against the property. Of this sum $2,908.70 was listed for designated "extras." On 7 January 1965, Bryan instituted this action against owners to recover the sum of $7,508.70 and to foreclose the lien. Answering the complaint, owners alleged that, despite its representation to the contrary, Bryan was not a licensed contractor under G.S. 87-1 *et seq.;* that the house was not built according to the agreed plans and specifications; that, as specified, defective materials had been used and construction done in an unworkmanlike manner; that, when completed, the house was not worth over $20,000.00; and that owners were entitled to recover from Bryan the sum of $2,700.00 as an overpayment.

When the case was called for trial at the March 1966 Session, owners moved to dismiss Bryan's action for that it was not a contractor licensed under Chapter 87, Article 1, of the General Statutes of North Carolina. Upon Bryan's admission that at the time it entered into the contract it was not a licensed contractor, Judge McKinnon entered an order dismissing Bryan's action against owners and allowing them to amend their cross action and counterclaim. Bryan was granted leave to reply to owners' amended pleading.

On 25 March 1966, owners filed an "Amended Answer and Cross Action," the allegations of which are summarized as follows:

The parties entered into a contract whereby Bryan agreed to construct a home for owners in accordance with agreed plans and specifications for the sum of $27,300.00. Unknown to owners, Bryan was not licensed to construct houses costing more than $20,000.00. The house was not constructed according to the plans and specifications, and it was erected with certain described "improprieties, faults and negligent acts of construction." With little or no knowledge of these defects, owners paid Bryan $22,700.00 of the contract price when the house was not worth more than $15,000.00. To make the house safe for occupancy would require the expenditure of at least $9,818.00. Owners are, therefore, entitled to recover of defendant the difference between the amount of money paid to Bryan and the amount by which the house constructed by Bryan increased the value of the premises, that is, at least the sum of $7,700.00.

Answering, Bryan admitted the execution of the contract but de-

nied the allegations of poor workmanship and faulty materials. He admitted no deviations from the specifications except those requested or acquiesced in by owners. By way of counterclaim, Bryan alleged (1) that the cost of constructing the house in accordance with the original plans and specifications, and of making the changes requested by owners, was $33,141.07; and (2) that it is entitled to recover of owners, $9,690.71, that is, the difference between the amount by which the house had enhanced the value of the property ($33,141.07) and the amount actually paid by plaintiffs ($22,700.00), less the cost of merchandise returned ($750.36).

At the trial, owners offered plenary evidence tending to establish their allegations of defective construction, faulty materials, and deviations from the agreed specifications. Owners developed their case by offering evidence which tended to establish the breach of an express contract. Norfleet Midyette, one of the owners, testified that the defective workmanship and materials which Bryan had furnished could only be corrected by tearing down the house and starting all over again. Bryan's evidence tended to show that, although certain errors had occurred during construction, they had been corrected. Its evidence was marshaled to show that it had complied with its contract; that, except as to changes made with the consent of owners, the house had been built according to plans and specifications; and that, including $2,908.70 for "extras" furnished at owners' request, it had expended a total of $31,906.72 in constructing the house. Witnesses for both Bryan and owners testified fully and without objection with respect to the contract, the specifications, and the agreed price of the house.

At the conclusion of owners' evidence and again at the conclusion of all the evidence, Bryan's motion for nonsuit was denied (assignment of error No. 1).

The court, without any objection from the parties, submitted the following issues to the jury:

1. What amount, if any, of the sum of $22,700.00 paid by the owners to Bryan are the owners entitled to recover?

2. What sum of money, if any, in excess of the sum of $22,700.00 already paid by the owners to Bryan is Bryan entitled to recover of the owners? (Issues are set out verbatim except that the word *owners* has been substituted for *plaintiffs* and *Bryan* for *defendant.*)

With reference to the first issue, the court charged the jury that, because Bryan had no contractor's license as required by G.S. 87-1 *et seq.*, the contract between it and owners "was illegal and void and

unenforceable"; that therefore Bryan is not suing, nor are the owners, "for breach of contract. . . . So, the measure of damages is based not on the laws for the nonperformance of the contract by either one party or the other, but rather, on the basis of an implied contract, which is in law called quantum meruit and quantum meruit literally means 'what he deserves.'" (Assignments of error Nos. 3 and 4.)

With reference to the contract price of $27,300.00, the court instructed the jury that it was "not the measure of damages, since the contract is unenforceable, but this was admitted in evidence and is to be considered by you only as tending to show what the parties considered the work and materials would probably be worth if the contract had been performed and the house constructed in an ordinary workmanlike manner. This is only evidence, and not controlling on you on the question of value." (Assignment of Error No. 6.)

The court's final instruction with reference to the first issue was that the burden of proof was upon owners to satisfy the jury by the greater weight of the evidence what sum represented the reasonable value of the work performed and materials furnished by Bryan to owners; that if owners had satisfied the jury as to this amount, and it was less than $22,700.00, they would deduct this amount from $22,700.00, and the difference would be their answer to the issue; that unless owners satisfied the jury by the greater weight of the evidence that the reasonable value of the work and materials furnished by defendant was less than $22,700.00, the jury would answer the first issue "NONE." (Assignment of Error No. 7.)

As to the second issue, the court instructed the jury that they would not consider it if they answered the first issue "in some amount." However, if their answer to the first issue was "NONE," and if Bryan had satisfied the jury by the greater weight of the evidence that it had furnished to owners work and materials which had a reasonable value in excess of $22,700.00, their answer to the second issue would be the exact amount of the excess. (Assignment of Error No. 8.)

The jury answered the first issue $1,350.00. From the judgment decreeing that owners recover this amount and canceling the lien which Bryan had filed against owners' property, Bryan appealed.

Williamson & Walton for Bryan Builders Supply, appellants.

No counsel for Norfleet W. Midyette and wife, appellees.

SHARP, J.

The basic error in this case is that the evidence was developed

upon one theory, and the court submitted it to the jury upon another theory.

[1] Upon Bryan's stipulation that at all times pertinent to this litigation it was not licensed to construct buildings "where the cost is $20,000.00 or more," Judge McKinnon correctly dismissed its action against owners for the balance due under the terms of the contract upon which it had sued. *McArver v. Gerukos,* 265 N.C. 413, 144 S.E. 2d 277; *Tillman v. Talbert,* 244 N.C. 270, 93 S.E. 2d 101; *Courtney v. Parker,* 173 N.C. 479, 92 S.E. 324. He correctly retained owners' counterclaim, which stated a cause of action against Bryan for breach of contract and faulty work.

[2, 3] The purpose of Article 1 of Chapter 87 of the General Statutes, which prohibits any contractor who has not passed an examination and secured a license as therein provided from undertaking to construct a building costing $20,000.00 or more, is to protect the public from incompetent builders. When, in disregard of such a protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits. 53 C.J.S. *Licenses* § 59 (1948); 33 Am. Jur. *Licenses* §§ 68-72 (1941); Annot., Failure of artisan or construction contractor to procure occupational or business license or permit as affecting validity or enforcement of contract. 82 A.L.R. 2d 1429 (1962); 5 Williston Contracts (Revised Edition 1937) § 1630; 6 Williston Contracts, *Ibid.* § 1766; 6A Corbin Contracts §§ 1510-1513.

[4, 5] In denying an unlicensed contractor the right to recover upon his contract, the court sometimes terms such contracts "void," but this term is too broad to be used in this connection. "A void contract is no contract at all; it binds no one and is a mere nullity." 17 Am. Jur. 2d *Contracts* § 7 (1964). Contracts such as the one between owners and Bryan are not totally without legal effect, for the innocent party may maintain an action for damages for breach of a contract entered into between him and an unlicensed contractor. 33 Am. Jur. *Licenses* § 68 (1968 Cum. Supp. p. 80). See cases collected in Annot., 82 A.L.R. 2d 1429, § 3[b] and § 6[b].

In *Cohen v. Mayflower Corp.,* 196 Va. 1153, 86 S.E. 2d 860, the Supreme Court of Virginia affirmed a verdict and judgment of $21,000.00, which a landowner had recovered against an unlicensed contractor for breach of his contract. As the Court pointed out, there is nothing immoral or contrary to public policy in a construction contract involving $20,000.00 or more. The statute does not forbid such

contracts; it undertakes to protect from incompetent builders citizens who expend over and above that amount. The denial of recovery to an unlicensed contractor rests upon his conduct and not the nature of the transaction. Quoting from 6 Corbin Contracts § 1510, p. 962, the Court said: " 'It would be a rare or nonexistent case in which such an innocent person could not maintain some kind of action for a breach of the agreement by the guilty party who has wrongfully engaged in business. . . .'

"This view is based upon the principle that such innocent party is among the class of persons designed to be protected by such statutes, that he is not *in pari delicto* with the unlicensed party, and is therefore entitled to relief. Or, to state the matter another way, to deny relief to the innocent party in such cases would defeat the purpose of the statute and penalize the person intended to be protected thereby." *Id.* at 1162-1163, 86 S.E. 2d at 865. (The factual situation in *Cohen v. Mayflower Corp.* and in the instant case is to be distinguished from the one in which a plaintiff seeks to recover money paid for services on the sole ground that the person who had rendered them was unlicensed. See *Comet Theater Enterprises v. Cartwright,* 195 F. 2d 80, 30 A.L.R. 2d 1229; Annot., 30 A.L.R. 2d 1233.)

[6] Owners in this case were clearly entitled to pursue the counterclaim for damages, which they had alleged against Bryan, and, if they established a breach of its contract with them, they were entitled to recover the damages resulting therefrom. *Robbins v. Trading Post, Inc.,* 251 N.C. 663, 111 S.E. 2d 884. In the alternative, owners could have sued to recover payments made in advance for performance which was not rendered as promised. *Golding v. Casstevens,* 255 N.C. 200, 120 S.E. 2d 436.

[7-10] Notwithstanding the fact that owners' evidence with reference to their damages, both as to breach of contract and the value of the actual benefit received from Bryan's construction, was minimal, under no theory was Bryan entitled to a judgment of nonsuit. "In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Bowen v. Bank,* 209 N.C. 140, 144, 183 S.E. 266, 268. In a suit brought under the doctrine which prohibits unjust enrichment, the measure of recovery and the rules governing implied contracts apply. 22 Am. Jur. 2d *Damages* § 78 (1965). *Bowen v. Bank, supra.* "[I]mplied *assumpsit* (contract) is the basis for recovery on *quantum meruit;* and, if such contract was breached [by Bryan], plaintiffs [owners] were entitled at least to nominal damages." *Gales v. Smith,* 249 N.C. 263, 267, 106 S.E. 2d 164, 168. Upon owners showing a breach of con-

tract or a failure of consideration in any amount, they were entitled to recover nominal damages. Bryan's first assignment of error is overruled.

[11-13] All other assignments which Bryan has brought forward relate to those portions of the charge which are set out in the statement of facts. Assignment of error No. 9, that the court failed to explain and apply the law to the evidence as required by G.S. 1-180, is broadside and will be rejected. *State v. Webster,* 218 N.C. 692, 12 S.E. 2d 272. An assignment based on failure to charge should set out the appellant's contention as to what the court should have charged. *State v. Malpass and State v. Tyler,* 266 N.C. 753, 147 S.E. 2d 180. Bryan has no such assignment. However, its contention that the court erred in not instructing the jury that owners had "accepted the house for occupancy in its defective condition" is totally without merit. The evidence would not support a charge that owners had waived their right to object to the defects.

[14, 15] Owners might well have excepted to, and assigned as error the issues submitted and those portions of the charge which constitute Bryan's assignments of error 3, 4, and 7. Clearly, the judge erred when he charged the jury that the contract between the parties was totally void and that neither could base a cause of action upon it. Owners, being a member of the class for whose protection G.S. 87-1 *et seq.* were enacted, and not being *in pari delicto* with Bryan, were entitled to maintain an action for Bryan's breach of contract. Owners, however, have not appealed, and Bryan may not complain of error which is harmful to owners but not to it. *Ray v. Membership Corp.,* 252 N.C. 380, 113 S.E. 2d 806. An appellant "must show not only error, but that the alleged error was prejudicial to it. . . . A party cannot justly complain of an error in a charge favorable to him." (Citations omitted.) *Taylor Co. v. Highway Commission,* 250 N.C. 533, 539, 109 S.E. 2d 243, 247.

[16] Our reading of the evidence in this case causes us to conclude that the theory upon which the judge submitted the case to the jury was favorable to Bryan. But be that as it may, Bryan did not except to the issues which determined the theory upon which the case was submitted to the jury. A litigant "may not acquiesce in the trial of his case in the Superior Court upon one theory and here complain that it should have been tried upon another." *Mills v. Dunk,* 263 N.C. 742, 746, 140 S.E. 2d 358, 362.

[17] No error prejudicial to Bryan appears in the court's charge on the first issue. The jury's answer to it eliminated the second issue from the case. We deem it appropriate to say, however, that we find no error in the charge on the second issue which could have prejudiced

Bryan in the jury's consideration of the first issue. The same rule which prevents an unlicensed person from recovering damages for the breach of a construction contract has generally been held also to deny recovery where the cause of action is based on *quantum meruit* or unjust enrichment. Annot., 82 A.L.R. 2d 1429, § 3(c); 53 C.J.S. *Licenses* § 59b (1948). Bryan, therefore, was not entitled to the second issue. To deny an unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. *Northen v. Elledge,* 72 Ariz. 166, 232 P. 2d 111. The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. *Lewis & Queen v. N. M. Ball Sons,* 48 Cal. 2d 141, 308 P. 2d 713.

A qualification of the rule that an unlicensed contractor may not maintain any action based on his construction contract was noted in *Culbertson v. Cizek,* 225 Cal. App. 2d 451, 37 Cal. Rptr. 548. That case held that the rule did not prevent the unlicensed person from *offsetting,* as a defense against damages due the owner, any sums which the owner otherwise owed him. This relaxation of the rule "permits the unlicensed contractor to assert his counter-demands defensively as it were, to the end of reducing in whole or in part the claims against him but without authorizing an affirmative judgment in the contractor's favor for an excess. . . . This result is consistent with the position taken by the courts that despite possible injustice resulting between the parties, they will not 'lend their assistance to a party who seeks compensation for an illegal act.'" *Id.* at 473-74, 37 Cal. Rptr. at 560-61.

The transcript of the evidence convinces us that no injustice resulted to appellant in the trial of this case. Indeed, Bryan seems to have profited greatly by owners' failure to offer more specific evidence tending to establish the exact amount of their monetary damage resulting from Bryan's breach of contract. We find no reason to impose upon owners, who are willing to abide by the verdict and who were not represented by counsel on this appeal, "the monstrous penalty of a new trial." *Freeman v. Ponder,* 234 N.C. 294, 308, 67 S.E. 2d 292, 302.

No error.

HUSKINS, J., took no part in the consideration or decision of this case.

DISPOSITIONS OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BOST v. BANK

No. 602

Case below: 1 N.C. App. 470.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

BUTLER v. BUTLER

No. 437

Case below: 1 N.C. App. 356.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

CROSBY v. CROSBY

No. 438

Case below: 1 N.C. App. 398.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

HARLESS v. FLYNN

No. 441

Case below: 1 N.C. App. 448.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 September 1968.

IN RE CUSTORY OF ROSS

No. 765

Case below: 1 N.C. App. 393.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

LANIER, COMR. OF INS. v. VINES

No. 521

Case below: 1 N.C. App. 208.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 August 1968. Case set with appeals from the 8th, 24th and 25th Districts.

DISPOSITIONS OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

McNULTY v. CHANEY

No. 601

Case below: 1 N.C. App. 610.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

MITCHELL v. BOARD OF EDUCATION

No. 686

Case below: 1 N.C. App. 373.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

STATE v. CAVALLARO

No. 165

Case below: 1 N.C. App. 412.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

STATE v. FINN

No. 170

Case below: 1 N.C. App. 257.

Petition for writ of *certionari* to North Carolina Court of Appeals denied 23 August 1968.

STATE v. LEWIS

No. 250

Case below: 1 N.C. App. 296.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 August 1968. Case set with appeals from the 8th, 24th and 25th Districts.

STATE v. SPEAR

No. 6

Case below: 1 N.C. App. 255.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

DISPOSITIONS OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. STOKES

No. 248

Case below: 1 N.C. App. 245.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 August 1968. Case set with appeals from the 8th, 24th and 25th Districts.

UNDERWOOD v. HOWLAND, COMR. OF MOTOR VEHICLES

No. 357

Case below: 1 N.C. App. 560.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 August 1968. Case set with appeals from the 8th, 24th and 25th Districts.

WOODY v. CLAYTON

No. 439

Case below: 1 N.C. App. 520.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 August 1968.

STATE OF NORTH CAROLINA v. DONALD FOX, ROY LEE FOX, AND ROBERT CARSON McMAHAN

No. 83

(Filed 9 October 1968)

1. Criminal Law § 92— joint trial of defendants

It has been a general rule in this State that whether defendants jointly indicted would be tried jointly or separately was in the sound discretion of the trial court, and, in the absence of a showing that a joint trial had deprived the movant of a fair trial, the exercise of the court's discretion would not be disturbed upon appeal.

2. Criminal Law § 95— admissibility of confession implicating codefendants — old rule

Prior to the decision in *Bruton v. United States*, 391 U.S. 123, the rule in this State was that the admission of the extrajudicial confession of one codefendant, even though it implicated another against whom it was inadmissible, was not error, provided the trial judge instructed the jury that the confession was evidence only against the confessor and must not be considered against another.

3. Criminal Law § 74— valid confessions — best evidence of guilt

A confession legally obtained is clearly competent against the defendant who made it and is the best evidence of his guilt.

4. Constitutional Law § 31; Criminal Law § 95— admissibility of confession implicating codefendant — denial of confrontation right

Under the decision in *Bruton v. United States*, 391 U.S. 123, which is binding in this jurisdiction and is to be applied retroactively, the admission in a joint trial of nontestifying defendant's extrajudicial confession which implicates his codefendants is a violation of the codefendants' right of cross-examination secured by the confrontation clause of the Sixth Amendment, even though the court instructs the jury that the confession is admissible only against the declarant; if, however, the declarant can be cross-examined, a codefendant has been accorded his right to confrontation.

5. Constitutional Law § 31— right of confrontation — obligatory on the States

The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the States by the Fourteenth Amendment.

6. Criminal Law § 92— joint trials — duty to exclude confession implicating codefendants

As a result of the decision in *Bruton v. United States*, 391 U.S. 123, which renders inadmissible the confession of a nontestifying defendant which implicates his codefendants, the trial court in a joint trial of defendants must exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant; failing this, the State must choose between relinquishing the confession or trying defendants separately.

7. Criminal Law § 75— admissibility of confessions — pre-Miranda tests

Although admissibility of confessions in this homicide prosecution was not dependent upon whether defendants were given the warnings specified in *Miranda v. Arizona*, 384 U.S. 436, the question remains whether the confessions were freely and voluntarily given and whether the officers employed the procedural safeguards then applicable.

8. Criminal Law § 75— confessions — voluntariness rule

An extrajudicial confession of guilt by an accused is admissible against him only when it is voluntary.

9. Criminal Law § 75— confessions — test of voluntariness — suggestion of hope or fear

When an investigating officer offers some suggestion of hope or fear to one suspected of crime and thereby induces a statement in the nature of a confession, such statement is involuntary, and hence incompetent as evidence.

10. Criminal Law § 76— confessions obtained by promise or threat — question of law

Whether conduct of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law reviewable on appeal.

11. Criminal Law § 76— multiple confessions — admissibility

The State offered in evidence two confessions by a defendant. Upon the voir dire the evidence was that the first confession was made after a police officer had told defendant (1) that it would be better for him in court if he told the truth and (2) that he might be charged with the lesser offense of accessory to the homicide rather than as a principal. Two days later, upon being told that he could "make a voluntary statement," defendant made the second confession to two other officers who did not know of the previous statement. *Held:* The language of the original officer constituted a suggestion of hope which rendered both confessions involuntary and incompetent.

12. Criminal Law § 76— admissibility of subsequent confession — presumptions

Where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence.

13. Criminal Law § 75— pre-Miranda confession — request for counsel

In prosecution begun after the decision in *Escobedo v. Illinois*, 378 U.S. 478, but before the decision in *Miranda v. Arizona*, 384 U.S. 436, if the defendant, after requesting an attorney, was not given an opportunity to confer with him prior to making his confession, the confession is inadmissible in evidence against him.

14. Criminal Law § 76— confessions — voir dire — duty to make findings of fact

Where the evidence of the State and the defendant upon the voir dire

was sharply conflicting as to whether defendant had requested an attorney before or after making a confession, the failure of the trial judge to make a finding of fact with respect to this material point is error and warrants a new trial.

APPEAL by defendants Roy Lee Fox and Robert Carson McMahan from *Campbell, J.,* February 1965 Criminal Session of BUNCOMBE.

At the November 1964 Session of Buncombe, Roy Lee Fox, Arrlie Fox, Donald Fox, and Carson McMahan were jointly charged in two bills of indictment. One alleged that on 10 November 1964 the four men "did unlawfully, willfully and feloniously and of their malice aforethought kill and murder Ovella Curry Lunsford while they . . . were committing the crime of Robbery with firearms . . . ." The other alleged that, about midnight on 10 November 1964, the same four individuals, with the intent to steal, take, and carry away the property of Charles and Ovella Lunsford, did feloniously and burglariously break and enter their dwelling while it was actually occupied by them.

Roy Lee Fox (aged 28) is the nephew of Donald Fox (23). Arrlie Fox (16) is the brother of Roy Lee Fox and made his home with him. For several months prior to 10 November 1964, Carson McMahan (18) had also lived with Roy Lee Fox. Carson's brother married Roy's sister.

When the cases were called for trial, defendants were represented by the following attorneys: Cecil C. Jackson, Esq., appeared for Roy Lee Fox; Don C. Young, Esq., for Arrlie Fox; Shelby E. Horton, Jr., Esq., and W. Paul Young, Esq., for Donald Fox; and Robert E. Riddle, Esq., for Carson McMahan.

The solicitor moved to consolidate the two bills "into one trial." Roy Lee Fox and Carson McMahan each moved that he be tried separately from the other defendants. The solicitor's motion was allowed; defendants' motions were denied.

Neither Roy Lee Fox nor Carson McMahan offered evidence before the jury. Donald Fox introduced evidence but did not testify. Arrlie Fox, after having testified and been cross-examined by the solicitor and counsel for each of the other defendants, rested his case. Immediately thereafter, on the fourth day of the second week of the trial, in the absence of the jury, he tendered a plea of guilty of burglary in the first degree in the form prescribed by G.S. 15-161.1. The judge, after examining him to determine whether his plea was understandingly and voluntarily made, accepted it and entered the

mandatory judgment that Arrlie Fox "be confined in the State's prison for the full term of his natural life." The solicitor then took a *nolle prosequi* as to the murder charge against Arrlie.

On 26 February 1965, the jury found each defendant guilty of the charges of burglary and murder with the recommendation in each case that he be imprisoned in the State's prison for the rest of his natural life. Upon the charge of murder in the first degree, the court adjudged that each defendant be confined in the State's prison for life; upon the charge of burglary in the first degree, that he be similarly confined, this sentence to begin at the expiration of the sentence imposed upon the charge of murder in the first degree. None of the defendants appealed.

On 17 August 1967, Donald Fox filed in this Court a petition for certiorari in which he requested permission to appeal belatedly. For the causes shown, on 6 September 1967, we allowed his petition and, *ex mero motu,* authorized his three codefendants to join him in one consolidated appeal if they desired and were so advised. Thereafter, Roy Lee Fox attempted to prosecute a separate appeal, and Carson McMahan attempted a direct appeal to this Court from a judgment of Bryson, J., entered 23 March 1967, denying him relief in a post-conviction proceeding. We treated this purported appeal as a petition for certiorari to review the original trial and allowed the petition on 7 November 1967. In the exercise of our supervisory jurisdiction, on 7 February 1968, we ordered counsel for Donald Fox, Roy Lee Fox, and Robert Carson McMahan to collaborate with the Attorney General and file one revised transcript of the proceedings in the original trial. In consequence, the record proper and an agreed case on appeal were finally filed 9 April 1968, and the case was set for argument at the beginning of the fall term.

Arrlie Fox did not appeal. Donald Fox died on 17 April 1968 from wounds received in a prison riot, and his appeal abated.

At the trial, the State's evidence tended to show the following events: On 9 November 1964, Charles H. Lunsford (54), a farmer living in the Candler section of Buncombe County, sold some hay to Kenneth Treadway for $251.05 in cash. Lunsford put the money received as a payment in his billfold, which, at that time, contained $800.00-$1,000.00. Arrlie Fox, one of the four boys who moved the hay for Treadway, was present at the time. During the moving operation, Arrlie and a co-worker, Hoot Worley, twice went into the Lunsford residence to telephone Treadway for instructions. The telephone was located in a downstairs bedroom to the left of the front door. On the night of 9 November 1964, Arrlie Fox roomed at

the bunkhouse of Treadway Stables. During his stay there, he exhibited to the other boys who roomed there a single-shot nickel-plated derringer, which he owned.

Shortly after 11:00 p.m. on 10 November 1964, the doors and windows of the Lunsford home were all shut and latched, and Lunsford was seated in his kitchen. Hearing a noise, he turned to see a man wearing "a horrible looking mask" and pointing a pistol at him. The man said, "This is a holdup. We came to get your money and we are going to get it." Lunsford threw a bowl of applesauce at the intruder and "rushed him" into the bedroom, where he got him on the bed. After another person hit him in the back of the head, Lunsford got up to find two men pointing guns at him. The second man, shorter than the first and wearing a hat, had a white handkerchief tied over his face. Lunsford called upstairs to his wife that they were being held up. As he struggled with the men, she came downstairs carrying a .22 rifle. One of the men jerked her to one side; the other ordered Lunsford to hand over his pocketbook and fired a shot into the wall behind him. In the ensuing scuffle, Lunsford pulled the handkerchief from the man's face and observed his attacker, whom he later identified as defendant Donald Fox. When Lunsford told his wife to shoot the rifle he was knocked down again. While on the floor he heard two shots fired close together. He then jumped up to see his wife standing in the passageway with blood gushing from her mouth. At that moment the short man had a pistol sticking in Lunsford's side; the other one was pointing a pistol and the rifle directly at Mrs. Lunsford. When she said, "I have been shot. Get me a doctor. I am dying", the two men dashed out of the door.

After concealing his billfold, which contained over $1,000.00, and locking the doors Lunsford began the trip to the hospital in Asheville with his wife. He immediately discovered that the station wagon had a flat tire. He arrived at the hospital with a broken wheel. Here a doctor told him that Mrs. Lunsford had died from massive internal hemorrhages resulting from a bullet wound in her chest. The coroner removed from Mrs. Lunsford's body a .22 caliber lead bullet, which was introduced in evidence as State's Exhibit S-3. In the opinion of John Boyd, an expert in the field of firearms and ballistics, the bullet (S-3) could have been fired from State's Exhibit 13, an inexpensive German Kohm revolver. The alloy content of its barrel was so low that the interior riflings changed with every shot and conclusive comparisons were impossible.

Later that night, Lunsford returned to his home with Deputy Sheriffs Gray Burleson and Elmer Gregg. They found the downstairs

in great disorder. The disconnected bloody bedroom telephone was on the kitchen table. On the floor was an old hat and a piece of blue cloth, which Lunsford had torn from the coat of the shorter intruder. The officers removed one bullet from the bedroom ceiling and another, a .22 caliber bullet "from the derringer," was taken from the floor.

On Wednesday, 11 November 1964, Arrlie Fox and the other three Treadway employees, who had been at the Lunsford home on the 9th, were brought to the sheriff's office for questioning. They were first warned of their right to remain silent; that anything they said could be used against them in court; and that they had a right to counsel. Arrlie denied any knowledge of the Lunsford murder and attempted robbery. When the officers, who had learned he owned a derringer, asked to see it he said he had lost it the previous day.

On Friday morning, 13 November, Chief Deputy Sheriff Willis Mitchell, after warning Arrlie once more of his constitutional rights, questioned him again. At that time Arrlie said he did not want an attorney and he made the statement, which is briefly summarized below:

On 9 November 1964, Arrlie was at the Lunsford home loading hay for Kenneth Treadway. He twice entered the dwelling to make telephone calls. The next afternoon he told the other defendants that he had seen Lunsford paid for the hay and had observed that he had "a pretty good bit of money on him." The four agreed they would get the money from Lunsford and split it.

Carson produced a khaki coat, a woman's blue cloth coat, an old gray hat, and a Halloween mask, which he put in a tow sack. Thereafter, the four drove to a schoolhouse near the Lunsford home where Arrlie put on the overcoat and Halloween mask; Donald put on the hat and blue coat and tied a white handkerchief over his face. Roy gave Arrlie a shell for his .22 derringer and handed his own loaded .22 revolver to Donald. Roy then drove past the Lunsford house, where Donald and Arrlie got out. After Donald had cut the rear tire of the Lunsford station wagon, Arrlie went in the front door and Donald went to the back.

When Lunsford saw Arrlie wearing the Halloween mask he threw a bowl, which hit him on the left side of his head and "addled him for a little bit." Lunsford rushed him and was pulled off by Donald, who told Lunsford he wanted his pocketbook. Lunsford kept hollering, "This is a holdup." Mrs. Lunsford appeared. Arrlie grabbed her but turned her loose when she resisted. Donald jerked the light out

and shot the pistol to frighten Lunsford into giving him his pocketbook. Arrlie fired the derringer into the floor. The struggle continued. Mrs. Lunsford hit Donald over the head with a rifle and both he and Arrlie grabbed the barrel. When he heard two shots, Arrlie jerked the gun from the other two. At that time, Donald was down on Lunsford and blood was gushing from Mrs. Lunsford's mouth. Donald's mask had come off, and his face was showing. The two backed out of the kitchen door, taking the rifle with them.

After seeing the Lunsfords leave, Arrlie and Donald hailed Roy and Carson in the truck and told them that Mrs. Lunsford had been shot. In the woods beyond a church on a gravel road, Carson hid the coats, mask, guns, and rifle. After Donald and Arrlie had "straightened up" at the truck stop they went to Roy's home, where all but Donald remained for the night.

Defendants' motion to strike this statement was denied, but the court instructed the jury that they would consider it only as to Arrlie Fox.

On Friday, 13 November 1964, about noon, Arrlie accompanied Sheriff Clay and Deputy Sheriffs Mitchell and Burleson to the Lunsford home, where he "re-enacted the whole crime." He then directed them to the place where they recovered the rifle and a tow sack containing the mask, coats, and pistols.

On 14 November 1964, the day after he was arrested, Donald Fox made a statement introduced in evidence as State's Exhibit 35. Each defendant objected to its introduction. After a *voir dire,* the judge found facts, concluded that the statement had been freely and voluntarily made, and admitted it. Thereafter, he denied defendants' motions to strike it from the evidence.

Since Donald Fox's appeal has abated, the evidence elicited upon *voir dire* and the facts found will not be recited. In admitting the statement, the judge admonished the jurors that they would consider it only as against Donald Fox. Donald's statement implicated all four defendants in the Lunsford murder and attempted robbery and differed in no material particular from the one given by Arrlie. Donald did, however, identify State's Exhibit 13, a .22 revolver with tape around the handle, as the gun he had used at Candler on 10 November 1964.

Investigating officers obtained two written statements from Carson McMahan after his arrest on Friday, 13 November 1964. The first (S-37) was obtained by Deputy Sheriff Albert Cunningham and Lieutenant Elmer Gregg that night. The second (S-36) was made to

Sheriff Clay and Deputy Gray Burleson on Sunday, 15 November 1964. Upon defendants' objections to its introduction, the judge conducted a *voir dire.*

The testimony of Cunningham and Gregg tended to show: Before questioning McMahan about 9:00 p.m. on Friday, 13 November 1964, they told him he did not have to tell them anything; that anything he said could be used against him; and that he was entitled to an attorney before he said anything. McMahan then said that on the night Mrs. Lunsford was shot he went to bed at home at 8:30 p.m. and did not leave the house until the next morning. The officers questioned him again about 10:30 p.m. This time Cunningham told him "that he would be a lot better off in court if he would tell them the truth about what happened. . . . [H]e would probably be charged with accessory to murder." They also showed him the guns, mask, and clothing to let him know that they "knew what had happened" and asked him "if he wanted to give a confession." He said that if he confessed, Roy would kill him. Whereupon, Cunningham promised that he would protect him from Roy if he would just tell the truth about it. McMahan then made a statement, which Cunningham took down in longhand. McMahan read the statement and signed it. This statement, S-37, was not offered in evidence.

On Sunday, 15 November 1964, Deputy Sheriff Gray Burleson and Sheriff Clay talked to McMahan. Burleson's testimony, on *voir dire,* tended to show: He did not know that Officers Cunningham and Gregg had previously secured a statement from McMahan. On Sunday, McMahan was brought into the sheriff's office, where Burleson fully warned him of his constitutional rights. McMahan said that he wanted to make a statement "to get this off of his mind." He then made a statement, which Mrs. Israel, one of the court reporters for Buncombe County, took and transcribed. McMahan, after reading and signing the transcription (S-36), said there were no corrections and that "he felt better that it was over."

McMahan, testifying on the *voir dire,* said that he signed both S-36 and S-37, but that he did so only because Mr. Gregg told him that if he would sign a statement he "wouldn't have to build no time" and that he "would get off with probation." McMahan further said that neither S-36 nor S-37 was a true statement.

After considering the testimony offered on *voir dire,* the judge found facts substantially in accord with the evidence summarized above. He specifically found that Officer Cunningham told McMahan "that it would be better for him if he told the truth about the entire matter and that it would be better for him in court; . . . that

sometime during the evening when said statement, State's Exhibit 37, was being taken, someone in the Sheriff's department mentioned to the defendant that he might be charged with being an accessory to the crime rather than a principal, and this would be a lesser charge." Upon the facts found, Judge Campbell adjudged that the statements given by McMahan, both S-36 and S-37, "were freely and voluntarily given, without threats, duress, coercion or inducements that would in any way violate the defendants' constitutional rights."

Over defendants' objections, after instructing the jurors to consider it only insofar as it pertained to defendant Carson McMahan, he admitted the statement, S-36. Thereafter, he denied defendants' motion to strike it from the evidence. The statement made by Carson McMahan, S-36, implicated all four defendants as conspirators and confederates in the murder and burglary. In all material aspects it corroborated the statements of Arrlie and Donald Fox.

The State also offered in evidence the stenographic transcription of a conversation between Roy Lee Fox and Sheriff H. P. Clay (S-42). In the absence of the jury, the court inquired into the manner in which it was obtained. The evidence upon *voir dire* tended to show:

Roy was arrested on Friday afternoon, 13 November 1964. His wife, father, and two brothers, Hubert and Leon, were also arrested. Roy was placed by himself in a cellblock on the fourteenth floor of the jail, which was put "on maximum security" because of reports that "some of the other Foxes were going to get them out of there." Instructions were given that only attorneys could visit prisoners. Shortly after his arrest, Sheriff Clay informed Roy that he had the right to remain silent; that any statement he made could be used against him; that he had the right to have an attorney present at any time. Roy said that he had done nothing and neither wanted nor needed an attorney, and he signed a statement that he knew nothing about the Lunsford murder. Later, however, when the sheriff showed him the clothing and weapons which had been found in the woods and at the Lunsford home, Roy questioned him "as to who had talked."

A warrant charging Roy with the murder of Ovella Lunsford was served upon him on 14 November 1964. Thereafter, he sent Sheriff Clay word by the jailer, Deputy Sheriff Martin, that he wanted to see him. In consequence, around 2:00 or 2:30 p.m. on Saturday afternoon, the sheriff went to the fourteenth floor of the jail to see him. Roy appeared to have been crying. The sheriff again warned him of his rights. Roy then said that he did know something about

"the occurrence on 10 November"; that with Arrlie, Donald, and Carson, he had gone from his house to Plemmons truck stop; that en route he had learned that those three were going "to pull a job"; that he got off at the truck stop; that later they came back and told him what had occurred at the Lunsford home. The sheriff inquired "if he wanted to make an official statement," and Roy said he would let him know. A little later the sheriff went back to the jail and had another conversation with Roy. This time Roy said "he wanted to make a full breast of the thing and get it off his mind." In the sheriff's office he gave a statement, which was electrically recorded as he made it. No officers made any promises or threats to Roy or put any pressure whatever on him to talk. That morning Deputy Sheriff Brooks had told him that his wife had convinced the officers she knew nothing about the crime with which he was charged and that she was going to be released.

After Roy was returned from the sheriff's office, Deputy Sheriff Burleson told the jailer that Fox wanted him to call an attorney. Roy then told the jailer that he wanted Mr. Jackson, and the jailer called him. This was the only telephone call which Roy ever requested. Mr. Jackson came to the jail to see Roy for the first time on Saturday afternoon while Roy was talking with the sheriff. He waited about fifteen minutes, and Roy was returned to his cell.

On the following day, Sunday, Sheriff Clay gave Roy a copy of the stenographic transcription of the statement he had made on Saturday and requested him to sign it if he found it to be correct. At that time, Roy told the sheriff that on Saturday Mr. Jackson had advised him not to sign or say anything unless he was present. Roy had not previously mentioned Mr. Jackson or any other attorney to the sheriff, and this was his first information that Mr. Jackson was in the case. He immediately called Jackson, who came to his office. There, in Jackson's and Roy's presence, the sheriff played the recording. Roy said he guessed that the voice was his. He did not sign the statement.

Roy Fox's testimony, on *voir dire,* tended to show: If he made any statement or confession to the sheriff "it was not of (his) *knowance"; that* he never sent for the sheriff, that the sheriff put words in his mouth when he was sick and fatigued from lack of sleep; that he had no connection whatever with the murder. The officers refused to tell him why he was arrested and what the charge against him was. From the time he was arrested he told Deputy Sheriff Brooks, Davis, Cunningham, Mitchell, and others that he wanted an attorney, but they refused his repeated requests to call one. Deputy

Sheriff Cunningham told him that McMahan and Arrlie had implicated him "in this murder"; that his wife had been arrested and neither she nor any member of his family would be released until he had signed a statement; that she would wash pans in Raleigh if he didn't, and she said for him to go ahead and tell the truth. Deputy Sheriff Brooks told him he thought that if Roy had not gone into the house he would not be in much trouble and that he should tell what happened. Sheriff Clay said if he would tell the truth he wouldn't get over 30-40 years and would have a chance at a parole; that the sheriff's office could be a lot of help in getting a parole. Deputy Sheriff Gregg, who is related to his sister's husband, said he would help him all he could if he would tell the truth.

At the conclusion of the *voir dire,* the judge found facts which detailed Roy's background and education, previous court experiences, and the treatment he received after his arrest. He also found that on 14 November 1964, after Sheriff Clay had warned him that he did not have to talk and that anything he said might be used against him — and at a time when he was in full possession of his faculties and mentally competent — Roy, "freely and voluntarily, and without threats of violence, promises, or other inducements," made a statement which was recorded and transcribed.

He thereupon overruled defendants' objections to the statement, and it was introduced in evidence as State's Exhibit 42. The transcript discloses no instruction by the court that the jury would consider the statement only as evidence against Roy Fox.

Roy's statement tended to show that Arrlie had represented to the other three defendants that it would be "a push over" to get Lunsford's money and that Arrlie had overpersuaded him to act as chauffeur on the night in question. His report of what Donald and Arrlie told him of events transpiring in the Lunsford house when he picked them up corroborated their statements. Roy's confession also implicated Carson McMahan.

When the State rested its case, Arrlie Fox testified in his own behalf. His account of events leading up to and transpiring at the Lunsford home on 10 November 1964, although given in greater detail, did not vary the statement he had previously given. In addition, Arrlie testified that in early October 1964, at Roy's instance, Arrlie and McMahan had robbed Mrs. Nolan Carson, who operated a small grocery near Weaverville. Roy, who did not participate in the actual robbery, took all this money. In September 1964, while Roy and Donald cruised around in the truck, Arrlie and McMahan had robbed Mr. T. J. Wilson, who ran a store near Burnsville. On another

occasion, Arrlie kidnapped an old man named Bryson, who carried money in his automobile, and took $500.00-$600.00 from him. Roy gave Arrlie "a little of the change to spend along." He also gave Donald some of the Bryson money.

After each defendant had rested, the State offered in evidence two additional statements signed by Carson McMahan (S-52 and S-53), which corroborated Arrlie's testimony with reference to the Carson and Wilson robberies. In each instance, McMahan said they had used a .22 revolver, which Roy had given Arrlie. Each defendant objected to the admission of these statements, and the court restricted the jurors' consideration of them to Carson McMahan only. (These exceptions were abandoned when not brought forward in appellants' briefs.)

T. W. Bruton, Attorney General; Ralph Moody, Deputy Attorney General; Millard R. Rich, Jr., Assistant Attorney General; and Andrew A. Vanore, Jr., Staff Attorney, for the State.

T. E. L. Lipsey for Roy Lee Fox, defendant.

John H. Giezentanner for Robert Carson McMahan, defendant.

SHARP, J.

Each appellant assigns as error the court's denial of his motion for a separate trial. These assignments raise the question whether a defendant, who is jointly indicted with another or others and moves for a severance, has a right to a separate trial when the State will offer in evidence the confession or admission of a codefendant which implicates the movant in the crime charged and is inadmissible against him.

[1] At the time this case was tried below, we followed the general rule that whether defendants jointly indicted would be tried jointly or separately was in the sound discretion of the trial court, and, in the absence of a showing that a joint trial had deprived the movant of a fair trial, the exercise of the court's discretion would not be disturbed upon appeal. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363; *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128; Annot., Right to severance where codefendant has incriminated himself, 54 A.L.R. 2d 830 (1957). In *State v. Bonner,* 222 N.C. 344, 23 S.E. 2d 45, this Court held that a joint trial had resulted in prejudice to the defendants and ordered a severance. The two defendants were tried jointly under separate bills of indictment for the first-degree murder of Ira L. Godwin. The

State relied for conviction solely upon each defendant's separate confession, which incriminated the other defendant, who had not acquiesced in it. Motions for separate trials were overruled and each was convicted. Upon appeal, this Court held that, despite the court's instructions to the jury to consider a confession only against the maker, the admission of the incriminating statements of one defendant had obviously prejudiced the trial of the other and that at the close of all the evidence the judge should have declared a mistrial and ordered a severance. See *State v. Battle, supra;* 1 Strong, N. C. Index, Criminal Law § 87 (1957).

[2, 3] Ordinarily, however, the admission of the extrajudicial confession of one codefendant, even though it implicated another against whom it was inadmissible, was held not to be error, *provided* the trial judge instructed the jury that the confession was evidence only against the confessor and must not be considered against another. *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677; Stansbury, N. C. Evidence § 188 (2d ed. 1963). In countenancing that rule, the court realized fully that the jury might find it difficult to follow the court's instructions and to put out of their minds those portions of a confession which implicated codefendant(s), yet, after weighing all the circumstances, the court thought that procedure the best solution of the difficult problem, and that it could not assume a jury would ignore the trial judge's instructions. *State v. Kerley,* 246 N.C. 157, 97 S.E. 2d 876. A confession legally obtained is clearly competent against the defendant who made it and the best evidence of his guilt. A severance requires multiple trials on exactly the same evidence, except as to the confessions, and, as in the instant case, the State's evidence frequently warrants an indictment against all the defendants for conspiracy to commit the crimes charged. *State v. Egerton,* 264 N.C. 328, 141 S.E. 2d 515.

The North Carolina rule was also the federal rule. *Delli Paoli v. United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 (1957). In *Delli Paoli,* the District Court admitted in evidence the confession of one of two defendants but instructed the jury that it was to consider it only in determining the guilt of the confessor. In affirming the appellant's conviction the Supreme Court of the United States said:

". . . Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instructions, our system

of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice.

" 'To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions.' . . . *Opper v. United States,* 348 U.S. 84." *Id.* at 242, 1 L. Ed. 2d at 286, 77 S. Ct. at 300.

[4] On 20 May 1968, however, in *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968), the Supreme Court of the United States overruled *Delli Paoli v. United States, supra.* In *Bruton,* the two defendants, Bruton and Evans, were tried jointly in the District Court on a federal charge of armed postal robbery. Evans' confession, which implicated Bruton, was admitted in evidence. Relying upon *Delli Paoli,* the trial judge instructed the jury that Evans' confession was incompetent hearsay against Bruton and should not be considered in determining his guilt or innocence. In reversing the decision of the United States Court of Appeals for the Eighth Circuit, which had affirmed Bruton's conviction, the Supreme Court repudiated the basic premise of *Delli Paoli* and quoted a statement by Chief Justice Traynor in *People v. Aranda,* 63 Cal. 2d 518, 529, 407 P. 2d 265, 271-272 (1965):

". . . A jury cannot 'segregate evidence into separate intellectual boxes.' . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A."

Mr. Justice Brennan, delivering the opinion of the Court in *Bruton,* said:

". . . We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse.

"* * *

". . . Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intoler-

ably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." *Id.* at 126 and 136, 20 L. Ed. 2d at 479 and 485, 88 S. Ct. at 1622 and 1628.

[4, 5] In *Roberts v. Russell,* 392 U.S. 293, 20 L. Ed. 2d 1100, 88 S. Ct. 1921 (1968), the Supreme Court held that *Bruton* is to be applied retroactively. In *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965), it was held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Id.* at 403, 13 L. Ed. 2d at 926, 85 S. Ct. at 1068. *Bruton,* therefore, is binding upon this Court and controls decision here.

[4, 6] The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately. The foregoing pronouncement presupposes (1) that the confession is inadmissible as to the codefendant (see *State v. Bryant, supra*), and (2) that the declarant will not take the stand. If the declarant can be cross-examined, a codefendant has been accorded his right to confrontation. See *State v. Kerley, supra* at 160, 97 S.E. 2d at 879.

[4] In this case, Arrlie Fox testified and was cross-examined by his codefendants. His statement, therefore, did not come within the ban of *Bruton.* However, no other defendant testified, and the confession of each — which implicated all the others — was admitted in evidence over their objections as were the statements of Carson McMahan (S-52 and S-53) with reference to two previous robberies. Thus, the decision in *Bruton* requires that appellants' convictions be set aside and a new trial awarded each of them.

[7] A new trial requires consideration of the assignments of error by which each appellant challenges the admissibility of his confession. The confessions in question were made in November 1964. Their admissibility therefore is not dependent upon whether McMahan and Fox were given the warnings specified in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), decided 13 June 1966; *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966). The question remains, however, whether they were freely and voluntarily given and whether the officers obtaining the

confessions employed the procedural safeguards then applicable. We consider first the confession of Carson McMahan.

[8-10] It has been the law of this State from its beginning that an extrajudicial confession of guilt by an accused is admissible against him only when it is voluntary. *State v. Vickers,* 274 N.C. 311, ... S.E. 2d .....; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Warren,* 235 N.C. 117, 68 S.E. 2d 779; *State v. Roberts,* 12 N.C. 259. When an investigating officer "offers some suggestion of hope or fear . . . to one suspected of crime and thereby induces a statement in the nature of a confession, the decisions are at one in adjudging such statement to be involuntary in law, and hence incompetent as evidence. . . ." (Citations omitted.) *State v. Biggs,* 224 N.C. 23, 26-27, 29 S.E. 2d 121, 123. Whether conduct on the part of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law, and the decision of the trial judge is reviewable upon appeal. *State v. Biggs, supra.*

[11, 12] In this case, the judge found that Officer Cunningham told McMahan that it would be better for him in court if he told the truth; that thereafter on 13 November McMahan made a statement (S-37), and while he was making it he was told that "he might be charged with being an accessory to the crime rather than a principal and this would be a lesser charge"; that on 15 November two other officers who did not know he had made a previous statement, after warning him of his rights, informed McMahan that he could "make a voluntary statement"; that McMahan then made the statement which was introduced in evidence as S-36.

Where the officers merely ask for the truth and hold out no hope of a lighter punishment a defendant's confession is not rendered involuntary by their request for "nothing but the truth." *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300; *State v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620; 23 C.J.S., Criminal Law § 817(8) (1961). In *State v. Dishman,* 249 N.C. 759, 107 S.E. 2d 750, the officers told defendant that "it would be better if he would go ahead and tell (them) what had happened." Nothing else was said. The court's conclusion that the defendant's confession was voluntary was upheld. In *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68, however, the officer testified that he told the defendant "if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." We held that "[t]his statement by a person in authority was a promise which gave defendant a hope for lighter punishment"; that

therefore the defendant's confession was involuntary and incompetent as a matter of law. *Id.* at 228, 152 S.E. 2d at 72.

Here, the implication of Officer Cunningham's statement to McMahan was (1) if he told the truth about the entire matter it would be better for him in court and (2) he might be charged with a lesser offense. Clearly this statement constituted "a suggestion of hope" which rendered his subsequent confessions involuntary. Nothing in the evidence suggests that the first confession (S-37) was any different from the subsequent confession (S-36), or that the promise which influenced the first one had not similarly influenced the second. If the hope of avoiding a murder charge influenced McMahan's first statement, it is improbable that he would have jeopardized that chance by refusing to make the same statement, or by making a different statement, to a second group of officers. "[W]here a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." *State v. Moore,* 210 N.C. 686, 692, 188 S.E. 421, 425; *accord, State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193; *State v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *State v. Roberts, supra.*

We hold, therefore, that the confession of Carson McMahan was incompetent and that its admission was prejudicial error.

[13] Roy Fox's confession antedated the decision in *Miranda v. Arizona, supra.* In the *Miranda* opinion, it is stated that interrogation of a prisoner who said he desires counsel must cease until he has had an opportunity to confer with an attorney. The question arises, therefore, whether this was the law prior to the *Miranda* decision. In *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1119 (1964), it was held that incriminating statements elicited by government agents from the defendant after he had been indicted and in the absence of his attorney were not admissible at his trial. *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964), extended this right to the presence of counsel to the time an accused is taken into custody. In *Escobedo,* the statement of a defendant, who had not been effectively warned of his constitutional right to remain silent and whose attorney had been forcibly kept from him, was held to be inadmissible in evidence against him.

Roy had been fully advised of his right to remain silent and to have counsel. Notwithstanding this distinction (and others which might be made between this case and *Escobedo*), if, after requesting an attorney, Roy was not given an opportunity to confer with him

prior to making his confession, it is our opinion that *Massiah* and *Escobedo* dictate a holding that his incriminating statements are not admissible in evidence against him. As pointed out in *Collins v. State* (Fla.), 197 So. 2d 574, *cert. denied,* 207 So. 2d 430 (Fla. 1968), a case involving this question, the Supreme Court said in *Miranda* that it based its decision upon cases it had previously decided:

"[W]e start here, as we did in *Escobedo,* with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution — that 'no person . . . shall be compelled in any criminal case to be a witness against himself' and that 'the accused shall . . . have the assistance of counsel.'" *Miranda v. Arizona, supra* at 442, 16 L. Ed. 2d at 705, 86 S. Ct. at 1611.

People v. Blanchard, 37 Ill. 2d 69, 224 N.E. 2d 813 (1967), also involved a crime which antedated *Miranda.* Relying upon *Escobedo,* the Illinois Supreme Court held the defendant's confession inadmissible because made in the absence of counsel after a request which had not been withdrawn. It disposed of the State's contention that the officers to whom the confession was made did not know that defendant had requested counsel by upholding that the "interrogating officers" were charged with the same knowledge which the "escorting deputies" had. "To hold otherwise," the Court said, "could make it possible to nullify an accused's request for the assistance of counsel by the expedient of transferring his custody for questioning to an officer who would be unaware of the request for an attorney." *Id.* at 73, 224 N.E. 2d at 813, 816. See Annot., Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R. 3d 1259 (1966).

[14] In passing upon the admissibility of Roy's confession it is necessary to ascertain whether he had been denied the assistance of counsel at the time of the interrogation which produced his confession. The State's evidence tends to show that shortly after his arrest Roy said that he did not want counsel; that thereafter he voluntarily made his confession to Sheriff Clay without telling him he desired counsel; that he first requested an attorney after he had made his confession. Roy's evidence tends to show that he requested counsel immediately after his arrest on Friday afternoon, 13 November; that, despite his continuous requests thereafter, Mr. Jackson was not called until Saturday, 14 November; that, when Jackson came to the jail in response to the call, he was informed that the sheriff was talk-

ing to Roy; that he waited and, in about fifteen minutes, Roy was brought up from the sheriff's office.

Although the evidence as to when Roy requested an attorney was sharply conflicting, the court's findings of fact omit any reference to this request, the time Mr. Jackson was called, and when he came. In a case such as this, after the preliminary inquiry into the circumstances surrounding the making of a confession, "the approved practice requires that the judge, in the absence of the jury, make findings of fact. These findings are made to show the basis for the judge's decision as to the admissibility of the proffered testimony." *State v. Conyers,* 267 N.C. 618, 621, 148 S.E. 2d 569, 571-72, *Accord, State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868; *State v. Gray, supra; State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344.

If Roy voluntarily made the statement (S-42), or the earlier one which was not transcribed, and *thereafter* requested counsel for the first time, he was not deprived of his Sixth Amendment right to counsel. If, however, *after* he had requested an attorney, and *before* he was given an opportunity to confer with him, officers continued to interrogate Roy, any incriminating statement thus elicited cannot be received in evidence against him. The ruling upon the admissibility of any statement which Roy may have made must await the findings of material facts to be made by the judge at the next trial.

New trial.

STATE OF NORTH CAROLINA v. WILLARD HORACE COLSON

No. 1

(Filed 9 October 1968)

1. Criminal Law § 146; Appeal and Error §§ 1, 3— appeal from Court of Appeals to Supreme Court — substantial constitutional question

An appeal may be taken as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case which directly involves a substantial question arising under the Constitution of the United States or of this State. G.S. 7A-30(1).

2. Criminal Law § 146; Appeal and Error §§ 1, 3— appeal from Court of Appeals to Supreme Court — substantial constitutional question — jurisdiction of Supreme Court — scope of review

An appellant seeking to appeal to the Supreme Court from a decision of the Court of Appeals as a matter of right on the ground that a substantial

constitutional question is involved must allege and show the involvement of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination, the allegation of a superficial or frivolous constitutional question or the mere mouthing of constitutional phrases like "due process" and "equal protection" being insufficient to avoid a dismissal of the appeal; once involvement of a substantial constitutional question is established, the Supreme Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented for review.

3. Criminal Law § 84; Searches and Seizures § 1— evidence gained by illegal search and seizure — Mapp. v. Ohio

Since the decision of *Mapp v. Ohio*, 367 U.S. 643, evidence unconstitutionally obtained is excluded in a state court, not as a rule of evidence, but as an essential of due process.

4. Criminal Law § 84; Searches and Seizures § 1— evidence rendered incompetent by G.S. 15-27

Evidence is not rendered incompetent by G.S. 15-27 unless it was obtained (1) in the course of a search, (2) under conditions requiring a search warrant, and (3) without a legal search warrant.

5. Criminal Law § 84; Searches and Seizures § 1; Constitutional Law § 21— prohibition of unreasonable searches and seizures

The Constitution does not prohibit all searches and seizures but only those which are unreasonable.

6. Criminal Law § 84; Searches and Seizures § 1— definition of unreasonable search

An unreasonable search is an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in a criminal prosecution.

7. Criminal Law § 84; Constitutional Law §§ 21, 37; Searches and Seizures § 2— waiver of immunity from unreasonable search and seizure — consent

An individual may waive his immunity from unreasonable searches and seizures; where an individual waives such immunity by consenting to a search of his person, he may not thereafter complain that his constitutional rights were violated by the search.

8. Criminal Law § 84; Constitutional Law § 37; Searches and Seizures § 2— consent to search without warrant — waiver

One who voluntarily permits or expressly invites and agrees to a search, being cognizant of his rights, waives his constitutional protection against unreasonable searches and seizures.

9. Criminal Law § 84; Constitutional Law § 21; Searches and Seizures § 1— seizure without warrant — no search required — article in plain view

The constitutional guaranty against unreasonable seizures does not pro-

hibit a seizure without a warrant where no search is required and the contraband matter is fully disclosed and open to the eye and hand.

10. Criminal Law § 84; Searches and Seizures § 1— article in plain view or voluntarily revealed by defendant

Where during a general conversation at the police station after being questioned about his wife's death, defendant offered to show officers a scar on his stomach, and in so doing revealed blood on his undershirt, and at the request of the officers defendant then voluntarily exhibited his blood-stained undershorts, the officers lawfully seized defendant's clothing without a warrant and the clothing was properly admitted into evidence, no search warrant being necessary when an incriminating article is in plain view or is revealed by the voluntary act of the defendant.

11. Criminal Law § 42; Constitutional Law § 33— seizure of clothing worn by defendant — self-incrimination

In a homicide prosecution, defendant's Fifth Amendment privilege against self-incrimination was not violated by the seizure from defendant's person and the subsequent chemical analysis of clothing allegedly worn by defendant at the time the homicide occurred.

12. Criminal Law § 99— questions propounded by trial judge

It is proper, and sometimes necessary, that the trial judge ask questions of a witness, but such examinations should be conducted with care and in a manner which avoids prejudice to either party.

13. Criminal Law § 99— questions by court — expression of opinion

Questions by the trial court which by their tenor, frequency, or by the persistence of the trial judge tend to convey to the jury in any manner at any stage of the trial the impression of judicial leaning violate G.S. 1-180 and constitute prejudicial error.

14. Criminal Law § 99— questions by court to clarify testimony

The questions asked witnesses by the court in this homicide prosecution *are held* not to constitute an expression of opinion by the judge, the questions serving only to clarify and promote a proper understanding of the testimony.

15. Coroners; Criminal Law § 111— refusal to instruct on duties of coroners

In a homicide prosecution, the court properly refused to instruct the jury on the statutory duties of coroners set forth in G.S. 152-7, such duties being collateral to the issue of defendant's guilt or innocence.

16. Criminal Law § 161— assignments not supported by exception

Assignments of error not supported by an exception will not be considered by the Supreme Court. Supreme Court Rule No. 19(3).

17. Criminal Law §§ 146, 174— appeal from Court of Appeals to Supreme Court — constitutional question not raised in Court of Appeals

Upon appeal to the Supreme Court from a decision of the Court of Appeals, the Supreme Court will not pass upon a constitutional question not raised and passed upon in the Court of Appeals.

18. Criminal Law § 84; Constitutional Law § 37; Searches and Seizures § 2— consent to search without warrant — waiver

Where police officers initially entered defendant's home by invitation of defendant's son and discovered the dead body of defendant's wife, the officers making a partial investigation at that time, evidence discovered in defendant's home by a search without a warrant later the same day when the officers resumed their initial investigation at the scene of the crime with defendant's consent and participation *is held* properly admitted into evidence, defendant's consent having dispensed with the necessity of a search warrant.

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *Cohoon, J.*, at the November 1967 Criminal Term of PASQUOTANK County Superior Court.

Defendant was tried upon a bill of indictment charging him with the murder of his wife Kathren Ralph Colson on 3 August 1967. The solicitor sought a verdict of guilty of murder in the second degree or manslaughter, as the evidence might disclose. The jury convicted defendant of manslaughter, and a prison sentence of 12 to 15 years was imposed by the court. Defendant appealed to the Court of Appeals where his conviction and sentence was upheld, 1 N.C.App 339.

The case is now before us on appeal, defendant alleging involvement of substantial constitutional questions by reason of (1) an illegal search of his person and seizure of his clothing; and (2) an illegal search of his house and seizure of an empty Jacquin's Vodka bottle.

The State's evidence — defendant offered none — tended to show that defendant's wife was stabbed to death at her home in Elizabeth City on the night of 3 August 1967. Police officers went to the home in response to a telephone call from defendant's son received at approximately 12:30 a.m. on 4 August 1967. They were admitted by the son Willard Colson, Jr., and found the deceased in a slumped position on a settee in the living room with her head on the armrest. Examination revealed a stab wound in her chest which penetrated the heart and large vessels leading to the lungs. A search of the house at that time revealed a butcher knife approximately twelve inches long on the counter in the kitchen with blood on the blade. Blood spots were also found on the bed clothing and sheets in the bedroom and on the rugs.

Defendant arrived at the house at approximately 1:30 a.m. just as the body of his deceased wife was being placed in a hearse. He was highly intoxicated, smelled of alcohol and was staggering. He walked up and asked the chief of police: "Chief, what's wrong? Has she had a heart attack?" The chief of police replied: "No, she did

not have a heart attack; she has been stabbed." The defendant then asked: "What with, a butcher knife?" During this conversation defendant was not in custody and was not being questioned by the officers. The chief of police then requested defendant and his son to accompany him to the police station, and they did so voluntarily.

Defendant was given the *Miranda* warning at the police station, after which he told the officers he had gotten off work and arrived home about 5 o'clock p.m. on the preceding afternoon; that his wife had been drinking and provoked an argument, though there was no argument between them; that he left the house about 6 p.m., at which time his wife was lying sprawled out on the settee; that he went to the liquor store and purchased a pint of liquor and just drove around drinking it; that the butcher knife found in the kitchen of his home was his, but he expressly denied that he had ever cut his wife or that he knew who had done it.

Following the foregoing statement and during a general conversation at the police station, defendant offered to show the officers a scar on his stomach. When he opened his shirt, the officers saw blood on his undershirt and asked defendant if they might see the rest of his underclothes. Defendant voluntarily exposed his undershorts to view at which time blood was observed on them. When he was asked by the officers and by his son how the blood got on his underclothing, defendant did not answer.

A serologist testified that the blood of the deceased was type "AB" and the blood on defendant's undershirt and undershorts was type "AB," while defendant's blood was type "O". This witness further stated that he had made an examination of the blood spots on the garments of the deceased, on the sheets in the bedroom, and on the butcher knife, and all were found to be type "AB".

Defendant's clothing — T shirt, undershorts, dungarees and shirt — was taken from him by the police between 2:00 and 2:30 a.m. on 4 August 1967. At this time he was being detained at the police station for questioning but had not yet been placed under arrest. A warrant was not obtained until sometime between 8:30 and 9:00 a.m. on the morning of 4 August 1967, as soon as a magistrate was available to issue it.

The defendant remained at the police station from the time he arrived at approximately 1:30 a.m. until about 9:30 a.m. the same morning when he accompanied the officers on a return to his home to see if any other evidence which might have been overlooked the previous night could be located. The officers requested permission to

enter the home for that purpose, and defendant, offering no objection, entered with them. Upon making a further search, an empty pint Jacquin's Vodka bottle was found under a chest of drawers in the bedroom. An employee of the County ABC Board testified that defendant bought a pint of vodka from him on the evening of 3 August 1967 between 7:15 and 8:00 p.m., and identified the bottle found in the bedroom as having been sold from his register on 3 August 1967. The bottle, and the testimony concerning its discovery, was admitted into evidence over objection by defendant.

Defendant's motion for nonsuit at the close of the State's evidence was overruled. The jury found defendant guilty of manslaughter, and from a judgment of imprisonment defendant appealed to the Court of Appeals, where his conviction and sentence was upheld, and then to this Court assigning errors as noted in the opinion.

Russell E. Twiford, O. C. Abbott and John S. Kisiday, Attorneys for defendant appellant.

T. W. Bruton, Attorney General, and Bernard A. Harrell, Assistant Attorney General, for the State.

HUSKINS, J.

Article IV, Section 10 of the Constitution of North Carolina confers upon the Supreme Court "jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference," authorizes establishment of the Court of Appeals with such appellate jurisdiction as the General Assembly may provide, and empowers the General Assembly by general law to provide a proper system of appeals.

In the exercise of its constitutional authority, the General Assembly created the North Carolina Court of Appeals effective January 1, 1967, as a part of the appellate division of the General Court of Justice, and defined the appellate jurisdiction of the Supreme Court and the Court of Appeals in these words: "The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice . . . in accordance with the system of appeals provided in this article." G.S. 7A-26. See also G.S. 7A-5, 7A-16.

[1] The General Assembly then enacted a system of appeals providing, *inter alia,* that an appeal may be taken as a matter of right to the Supreme Court from any decision of the Court of Appeals rendered in a case which directly involves a substantial question

arising under the Constitution of the United States or of this State. G.S. 7A-30(1).

[2] In the case before us, defendant appeals to the Supreme Court, allegedly as of right, on the ground that a substantial constitutional question is involved. The initial question, therefore, for the Court to decide is: Does the case present a substantial constitutional question; and, if so, does the Supreme Court consider only the constitutional questions and nothing else, or may it pass upon all assignments of error allegedly committed by the Court of Appeals and properly brought forward for review? In other words, what is the scope of review upon an appeal as of right? This is a matter of first impression in North Carolina due to recent changes in our court structure. Decisions in other jurisdictions having intermediate appellate courts are only obliquely authoritative due to constitutional and statutory provisions at variance with ours.

Intermediate appellate courts exist in sixteen states. In some, the constitution or statutes provide for a direct appeal from the trial court to the highest court in cases involving a substantial constitutional question, by-passing the intermediate appellate court. See *Burke v. State,* 205 Ga. 520, 54 S.E. 2d 348; *Glos v. People,* 259 Ill. 332, 102 N.E. 763; *Capitol Indemnity Insurance Co. v. State,* 126 Ind. App. 535, 134 N.E. 2d 822; *New Orleans v. Vinci,* 153 La. 528, 96 So. 110, 28 A.L.R. 1382; *Fish v. Chicago R. I. & P. Ry.,* 263 Mo. 106, 172 S.W. 340; *Going v. Going,* 148 Tenn. 522, 256 S.W. 890, 31 A.L.R. 633. In "by-pass" states, involvement of a substantial constitutional question is jurisdictional, and the highest court is powerless to act absent a constitutional issue.

The Missouri Constitution, Article V, Section 3, provides: "The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the construction of the Constitution of the United States or of this state. . . ." Hence, the Supreme Court of Missouri in *Taylor v. Dimmitt,* 336 Mo. 330, 78 S.W. 2d 841, 98 A.L.R. 995, said: "Our jurisdiction rests upon the constitutional issues involved. Having jurisdiction, this court will determine the whole case, irrespective of the issue upon which the case may turn."

In *Pennington v. Farmers' and Merchants' Bank,* 144 Tenn. 188, 231 S.W. 545, 17 A.L.R. 1213, plaintiff sued to recover the value of a $1,000 bond which had been lodged in the bank's vault for safekeeping and stolen by burglars. The trial court nonsuited under a statute which provided that the bank shall not be liable for loss by theft, robbery or fire. Plaintiff, contending the statute was unconstitutional for that it was arbitrary and unreasonable and discrim-

inatory in favor of banks, appealed directly to the Supreme Court alleging involvement of a constitutional question. The court said: "We do not think this legislation is applicable to the case before us, and therefore have no occasion to pass upon the constitutionality of the enactment. Nevertheless, as the constitutional question was fairly raised on the record, we retain jurisdiction of the case and will dispose of the other questions."

In Indiana, a statute provides that jurisdiction of an appeal shall be in the Supreme Court, rather than the intermediate appellate court, if a constitutional question is involved. The Indiana Supreme Court said: "But, in order for the Supreme Court to have jurisdiction of such a case, the constitutional question must actually be involved and be properly presented. It is not sufficient that it merely be alleged to be involved. If an allegation only was sufficient, it would be possible to appeal every case . . . to the Supreme Court or to obtain the transfer thereto of any case pending in the Appellate Court." *Pivak v. State,* 202 Ind. 417, 175 N.E. 278, 74 A.L.R. 406.

Article VI, Section 5, of the Constitution of Illinois provides, *inter alia,* that "appeals from the final judgments of circuit courts shall lie directly to the Supreme Court as a matter of right only . . . (b) in cases involving a question arising under the Constitution of the United States or of this State. . . . Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. . . ."

In *People v. Perry,* 34 Ill. 2d 229, 215 N.E. 2d 229, defendant was convicted in the trial court and appealed directly to the Supreme Court alleging that the trial court erred in refusing to suppress evidence obtained by an unreasonable search and seizure in violation of his rights under the State and Federal Constitutions. The court said: "And while the latter contention serves to invest us with jurisdiction of the direct appeal, the constitutional question it presents need not be decided since in our opinion it is unnecessary to do so." The court then considered other assignments involving non-constitutional questions and reversed the judgment of the trial court on the ground that defendant had not been proven guilty beyond a reasonable doubt.

In "double appeal" states, including North Carolina and New Jersey, cases involving a substantial constitutional question are appealable in the first instance to the intermediate appellate court

and then to the highest court as a matter of right. G.S. 7A-30(1); New Jersey Constitution, Article 6, Section 5.

In New Jersey, if the alleged constitutional question is frivolous, the appeal will be dismissed. *Klotz v. Lee,* 21 N.J. 148, 121 A. 2d 369; *State v. DeMeo,* 20 N.J. 1, 118 A. 2d 1, 56 A.L.R. 2d 905. On the other hand, if a substantial constitutional question is *alleged and shown,* the Supreme Court may then consider all questions properly presented. ". . . [T]he constitutional question should be a real and not merely a superficial one. Consequently this court determined in the early days of the new system that a constitutional question . . . must be 'substantial', *Starego v. Soboliski,* 11 N.J. 29, 32, 93 A. 2d 169 (1952), cert den. 345 U.S. 925, 73 S. Ct. 784, 97 L. ed. 1356 (1953), and not 'merely colorable', *State v. Pometti,* 12 N.J. 446, 450, 97 A. 2d 399 (1953)." *Tidewater Oil Co. v. Mayor and Council of Carteret,* 44 N.J. 338, 209 A. 2d 105 (1965). The constitutional question relied upon must not have already been the subject of a conclusive judicial determination. *Tidewater Oil Co. v. Mayor and Council of Carteret, supra; State v. Pometti, supra.* See *Camden County v. Pennsauken Sewerage Authority,* 15 N.J. 456, 105 A. 2d 505 (1954); *Butler Oak Tavern v. Division of Alcoholic Beverage Control,* 20 N.J. 373, 120 A. 2d 24 (1956); *Fifth Street Pier Corp. v. City of Hoboken,* 22 N.J. 326, 126 A. 2d 6 (1956).

In 4 Am. Jur. 2d, Appeal and Error, § 14, we find this language: "For a case to be appealable as involving a constitutional question, the question must be actually involved in the case and must be properly presented; it is not sufficient that it merely be alleged."

It will be noted from the foregoing citations that in jurisdictions having intermediate appellate courts the appellant is invariably required to *allege and show* the involvement of a substantial constitutional question in order to gain entrance to the higher appellate court as a matter of right. Mere assertion of constitutional involvement will not suffice. This is true not only in jurisdictions employing a direct appeal by-passing the intermediate court but also in states employing the provision for double appeals as of right when a substantial constitutional question is involved. Once involvement of the basic question is established, however, the higher appellate court may then pass upon all assignments of error allegedly committed by the intermediate appellate court and properly brought forward for review.

It now becomes our duty to determine the scope of review upon an appeal as of right under the Constitution and laws of North Carolina. Brief historical reference reveals that the 1963 General As-

sembly by joint resolution created the Courts Commission and charged it with the duty of preparing and drafting legislation necessary for the full and complete implementation of Article IV of the Constitution. In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the Courts Commission was guided, *inter alia,* by the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case. The Commission sought to avoid double appeals as of right, except in the most unusual cases, the importance of which may be said to justify a second review. See Report of the Courts Commission to the 1967 General Assembly, p. 4. That report depicts the legislative intent with respect to appellate jurisdistion in the following language on pages 10 and 11:

> "In the beginning it must be understood that, in speaking of the jurisdiction of the Court of Appeals, we are necessarily also dealing with the jurisdiction of the Supreme Court. Under our pre-1965 Constitution, all appellate jurisdiction above the trial division was vested in the Supreme Court, and such jurisdiction as is now to be given to the Court of Appeals is necessarily taken from the Supreme Court. However, the exercise of jurisdiction given to the Court of Appeals may still be subject to review by the Supreme Court, and hence it is possible to speak with accuracy and clarity only of the jurisdiction of the *Appellate Division,* or of its two separate branches, the Court of Appeals *and* the Supreme Court.
>
> "The 1965 amendment to the Judicial Article of the Constitution provides that the Court of Appeals shall have such appellate jurisdiction as the General Assembly may provide. This must be read in conjunction with the Supreme Court's power, set out in Art. IV, Sec. 10(1) '. . . to review upon appeal any decision of the courts below, upon any matter of law or legal inference,' and of the grant to the General Assembly in Art. IV, Sec. 10(5) [now (6)], to '. . . provide a proper system of appeals.' Construing these sections together, it is clear that the Supreme Court is empowered directly by the Constitution (though not compelled by it) to review any and all cases, and that under the Constitution the General Assembly may assign to the Court of Appeals such appellate jurisdictions as it sees fit. Thus, the only constitutional limitations on making any conceivable division of appellate labors and functions between the two are the limitations implicit in the fact that one is higher than the other in the hierarchy of the General Court of Justice."

A Bill embracing these philosophies was enacted into law as Chapter 108 of the 1967 Session Laws.

[2] Construing the legislative intent and mindful of the New Jersey system to which we are kin, we hold that an appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must *allege and show* the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal. Once involvement of a substantial constitutional question is established, this Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented here for review.

[10] Defendant assigns as error the admission into evidence of the clothing he was wearing on the night his wife was killed (T shirt, undershorts, dungarees and shirt). These items were removed from his person about 2:00 a.m. on the morning of 4 August 1967 at the police station while defendant was detained during police investigation but prior to his actual arrest. Defendant contends the taking of his clothing was an unlawful search and seizure, violative of the Fourth and Fifth Amendments to the Federal Constitution and Article I, Section 15, of the Constitution of North Carolina. The State contends no search was involved, and the Court of Appeals so held.

[3] Under common-law rules the admissibility of evidence was not affected by the means, lawful or otherwise, used in obtaining it, *Olmstead v. United States,* 277 U.S. 438, 72 L. ed. 944, 48 S. Ct. 564; *State v. McGee,* 214 N.C. 184, 198 S.E. 616; and, if the evidence was otherwise relevant and competent, it was generally admissible unless its admission violated the constitutional rights of the person against whom it was offered or contravened the statutory law of the jurisdiction. 29 Am. Jur. 2d, Evidence § 408. Notwithstanding such general common-law practice, the Supreme Court of the United States developed an exclusionary rule applicable in the federal courts whereby evidence that had been obtained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure was excluded. *U. S. v. Blue,* 384 U.S. 251, 16 L. ed. 2d 510, 86 S. Ct. 1416. This rule was first laid down in *Weeks v. United*

States, 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341 (1914). There, the Court held that evidence obtained by federal officers in an illegal search and seizure violated defendant's constitutional rights under the Fourth Amendment and was inadmissible, but stated that the Fourth Amendment reached only the federal government and its agencies and did not apply to individual misconduct of state officers not acting under federal authority. Thus, evidence admittedly obtained by state or local officers by illegal search and seizure continued to be competent in state courts if otherwise relevant, unless prohibited by statutory law of the forum.

In *Wolf v. Colorado,* 338 U.S. 25, 93 L. ed. 1782, 69 S. Ct. 1359 (1949), the Court declined to extend the exclusionary rule adopted in *Weeks* to the states by the due process clause of the Fourteenth Amendment, stating that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." However, twelve years later, in *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684 (1961), it was held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." Since *Mapp,* the states are no longer free to adopt or reject at will the exclusionary rule as a means of enforcing the Fourth Amendment in state courts. Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process — not as a rule of evidence but as a matter of constitutional law.

[4] The federal exclusionary rule enunciated in *Weeks* became statutory law in North Carolina long before *Mapp* by enactment of Chapter 339 of the 1937 Session Laws as amended by Chapter 644 of the 1951 Session Laws, codified as G.S. 15-27, which provides in pertinent part that "no facts discovered or evidence obtained without a legal search warrant in the course of any search, made under conditions requiring the issuance of a search warrant, shall be competent as evidence in the trial of any action." Evidence is not rendered incompetent under the foregoing section unless it was obtained (1) in the course of a search, (2) under conditions requiring a search warrant, and (3) without a legal search warrant. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; *State v. Stevens,* 264 N.C. 737, 142 S.E. 2d 588.

So, in the case before us, if the circumstances under which defendant's clothing was taken required the issuance of a search warrant, the seizure was unlawful and the evidence inadmissible. Otherwise not.

[5, 6] The Constitution does not prohibit all searches and seizures but only those which are unreasonable. *Carroll v. United States,* 267 U.S. 132, 69 L. ed. 543, 45 S. Ct. 280; *Elkins v. United States,* 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437. An unreasonable search has been defined as "an examination or inspection without authority of law of one's premises or person, with a view to the discovery of . . . some evidence of guilt, to be used in the prosecution of a criminal action." 47 Am. Jur., Searches and Seizures § 52.

[7, 8] An individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search of his person, an individual cannot thereafter complain that his constitutional rights have been violated. If one voluntarily permits or expressly invites and agrees to the search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection. 47 Am. Jur., Searches and Seizures § 71 and cases cited; *State v. McPeak,* 243 N.C. 243, 90 S.E. 2d 501; *State v. Moore,* 240 N.C. 749, 83 S.E. 2d 912.

[9] Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur., Searches and Seizures § 20, as follows: "Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand." See *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736; and *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95.

[10] Applying these principles to the evidence regarding defendant's clothing, we are of the opinion that the circumstances prevailing at the police station when defendant's clothing was taken required no search warrant. There was no need to search. As stated in the opinion of the Court of Appeals, 1 N.C.App. 339 at 343, 161 S.E. 2d 637, 640, ". . . the bloody underclothing was not discovered by the police officers as a result of any search being made by them of defendant's person. Rather, the defendant voluntarily exhibited his underclothing to them while, for whatever reasons of his own, he was engaged in showing them scars upon his body. When the incriminating article is in plain view of the officers or is revealed by the voluntary act of the defendant, no search is necessary and the constitutional guaranty does not apply."

[11] Defendant's Fifth Amendment privilege against self-incrimination was not violated by seizure of his clothing. Clothing, like identifying physical characteristics such as blood samples, fingerprints, hair, the body itself, is outside the protection of the Fifth Amendment. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581.

In *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873, defendant claimed the taking of his clothing for chemical analysis, followed by testimony that the stains found on them were human blood stains, constituted self-incrimination forbidden by Article I, Section 11, of the Constitution of North Carolina and the Fifth Amendment to the United States Constitution. The Court said: "This contention runs counter to State and Federal decisions. No constitutional rights were invaded when the officer required defendant to surrender for examination and analysis the clothing worn by him at the time the crime was alleged to have been committed." See *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269 (1967).

It follows that seizure of defendant's clothing did not violate his rights under the Fourth or Fifth Amendments to the United States Constitution or under Article I, Section 15, of the Constitution of North Carolina. Defendant's first Assignment of Error is overruled.

[12-14] Defendant assigns as error certain questions put to witnesses by the trial judge during the trial. The Court of Appeals found no merit in this assignment, and we agree. "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so. . . ." *State v. Horne,* 171 N.C. 787, 88 S.E. 433. Such examinations should be conducted with care and in a manner which avoids prejudice to either party. If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the "impression of judicial leaning," they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error. *State v. McRae,* 240 N.C. 334, 82 S.E. 2d 67; *Andrews v. Andrews,* 243 N.C. 779, 92 S.E. 2d 180; *State v. Peters,* 253 N.C. 331, 116 S.E. 2d 787; *State v. Lea,* 259 N.C. 398, 130 S.E. 2d 688. Even so, this Court has said that "Judges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness so that the 'truth, the whole truth, and nothing but the truth' be laid before the jury." *Eekhout v. Cole,* 135 N.C. 583, 47 S.E. 655. We have examined the questions by the judge to which exception was taken, and in our opinion no prejudice resulted from them. The questions

served only to clarify and promote a proper understanding of the testimony of the witnesses and did not amount to an expression of opinion by the judge. *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9; *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1.

[15, 16] The statutory duties of coroners are set forth in G.S. 152-7. Defendant requested the trial judge to instruct the jury relative to these duties and assigns as error the approval by the Court of Appeals of his refusal to do so. These duties are collateral to the issue of defendant's guilt or innocence, and no instruction concerning them was required. Furthermore, the whole of the coroner's evidence, both direct and cross examination, was elicited without a single objection or exception. If this assignment had merit, which it hasn't, it has no foundation to support it. Only exceptive assignments of error are considered. Rule 19(3), Rules of Practice in the Supreme Court, 254 N.C. 783 at 797; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781. This is a perfect example of inconsequential assignments which the Supreme Court will not discuss in future appeals.

[17] Defendant asserts prejudicial error in allowing State's witness Boyce to testify concerning the finding of a vodka bottle in the bedroom, as shown by Exceptions 28 and 29 appearing in the transcript on pages 102, 103 and 108, alleging the bottle to be the tainted fruit of an illegal search. This assignment is not discussed in appellant's brief filed in the Court of Appeals, and no reason or argument is cited in support of it. Rule 28, Rules of Practice in the Court of Appeals, provides in pertinent part that "exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." That court apparently so considered it since evidence concerning the vodka bottle was discussed in its opinion only in connection with a different assignment involving the propriety of certain questions asked by the Judge.

Now in this Court for the first time in the appellate division, defendant seeks to inject the constitutionality of the search of the bedroom made by Officer Boyce and others between 9 and 10 a.m. on the morning of 4 August 1967 when an empty Jacquin's Vodka bottle, purchased by defendant at a local ABC store on the previous evening, was found under a chest of drawers. This he cannot do. The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for consideration.

"The attempt to smuggle in new questions is not approved. *Irvine*

v. California, 347 U.S. 128, 129 [98 L. ed. 561, 74 S. Ct. 381]. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones,* 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California,* 344 U.S. 357, 358 [97 L. ed 387, 73 S. Ct. 293]." *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1. Thus, the new question is not properly before us because it was not raised and passed upon in the Court of Appeals.

[18] Even so, we note that the officers initially entered defendant's home at 12:30 a.m. by invitation of defendant's son and found the dead body of defendant's wife on a settee in the living room. A *partial* investigation at that time resulted in the discovery of a bloody butcher knife, apparently the death weapon, and blood spots on bed clothing, sheets and rugs. The body was removed at approximately 1:30 a.m., and the officers were accompanied to the police station by defendant who was questioned after having been warned of his constitutional rights. Later, between 9 and 10 a.m. on the same day, the officers returned to the home to complete the investigation accompanied by defendant. He was present and consenting when the officers entered the home a second time. When they asked defendant's permission to enter, he offered no objection but entered with them. This was merely a resumption of the initial investigation at the scene of the crime with defendant's consent and participation. The necessity of a search warrant is not apparent. "It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether." *State v. Moore, supra* (240 N.C. 749, 83 S.E. 2d 912), citing numerous authorities. See also *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61; *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506; *Zap v. United States,* 328 U.S. 624, 90 L. ed. 1477, 66 S. Ct. 1277.

There is substantial evidence of all material elements of the offense. In the decision of the Court of Appeals, we find

No error.

STATE OF NORTH CAROLINA v. JOHN HORTON VICKERS

No. 739

(Filed 9 October 1968)

1. Criminal Law § 74— applicability of Miranda v. Arizona

Miranda v. Arizona, 384 U.S. 436, is not applicable to a trial begun prior to 13 June 1966.

2. Criminal Law § 75— admissions while under arrest

Admissions to police officers are not rendered incompetent solely because defendant was under arrest when they were made.

3. Criminal Law § 75— admissibility of extra-judicial confession

An extra-judicial confession is admissible against a defendant only when it was, in fact, voluntarily and understandingly made.

4. Criminal Law §§ 75, 76— general objection to admission of confession

A general objection is sufficient to challenge the admissibility of a confession.

5. Criminal Law § 76— objection to admission of confession — necessity for voir dire hearing as to voluntariness

When the State offers an admission or confession in a criminal trial and the defendant interposes a general or specific objection, the trial judge must determine the voluntariness of the admission or confession by a preliminary inquiry in the absence of the jury, and his failure to do so constitutes prejudicial error requiring a new trial.

PARKER, J., dissenting.

APPEAL by defendant from *Johnson, J.*, 19 February 1965 Criminal Session of DURHAM.

Defendant was tried upon a bill of indictment charging him with the crime of armed robbery.

The State offered testimony of Murphy Jerome Durham, an employee of Tar Heel Cab Company, who testified in substance as follows: On 21 September 1964, at approximately 2:00 o'clock, defendant entered the cab operated by Durham, stating that he wanted to go to Carrboro. After several stops, including Carrboro, defendant told the witness that he would direct him to defendant's home. After they had driven some miles on Highway 54, defendant pulled a butcher knife from somewhere below the seat and held the point to Durham's right side and took some $15.00 in cash from him. Defendant then directed him to drive back to the old Chapel Hill Road. When they were near a service station, Durham stopped the cab and ran. Defendant took the cab and left. Durham called the Sheriff's office, and he later saw the cab in a ditch near the Veterans Administration Hospital in the City of Durham. Defendant was in custody

of the Sheriff at that time. The witness further stated that defendant cut the wires to his cab microphone and that "At times defendant appeared to be in his right mind and at others he did not."

W. W. Ray, a police officer for the City of Durham, in pertinent part, testified: That he first saw defendant on Erwin Road in Durham and followed him until he saw the cab driven by defendant strike the automobile driven by Deputy Sheriff Hall. Defendant was taken in custody and placed in the rear of Sheriff Hall's car.

Sheriff L. Y. Hall testified that after defendant had been placed in custody, he took defendant to Durham County Jail. Thereafter, according to the record, the following occurred:

"Q. What, if anything, did he tell you the next day?

A. The same thing Mr. Watson just told that—

OBJECTION OVERRULED EXCEPTION No. 2.

A. That he had been drinking beer all the weekend, that he went to the job Monday morning and his boss did not need him and two other fellows that was with him and he went—he had seven dollars and something and after 7:30 he started drinking beer and he had drank beer until he got into the cab that day, and that he bought six cans of beer and picked up a knife in a store and he remembered cutting the mike but he did not remember robbing Mr. Vickers, (sic) and he threw the knife away but he did not know where."

L. R. Watson, a Deputy Sheriff of Durham County, also testified over objection as to the statement made by defendant. His testimony concerning this statement was, in essence, the same as that of Sheriff Hall.

Defendant offered evidence tending to show that he had been in mental hospitals on several occasions and that prior to 21 September 1964 he "was at times sane and other times he appeared to be insane."

Defendant also offered the following exhibits into evidence: Exhibit No. 2, a photostatic copy obtained from the Clerk of Court's office of an "Affidavit to Procure Admission for Mental Illness or Inebracy," Exhibit No. 3, a "General Discharge of John Horton Vickers from the United States Navy dated August 23, 1957," Exhibit No. 5, a "Judgment and Order in case No. 9180." The record shows no certification or authentication of the offered exhibits. The court sustained the State's objections to each of these exhibits.

The State in rebuttal offered testimony of Dr. Walter Sykes, a

qualified expert in the field of psychiatry. Dr. Sykes testified: "That he had examined the defendant and that the examination and evaluation covered a period of 62 days. That in his opinion the defendant was competent to stand trial and to understand the charges against him. That the defendant was a psychopathic personality but was not insane."

The jury returned a verdict of guilty as charged. From judgment imposed, defendant appealed. The appeal was withdrawn at the April 1965 Criminal Session of Durham. On 30 April 1968 this Court allowed defendant's petition for certiorari to the end that he might perfect his appeal.

Attorney General Bruton and Deputy Attorney General Bullock for the State.

H. M. Michaux, Jr., for defendant.

BRANCH, J.

Defendant's statements made to police officers while in custody were inculpatory since they placed him at the scene of the crime and placed in his possession the weapon described by the State's chief witness as having been used in the perpetration of the robbery. Upon the defendant's objection to the introduction of the statements, the trial judge simply overruled the objection and did not hold a voir dire hearing to determine the voluntariness of defendant's statements.

[1, 2] The case of *Miranda v. Arizona,* 384 U.S. 436, is not applicable to the instant case since trial of this case had begun prior to 13 June 1966. *Johnson v. New Jersey,* 384 U.S. 719. Further, the otherwise silent record as to the surrounding circumstances under which defendant made the admissions reveal only that defendant made the admissions or confession while he was in custody and being questioned by police officers. The admissions to police officers, if any, would not be rendered incompetent solely because defendant was under arrest when they were made. *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84; *State v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24.

[3] The rule that an extra-judicial confession is admissible against a defendant when, and only when, it was, in fact, voluntarily and understandingly made has long been recognized and approved in this jurisdiction. *State v. Roberts,* 12 N.C. 259; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Moore,* 210 N.C. 686, 188 S.E. 421.

[4] We must first consider whether defendant's general objection

sufficiently challenged the admissibility of the confession so as to require a preliminary inquiry to determine its admissibility.

In the case of *State v. Rogers, supra,* we find the following statement:

> "When the admissibility of a confession is challenged *on the ground that it was induced by improper means,* the trial court is required to determine the question of fact whether it was or was not voluntary before he permits it to go to the jury." (Emphasis ours)

The italicized portion of the statement above quoted might be interpreted to require a specific objection stating the particular grounds for objection.

We also find in 29 Am. Jur. 2d, Evidence § 583, p. 640, the following:

> "While there is some authority to the effect that it is the duty of the trial court, in the absence of objection by the defendant, to conduct an inquiry into the admissibility of a confession, it is more generally held that a defendant in a criminal case who objects to the introduction in evidence of a confession by him, on the ground that it was involuntary, should make a timely offer of evidence showing the incompetency of the confession, or should request that a preliminary investigation of the matter be made, which offer or request should be made before the court rules on the evidence offered. Where no proper and timely objection to the voluntariness of a confession is made, or no request is made for an examination as to its voluntariness, no preliminary examination or hearing is required with respect to such question, and the defendant cannot, upon an appeal, raise the issue that the court erred in failing to conduct such a preliminary examination."

The Louisiana Court held in *State v. Perry,* 51 La. Ann. 1074, 25 So. 944, that the objection was properly overruled where the defendant objected to inculpatory statements alleged to have been made by him, on the ground that proper foundation had not been laid when he declined to state wherein the defect lay upon inquiry by the court.

A rule that interposition of a general objection is not sufficient to challenge admission of a confession was adopted by the Mississippi Court in *Jackson v. State,* 163 Miss. 235, 140 So. 683. However, Alabama (*Bradford v. State,* 104 Ala. 68, 16 So. 107) and Florida (*Bates v. State,* 78 Fla. 672, 84 So. 373) adopt the view that a specific ob-

jection is not necessary if the objection is so stated as to call the trial court's attention to the matter.

We do not think the rule quoted above from American Jurisprudence nor the rule adopted by the Mississippi and Louisiana Courts, and possibly alluded to in *State v. Rogers, supra,* is sustained by the better reasoning or the weight of authority in this jurisdiction.

This Court, speaking through Higgins, J., in *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, said: "When a confession is offered in evidence and *challenged by objection,* the court, in the absence of the jury, should determine whether the confession was free and voluntary." (Emphasis ours) This language has been approved in the cases of *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469; *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511.

Here, defendant's general objection made it clear that he challenged the admission of the confession because of its involuntary character. This Court has always jealously protected defendants' rights as to admissions and confessions, and it will not in this instance allow such rights to be impaired by a rule which requires a specific objection when a general objection clearly calls the matter to the trial court's attention so as to challenge the involuntary nature of the confession or admission. We hold that defendant's general objection was sufficient to challenge the admission of the proffered confession.

[5] Since we hold that defendant's objection was sufficient to challenge the voluntariness of the alleged confession, it becomes necessary that we examine recent decisions concerning admission of confessions when challenged by defendant.

In the case of *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6, defendant was charged with forgery and issuing a forged instrument. The evidence in part revealed that defendant asked to talk with an F. B. I. agent. He was taken to a conference room and there was told of his right to representation by an attorney, right to remain silent, and that anything he said might be used against him. He thereupon made a statement which was offered into evidence. When the statement was offered, defendant's counsel objected on the ground that the alleged confession was procured under coercion and under such circumstances that his constitutional rights were violated. Defendant made no request for voir dire hearing, nor did he request that he be allowed to offer testimony as to the voluntariness of his confession. The judge made no finding of fact concerning the competency of the confession, but merely overruled defendant's objec-

tion. The Court cited *State v. Litteral, supra,* and quoted from it the following:

> "While it is the better practice for a judge on a voir dire respecting an alleged confession to make his finding as to the voluntariness thereof and enter it in the record, a failure so to do is not fatal. Voluntariness is the test of admissibility, and this is for the judge to decide. His ruling that the evidence was competent of necessity was bottomed on the conclusion that the confession was voluntary."

The Court further stated that "Such a 'conclusion the confession was voluntary' is supported by all the evidence in the case, and there is nothing in this record upon which a contrary conclusion could be based."

The case of *State v. Litteral* differs from *Painter* in that the defendant Litteral signed a statement in the nature of a confession which was admitted into evidence against him *without objection,* and when a written statement was offered against the defendant Bell, the court, of its own motion, had the jury retire and conducted a voir dire hearing. *Painter* differs from instant case in that there is plenary evidence of circumstances attendant to the confession in *Painter* while the record in instant case is virtually silent concerning circumstances surrounding the admissions or confession.

In the case of *State v. Stubbs,* 266 N.C. 274, 145 S.E. 2d 896, the defendant contended that the trial court committed error in allowing witnesses to testify to statements made by the defendant in the absence of showing that such statements were voluntarily made. The statements made by the defendant were admitted without objection at the trial. This Court, holding that there was no merit in this contention, stated: "As a general rule a confession is presumed to be voluntary, and the burden is on the accused to show to the contrary. *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193; *State v. Grass,* 223 N.C. 31, 25 S.E. 2d 193; *State v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852." The Court then quoted from 20 Am. Jur., Evidence, § 536, p. 456, as follows: " 'In a majority of the jurisdictions a confession is presumed to be, or is regarded as prima facie, voluntary and, hence, if not objected to by the defendant, should be admitted in evidence by the court, unless there is something in the confession which indicates its inadmissibility.' . . ." This case is factually distinguishable from the instant case in that in *Stubbs* the evidence as to the confession was admitted without objection.

While the case of *State v. Painter, supra,* holds that upon objection failure to conduct a voir dire hearing in the absence of the

jury as to the voluntariness of the defendant's confession is not fatal error, it recognizes that the holding of such hearing is the better practice. Further, a long line of recent cases in this jurisdiction state that the better practice requires the trial judge, upon objection, to excuse the jury and in the absence of the jury hear the evidence of both the State and the defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession. *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22; *State v. Bishop, supra; State v. Ross, supra; State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Gray, supra; State v. Barnes, supra; State v. Outing,* 255 N.C. 468, 121 S.E. 2d 847; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365.

The procedure approved in this line of decisions places North Carolina in the category of the Wigmore or "orthodox" rule, which has been approved by the United States Supreme Court in *Jackson v. Denno,* 378 U.S. 368. In essence, the holding in *Jockson v. Denno* is that in determining the voluntariness of a confession as between court and jury the only procedure meeting the due process requirement is one in which the judge, or a jury convened for that sole purpose, determines the voluntariness of the confession upon a consideration of all the pertinent evidence before it is submitted to the jury deciding the defendant's innocence or guilt.

The North Carolina cases represented by *State v. Barnes, supra,* and *State v. Gray, supra,* approved the procedure required in *Jackson v. Denno* long before its decision. These North Carolina cases which approve and adopt procedure requiring a preliminary inquiry in the absence of the jury as to the admissibility of a defendant's admissions or confession are well buttressed by logic and decision.

Ervin, J., speaking for the Court in the case of *State v. Hamer, supra,* stated:

> "We accept as valid the definition of Dean Wigmore, the great master of the law of evidence, that 'a confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.' Wigmore on Evidence (3rd Ed., 1940) Section 821."

The condemning and conclusive weight of admissions or confessions makes it necessary that the courts carefully guard a defendant's rights when admissions or a confession are offered into evidence.

In the case of *State v. Barber, supra,* Bobbitt, J., speaking for the Court, clearly stated legal principles pertinent to decision of instant case, as:

"1. 'When the State offers a confession in a criminal trial and the defendant objects on the ground it was not voluntary, the question thus raised is determined by the judge in a preliminary inquiry *in the absence of the jury* . . . The trial judge hears the evidence, observes the demeanor of the witnesses and resolves the question.' *State v. Outing,* 255 N.C. 468, 472, 121 S.E. 2d 847, 849; cert. den., 369 U.S. 807, 7 L. Ed. 2d 555, 82 S. Ct. 652. Accord: *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

"2. 'In the establishment of a factual background by which to determine whether a confession meets the test of admissibility, the trial court must make the findings of fact. . . . Of course, the conclusions of law to be drawn from the facts found are not binding on the reviewing courts.' *S. v. Barnes, supra,* opinion by Higgins, J. This legal principle underlies the decision in *S. v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

"3. These findings of fact are made only for one purpose, namely, to show the basis for the judge's decision as to the admissibility of the proffered testimony. They are not for consideration by the jury. They should not be made or referred to in the jury's presence. *S. v. Walker,* 266 N.C. 269, 145 S.E. 2d 833.

"4. 'If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.' *S. v. Walker, supra.*"

For more than one hundred years this Court has recognized that "it is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make." *State v. Andrew,* 61 N.C. 205. The requirement now recognized in North Carolina that there should be a preliminary investigation in the absence of the jury to determine the voluntariness of confessions is demanded because of the conclusive nature of a

confession. A trial jury's deliberations should not be infected by forcing a defendant to fight out his objection as to admissibility of an alleged confession in the presence of the jury. Even though the trial court might, after a hearing in the presence of the jury, rule out the confession as being involuntary and instruct the jury not to consider it in determining the innocence or guilt of a defendant, yet it must, in most cases, be prejudicial against the defendant.

For a long period of time North Carolina has remained squarely within the rule that a confession is presumed to be voluntary until the contrary appears (*State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494; *State v. Rogers, supra; State v. Stubbs, supra*), and that when a confession is offered into evidence the burden is on defendant to show the contrary. *State v. Hamer, supra; State v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121; *State v. Stubbs, supra.* However, it becomes evident from the authorities herein cited that when an alleged confession is challenged by objection the necessity for a voir dire hearing in the absence of the jury is no longer controlled by these principles.

See 3 Wigmore, 3d Ed., § 860, 1964 Pocket Supplement, for full note and cites as to modern trend in other jurisdictions.

[5] We hold that hereafter when the State offers a confession in a criminal trial and the defendant objects, the trial judge shall determine the voluntariness of the admissions or confession by a preliminary inquiry in the absence of the jury.

We do not deem it necessary to consider defendant's other assignments of error.

There must be a new trial consistent with the holdings herein.

New trial.

PARKER, C.J., dissenting:

It is now hornbook law that a defendant in a criminal action is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. *S. v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232, *S. v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *S. v. Roberts,* 12 N.C. 259; *Jackson v. Denno,* 378 U.S. 368, 12 L. Ed. 2d 908; 1 A.L.R. 3d 1205; *Rogers v. Richmond,* 365 U.S. 534, 5 L. Ed. 2d 760.

This appears in the majority opinion:

> "Sheriff L. Y. Hall testified that after defendant had been placed in custody, he took defendant to Durham County Jail. Thereafter, according to the record, the following occurred:

"Q. What, if anything, did he tell you the next day?

A. The same thing Mr. Watson just told that—

OBJECTION OVERRULED EXCEPTION No. 2

A. That he had been drinking beer all the weekend, that he went to the job Monday morning and his boss did not need him and two other fellows that was with him and he went — he had seven dollars and something and after 7:30 he started drinking beer and he had drank beer until he got into the cab that day, and that he bought six cans of beer and picked up a knife in a store and he remembered cutting the mike but he did not remember robbing Mr. Vickers, (sic) and he threw the knife away but he did not know where."

It is to be particularly noted that defendant only made a general objection to the question, and that he did not object to the alleged statements made by him on the ground that they were involuntary, did not at any time make an offer of evidence tending to show the incompetency of the alleged confession, and did not request that a preliminary investigation of the matter be made before the court ruled on the evidence offered. It is familiar law that a defendant has a constitutional right at some stage in the proceedings to object to the use of a confession and to have a fair hearing and a reliable determination of the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Jackson v. Denno, supra.* According to the weight of authority, which will be set forth below in detail, this right may be waived.

Defendant was represented by a lawyer of his own choice, Alfred Bryant, an able and experienced lawyer of the Durham County Bar. The defendant offered testimony in his own behalf. In the record before us there is not a suggestion or intimation that his alleged confession was not free and voluntary. Defendant's evidence tends to show that he was mentally incompetent by reason of the fact that he had been a patient in several mental institutions and had been confined in State hospitals upon three occasions for the mentally incompetent, and that he was not guilty by reason of insanity or mental disease, or both.

This is said in *S. v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104, a leading case in this jurisdiction written by Justice Ervin, who is now a member of the United States Senate: ". . . *When the admissibility of a confession is challenged on the ground that it was induced by improper means,* the trial judge is required to determine the question of fact whether it was or was not voluntary

before he permits it to go to the jury. [Citing authority.] In making this preliminary inquiry, the judge should afford both the prosecution and the defense a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made." (Emphasis mine.)

It is true that in *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, the Court said: "When a confession is offered in evidence and challenged by objection, the court, in the absence of the jury, should determine whether the confession was free and voluntary." However, the Court in that opinion cites as authority for the statement, *S. v. Rogers, supra,* which says, as we have quoted above, *"When the admissibility of a confession is challenged on the ground that it was induced by improper means. . . .*" The *Barnes* case also cites *S. v. Elam,* 263 N.C. 273, 139 S.E. 2d 601, which has no reference as to the proper procedure for challenging the admissibility of an alleged confession. In that case there was a preliminary inquiry at length made by the court in the jury's absence in respect to the admissibility of the alleged confession.

S. v. Smith, 213 N.C. 299, 195 S.E. 819, was a prosecution upon an indictment charging the defendant with the commission of the capital felony of rape. When the State offered evidence of statements made by defendant, the defendant objected and asked permission to cross-examine the witness regarding the voluntariness of his statements. After some considerable cross-examination, defendant requested the court to find the facts regarding the alleged confession and to hold that any evidence regarding the same was incompetent. The court made an entry that under the present evidence the statement of defendant was voluntary. The Court in its opinion said:

> "The defendant contends here that he had the right to testify and offer witnesses in the absence of the jury in rebuttal concerning the circumstances under which the alleged confession was procured from him. This is true if he asserts or requests the right at the time. However, when his counsel had completed his cross-examination of the witness in respect to the circumstances under which the confession was made he did not tender any witnesses in rebuttal, but elected to request the court at that time to find the facts. It was not the duty of the court to call upon the defendant to offer evidence. It ruled upon the competency of the testimony when called upon to do so by the defendant. This gives the defendant no cause for complaint."

In *S. v. Outing,* 255 N.C. 468, 121 S.E. 2d 847, the Court cites

S. v. Davis, supra, which quotes from *S. v. Rogers, supra,* which quotation appears above.

In *S. v. Barber,* 268 N.C. 509, 151 S.E. 2d 51, Bobbitt, J., speaking for the Court, said:

> " 'When the State offers a confession in a criminal trial and the defendant objects on the ground it was not voluntary, the question thus raised is determined by the judge in a preliminary inquiry *in the absence of the jury.* . . . The trial judge hears the evidence, observes the demeanor of the witnesses and resolves the question.' (Our italics.) *S. v. Outing,* 255 N.C. 468, 472, 121 S.E. 2d 847, 849, cert. den. 369 U.S. 807, 7 L. Ed. 2d 555, 82 S. Ct. 652. Accord: *S. v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344; *S. v. Gray,* 268 N.C. 69, 150 S.E. 2d 1."

In *S. v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84, it is said:

> "While it is the better practice for a judge on a *voir dire* respecting an alleged confession to make his finding as to the voluntariness thereof and enter it in the record, a failure so to do is not fatal. Voluntariness is the test of admissibility, and this is for the judge to decide. His ruling that the evidence was competent of necessity was bottomed on the conclusion the confession was voluntary. *S. v. Hawkins, supra* [214 N.C. 326, 199 S.E. 284]."

A similar result was arrived at by the Supreme Court of Vermont in *State v. Goyet,* 120 Vt. 12, 132 A. 2d 623. In that case the defendant was indicted by a grand jury for murder in the first degree. Defendant pleaded not guilty, and not guilty by reason of insanity. The verdict was guilty of murder in the first degree. After verdict and before entry of judgment on the verdict, the case was passed to the Supreme Court of Vermont on exceptions of defendant. Exception 11 was concerned with the admission in evidence of defendant's written confession. In its opinion the Court said:

> "The basic test in connection with the admission of a confession is; — Was it voluntarily given? Is there any evidence of threats, promises or course of conduct that tends to show that the confession was not a voluntary act? *State v. Watson,* 114 Vt. 543, 550, 49 A. 2d 174; 22 C.J.S. Criminal Law § 817. This question is a preliminary one for the determination of the trial court. Unless it can be said as a matter of law that the decision was wrong, it must stand. *State v. Blair,* 118 Vt. 81, 85, 99 A. 2d 677. The court, by admitting the confession after hearing evidence of the circumstances attending the giving of it, impliedly

held that it was voluntarily given. *State v. Blair, supra,* 118 Vt. at page 89, 99 A. 2d at page 682."

In the conclusion of its opinion the Court said:

"There was no error and the respondent takes nothing by his exceptions. Judgment on the verdict not having been entered below, judgment of guilty of murder in the first degree is rendered and entered here upon the verdict of the jury. Let sentence pass and execution thereof be done."

This is stated in 29 Am. Jur. 2d Evidence § 583:

"While there is some authority to the effect that it is the duty of the trial court, in the absence of objections by the defendant, to conduct an inquiry into the admissibility of a confession, it is more generally held that a defendant in a criminal case who objects to the introduction in evidence of a confession by him, on the ground that it was involuntary, should make a timely offer of evidence showing the incompetency of the confession, or should request that a preliminary investigation of the matter be made, which offer or request should be made before the court rules on the evidence offered. Where no proper and timely objection to the voluntariness of a confession is made, or no request is made for an examination as to its voluntariness, no preliminary examination or hearing is required with respect to such question, and the defendant cannot, upon an appeal, raise the issue that the court erred in failing to conduct such a preliminary examination."

This is said in an annotation in 102 A.L.R. 625 *et seq.:*

"Assuming that where proper objection is made, it is the duty of the trial court to conduct a preliminary investigation as to the voluntary or involuntary character of an alleged confession of one on trial for a criminal offense, important questions arise as to the effect of failure of the defendant to object to the admission of testimony regarding the confession or to make the specific objection that it was involuntary, or failure on his part to request a preliminary investigation or to offer evidence for the court's consideration in passing on the question. Must the court on its own initiative, where an alleged confession is offered in evidence by the prosecution, conduct a preliminary investigation into the question of the voluntariness of the confession, or is such an investigation waived by the defendant by failure to object? The weight of authority is to the effect that the preliminary investigation may be waived, and

that, in the absence of a proper objection or a request for a preliminary hearing, and in some instances in the absence of an offer of proof of involuntariness, the defendant cannot, on appeal, raise the issue that the trial court, before permitting the confession to be introduced in evidence, should have conducted a preliminary investigation into the question of its voluntary or involuntary nature, the court, at least in those jurisdictions in which a confession is prima facie voluntary, not being obliged to do so on its own initiative, if there is nothing in the circumstances shown at the time the confession is offered in evidence indicating that it was involuntary. . . .

* * *

"It has been held that the defendant should offer evidence of the alleged involuntary nature of the confession where he seeks to exclude it from the jury on this ground, and that he should request a preliminary investigation. On this point, the Illinois court [*People v. Knox*, 302 Ill. 471, 134 N.E. 923], in holding that an objection merely that an alleged confession was obtained by duress is insufficient, has said: 'While it is and should be the desire and duty of a court to avoid the admission of incompetent evidence, there is likewise a duty on the part of counsel to seek to present to the court evidence, if any he has, showing the incompetency of such testimony, and we are not inclined to hold that the duty rests first with the court to inquire into the circumstances surrounding such conversation before its admission in evidence, where there is nothing in the evidence to indicate promises of leniency or duress, though it might with propriety do so of its own motion. Counsel, if he desired such inquiry, should have requested it in advance of the court's ruling on the evidence offered. The court is not bound to make such inquiry where, as here, counsel merely objects on the ground that the statement concerning which the evidence was offered was obtained by duress. Objection of counsel that the statement was so obtained was not evidence of the fact. Counsel cannot refrain from making inquiry, and then claim error where the record did not disclose such threats and promises. There was no ruling of the court as to its admissibility after the evidence concerning threats and promises was in. No motion was made to strike the evidence.'"

In *State v. Roland*, 336 Mo. 563, 79 S.W. 2d 1050, 102 A.L.R. 601, defendant was found guilty of murder in the first degree, and his punishment was assessed at death. He appealed from the judg-

ment thereon. The Court affirmed the judgment of death. In its opinion the Court said:

"The bill of exceptions discloses no request by defendant to the court for any preliminary investigation to ascertain whether or not the confession was voluntary; nor does it show any offer on the part of the defendant to prove any facts tending to establish the confession was involuntary. Its admissibility was attacked only as set forth above. There is an entire absence of any evidence tending to show that the confession was not voluntary. It has long been the rule in this state that a confession (speaking of extrajudicial confessions) of an accused person is presumed to be voluntary until the contrary is shown. *State v. White,* 330 Mo. 737, 745, 51 S.W. (2d) 109, 112, and cases there cited. Present such a presumption, and absent a request for a preliminary investigation or an offer to prove a confession involuntary, a trial court is not to be convicted of error in admitting in evidence a confession of guilt made by a defendant. Confessions are competent evidence, possessing considerable probative value; and are not in and of themselves inadmissible. While trial courts should avoid the admission in evidence of an inadmissible confession, a duty also exists on defendants (as in other analogous instances) to be fair with the court and timely present evidence (defendant should know the circumstances under which a confession was obtained) showing the incompetency of the confession; or, at least, request of the court a preliminary investigation as to the admissibility of the confession in evidence. To be timely, such action should be taken before the court rules on the offered evidence; and defendants who refrain from making such request or an offer of such evidence should not thereafter be heard to successfully assert error based on the admission of the confession. Under the facts in the instant case, the court was privileged to admit the confession in evidence on the presumption that it was voluntary. In *State v. Hayes* (Mo. Sup.) 247 S.W. 165, 168, this court said: 'When offered in evidence, appellant objected upon the ground that such confessions were not competent, until it was shown that they were voluntary. Appellant did not ask for a preliminary inquiry on the question of their voluntary or involuntary nature. The court properly proceeded upon the theory that such confessions were presumed to be voluntary.' See, also, *State v. Long,* 324 Mo. 205, 212, 22 S.W. (2d) 809, 813; *State v. McGuire,* 327 Mo. 1176, 1185, 39 S.W. (2d) 523, 526; *State v. Seward* (Mo. Sup.) 247 S.W. 150, 153; *People v. Knox,* 302 Ill. 471, 473, 134 N.E. 923, 924. Prior to

the offer of the instant confession in evidence, there was oral testimony that defendant had informed the officers he had sold his revolver; that he drew a map to aid them in locating the place where he had disposed of it; that it was the gun he used in killing Officers Shane and Whitted; and that, as stated by the witness, defendant was trying to help the officers locate the revolver. The oral testimony was that defendant read the confession before signing it, and it concludes: 'I have read the above statement consisting of five (5) pages, before signing same, and this statement is true and correct to the best of my knowledge. I have made the above statement of my own free will, and accord, and after having been advised as to the nature of the charges against me, and of my right to interview an attorney before making this statement, and no threats, promises of reward or immunity have been made by anyone in order to obtain this statement, and I have been warned by those to whom this statement is being made that anything I say in this statement may be used against me as evidence at my trial.' We find no error in the admission of the confession in evidence under the facts in the instant case."

The majority opinion in the instant case states this:

"Further, a long line of recent cases in this jurisdiction state that the better practice requires the trial judge, upon objection, to excuse the jury and in the absence of the jury hear the evidence of both the State and the defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession. *S. v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22; *S. v. Bishop, supra* [272 N.C. 283, 158 S.E. 2d 511]; *S. v. Ross, supra* [269 N.C. 739, 153 S.E. 2d 469]; *S. v. Barber*, 268 N.C. 509, 151 S.E. 2d 51; *S. v. Gray, supra* [268 N.C. 69, 150 S.E. 2d 1]; *S. v. Barnes, supra* [264 N.C. 517, 142 S.E. 2d 344]; *S. v. Outing*, 255 N.C. 468, 121 S.E. 2d 847; *S. v. Davis*, 253 N.C. 86, 116 S.E. 2d 365."

I have discussed above *S. v. Outing, supra; S. v. Barber, supra;* and *S. v. Barnes, supra.* It is true that in the cases of *Greenlee, Ross,* and *Gray* there may be found language stating in substance what is quoted above. I think the statement in these cases that upon objection alone the judge should excuse the jury and conduct a *voir dire* examination is too broad and not consistent with our line of decisions represented by *S. v. Rogers, supra, S. v. Barber, supra,* the majority rule which we have quoted above from American Jurisprudence 2d, and the annotation in American Law Reports, though it

may be the better practice in the light of the legal quibbles and technicalities regarding the admission of confessions in evidence, but I do not think it is necessary under all the facts in the case here. In *S. v. Davis, supra,* the Court quotes from *S. v. Rogers, supra.* I think the correct rule is as stated by Justice Ervin in *S. v. Rogers, supra,* and by Justice Bobbitt in *S. v. Barber, supra;* also in 29 Am. Jur. 2d Evidence § 583 and in the annotation in 102 A.L.R. 625 *et seq.*

I do not think that anything said in *Jackson v. Denno, supra,* is in conflict with the majority rule that we have quoted above from American Jurisprudence 2d and from an annotation in American Law Reports. In that case, under the New York procedure concerning the determination of the voluntariness of a confession offered by the prosecution, the Court excludes it if in no circumstances it could be deemed voluntary, but leaves to the jury the ultimate determination of its voluntary character, as well as its truthfulness, if the evidence presents a fair question as to its voluntariness. In that case a divided Court overruled one of its former decisions, *Stein v. New York,* 346 U.S. 156, 97 L. Ed. 1522, and held that the New York procedure described above violated the 14th Amendment of the United States Constitution.

Under the orthodox rule, which appears to be followed in at least twenty states, including North Carolina, the trial judge alone resolves all questions of fact and determines the issue of voluntariness in a preliminary hearing when requested. *S. v. Rogers, supra;* 18 Sw. L. J. 731-32, note 19

After an exhaustive research, I can find no decision in this jurisdiction that, under all the circumstances of this case, holds the confession here was inadmissible.

In the President's Crime Commission Report of last year (in which the Honorable Lewis F. Powell, Jr., an eminent member of the Richmond, Virginia bar and a former President of the American Bar Association, participated) it was said: "We know of no other system of criminal justice which subjects law enforcement to limitations as severe and rigid as those we have discussed." In recent years many habitual and permanent criminals have been turned loose through technicalities and legal quibbles, and rulings of the Federal Supreme Court have revamped criminal law and procedures so that many such criminals have an easy time keeping out of jail. I have no disposition to pile up another legal quibble or technicality to impede the administration of justice. In an unbroken line of decisions since *S. v. Roberts, supra,* decided by this Court in 1827, down to the present moment, this Court has held that no conviction

of a defendant can stand where his conviction is founded, in whole or in part, upon an involuntary confession. I am in thorough accord with those decisions of ours. In the instant case there is an entire absence of any evidence tending to show that the alleged confession was not voluntary. In my opinion the evidence of the alleged confession here, under all the circumstances in the record before us, was competent, and my vote is to affirm the judgment of the Superior Court below.

STATE OF NORTH CAROLINA v. JOHNNY THOMAS WILLIAMS

No. 494

(Filed 9 October 1968)

1. Criminal Law § 146; Appeal and Error § 1— certiorari from Supreme Court to Court of Appeals — scope of review

When the Supreme Court grants certiorari pursuant to G.S. 7A-31 to review a decision of the Court of Appeals, only the decision of that Court is presented for review, and inquiry is restricted to rulings of the Court of Appeals assigned as error in the petition for certiorari and preserved by arguments or by citation of authorities in the brief, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to it.

2. Criminal Law § 157; Appeal and Error § 40— necessary parts of record

Elementary consideration for efficient and just administration of the legal processes involved in the adjudication of a lawsuit, criminal or civil, requires that an appellate court have in the record before it a complete account of the action by the trial court of which the appellant complains.

3. Criminal Law § 158— conclusiveness and effect of record

An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.

4. Criminal Law § 162— necessity for objection — motion to strike

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; where, however, the incompetency of the testimony elicited by a proper question does not become apparent until the witness answers or until subsequent evidence is introduced, the opposing party may then make a motion to strike the incompetent testimony.

5. Criminal Law § 162— motion to strike — consideration of evidence

Ruling of trial court upon defendant's motion to strike testimony re-

lating to the in-court identification of the defendant must be judged in the light of matters in the record at the time the motion was made, there having been no renewal of it at a later stage of the trial.

6. Criminal Law § 66— evidence — in-court identification of defendant — motion to strike

Trial court did not err in denying defendant's motion to strike evidence of the State relating to the in-court identification of the defendant, such evidence being admitted without objection, where the testimony before the court at the time the motion was made was to the effect that the prosecuting witness had previously identified the defendant as the perpetrator of the robbery in a police lineup of approximately eight people at the jail sixteen days after the crime, such testimony not being incompetent *per se*.

7. Criminal Law § 162— motion to strike — disallowance of broadside motion

Even though subsequently admitted evidence discloses the incompetency of earlier testimony which was apparently competent when admitted, a motion to strike the entire testimony will not be allowed where some of that testimony remains competent; in such case, the moving party must designate the incompetent evidence to be stricken from the record.

8. Criminal Law § 169— waiver of objection — admission of like evidence for impeachment

The rule that an objection to the admission of testimony is waived when like evidence is thereafter admitted without objection or is subsequently offered by the objecting party himself is not applicable where the objecting party offers the evidence for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question.

9. Constitutional Law § 32— waiver of right to counsel

One may waive his constitutional right to counsel provided he does so freely, voluntarily and with full understanding that he has such right.

10. Constitutional Law § 32— waiver of counsel — effect of failure to make request

The right to have counsel appointed and to consult with him prior to participation in a police identification lineup is not to be deemed waived merely because of defendant's failure to request such appointment or consultation; however, it is not required that the waiver be in writing.

11. Criminal Law § 32— test of waiver of counsel

Whether a waiver of right to counsel be oral or written, the crucial question is whether the accused clearly understood that he had the right and voluntarily elected to waive it.

12. Criminal Law § 66; Constitutional Law § 32— evidence — lineup identification of defendant — preservation of constitutional rights

Evidence that defendant was identified at a police identification lineup by the prosecuting witness as the perpetrator of the robbery is competent and is properly admissible where (1) the uncontradicted evidence is to the effect that defendant was clearly told of his right to court-appointed

counsel at the lineup and that defendant freely and understandingly consented to stand in the lineup without counsel, and where (2) there was no evidence to suggest that the lineup was inherently unfair to defendant or violated any of defendant's constitutional rights.

13. Criminal Law §§ 66, 84— evidence obtained unlawfully — effect of unconstitutional lineup — independent identification of defendant

Even if police identification lineup had deprived defendant of his constitutional rights, the in-court identification of defendant would not be inadmissible in evidence when such identification was an independent identification based upon what the witness observed at the time of the robbery.

14. Criminal Law § 66— lineup identification of defendant — failure to make findings of fact

Failure of trial judge to hold voir dire hearing and to make specific findings of fact concerning the conduct of a police identification lineup and defendant's waiver of counsel thereat, while not approved, will be deemed harmless error in this robbery prosecution when the evidence is clear and uncontradictory that (1) the defendant waived his right to counsel at the lineup, (2) the lineup was conducted fairly and without prejudice to him, and (3) the in-court identification of defendant was not fruit of the lineup but had its independent origin in the witness' observation of the crime itself.

SHARP, J., concurs in result.

ON certiorari to the Court of Appeals.

Upon an indictment, proper in form, charging him with robbery with the use of firearms, the defendant was found guilty as charged and was sentenced by the Superior Court of Wake County to confinement in the State Prison for a term of 15 to 20 years. On appeal, the Court of Appeals found no error. *State v. Williams,* 1 N.C.App. 127. The defendant being found indigent, his present counsel was duly appointed by the superior court to represent him at the trial and did so, the appointment and representation being continued for appellate review proceedings.

At the trial in the superior court on 30 October 1967, the evidence for the State consisted of the testimony of Allen Bruce Wood and Police Officer M. L. Stephenson. The testimony of Wood on direct examination, summarized except as indicated, was as follows:

On 18 August 1967, about 10:30 p.m., the defendant entered the filling station operated by Wood, no other person being present, purchased a bottled drink, "stood around for a while" and then drew a pistol, stuck it in Wood's ribs and said he wanted everything in the cash register and if Wood "tried anything" he would fill Wood "full of holes." After taking the contents of the cash register, the defendant ordered Wood to go

into the rest room and remain there for five or ten minutes, which Wood did. Thereupon, Wood came out and called the police, the defendant having departed.

After the defendant's entry into the station, some children came in and purchased some cookies but left before the defendant drew the pistol. The defendant remained in the filling station approximately 15 or 20 minutes.

Wood next saw the defendant on 3 September 1967, when, in response to a call from the police, he went to the jail and saw the defendant in a lineup consisting of approximately eight people, Officer Stephenson being present.

Before beginning his cross-examination of Wood, defendant's council made a motion "to strike the testimony of this witness," the motion being directed to the entire testimony and not to any specific portion of it. The court excused the jury. The record shows "discussion off record" in the absence of the jury, the nature of the discussion not appearing. Thereupon, the court denied the motion. The defendant excepted.

On cross-examination, Wood testified as follows, summarized except as indicated:

He first saw the defendant when the defendant was coming in at the door of the station. He had never seen the defendant before. At the time of the robbery the defendant had a moustache. At the time of the trial [or of the lineup — the record not being clear on this point] he was clean shaven. At the time of the robbery the defendant had on a yellow shirt and dark pants. The shirt he wore had various designs of different shapes upon it. The defendant held the gun in his right hand and stuck it in Wood's ribs while standing on Wood's right side. Wood had three or four minutes to observe the defendant's physical appearance when the defendant conducted Wood to the rest room.

Officer Stephenson testified on direct examination as follows, summarized except as indicated:

He is a detective sergeant in the Raleigh Police Department. He arrested the defendant 2 September 1967 on another charge. On the following day he placed the defendant in a lineup at the jail with five other Negro males and requested Wood to view the men in the lineup. He had not told Wood which of the men in the lineup was suspected of having perpetrated the robbery now in question. While in the lineup, the defendant wore a blue shirt as did at least one of the others, the remainder of the men in the

lineup wearing clothing of different colors. Each man in the lineup held a card on which there was a number. Wood was instructed to go down the line, look at the men in it and, if he saw the person in the lineup who had robbed him, to write that person's number on a sheet of paper and exhibit it to the officer. Wood so identified the defendant.

Prior to requesting Wood to view the men in the lineup, Stephenson advised the defendant as follows: "No. 1. You have the right to remain silent. No. 2. Anything you say can and will be used against you in a court of law. No. 3. You have the right to talk to a lawyer and have him present with you while you are being questioned. No. 4. If you cannot afford to hire a lawyer one will be appointed to represented [sic] you. No. 5. Do you understand each of these rights I have explain [sic] to you? No. 6. Having these in mind do you wish to talk to us now? And I further advised Johnny that he had the right to see an attorney before he was placed in the line up. * * * The defendant did not want any counsel, he stated he had not committed any crime and he did not mine [sic] standing in a line up."

On cross-examination, Officer Stephenson testified that he did not obtain from the defendant a written waiver of counsel. At the time of the lineup the defendant was not represented by counsel. He did not request one.

The defendant took the stand in his own behalf and denied his guilt. He introduced evidence which, if true, was sufficient to establish an alibi. With reference to the lineup, he testified that there were six persons in it and that Wood, without looking at anyone else, walked straight to the defendant.

Attorney General Bruton, Deputy Attorney General McGalliard and Deputy Attorney General Bullock for the State.

Ralph McDonald for defendant appellant.

LAKE, J.

The only question presented for our consideration is: Did the Court of Appeals err in its conclusion that there was no error in the denial by the trial judge of the defendant's motion to strike the entire testimony of the witness Wood?

In his appeal to the Court of Appeals the defendant assigned as error this ruling of the trial judge, the denial of his motion for

judgment as of nonsuit, and a specified portion of the charge to the jury. The Court of Appeals concluded there was no merit in any of these assignments of error. Neither in his petition to this Court for certiorari nor in his brief filed in this Court did the defendant refer to the denial of his motion for judgment as of nonsuit or to the alleged error in the charge to the jury. Consequently, these matters are not before us and are deemed abandoned by the defendant.

[1] When this Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by G.S. 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of that Court is before us for review. We inquire into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Our inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in this Court, except in those instances in which we elect to exercise our general power of supervision of courts inferior to this Court. Our review of a decision by the Court of Appeals upon an appeal from it to us as a matter of right, pursuant to G.S. 7A-30, which means of review might have been pursued by the defendant in this action, is similarly limited.

The complete transcript of the proceedings in the trial court, contained in the record before the Court of Appeals and before us, shows that the defendant did not interpose a single objection to any question propounded to the witness Wood or move to strike any specific portion of his testimony. At the conclusion of the direct examination of this witness, his testimony thereon being summarized above in our statement of facts, the defendant made a motion to strike his entire testimony. Thereupon the trial judge sent the jury from the courtroom and in the absence of the jury there was "discussion off record," the nature of which is not set forth in any manner in the record. The motion to strike was denied. The jury then returned to the courtroom.

[2, 3] Elementary consideration for efficient and just administration of the legal processes involved in the adjudication of a lawsuit, criminal or civil, requires that an appellate court have in the record before it a complete account of the action by the trial court of which the appellant complains. An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.

As soon as counsel made his motion to strike the testimony, the

trial judge sent the jury from the courtroom and heard counsel upon his motion. There is nothing whatever in the record to suggest that the trial judge did not hear and consider everything which counsel sought to present for his consideration.

So far as appears in the record, at the time the trial judge denied the motion to strike, which motion was never renewed, all of the evidence was to the effect that approximately two months prior to the trial a robbery had been committed, that the only witness who had then testified was the victim of the robbery, that he identified the defendant in the courtroom as the perpetrator of it and that he had previously identified the defendant as such perpetrator in a lineup of approximately eight people at the jail sixteen days after the robbery. According to the record, there was then before the trial judge no evidence, or even contention, that the lineup was unfairly conducted, or that counsel or friends of the defendant were not present or that there was any other defect in the lineup procedure. Upon these facts, should a new trial be granted for the reason that the trial judge denied the motion to strike the entire testimony of the witness Wood?

We turn first to the law of this State.

[4] 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. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643; *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895; *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667; *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; Stansbury, North Carolina Evidence 2d ed., § 27; Wigmore on Evidence, 3d ed., § 18. Where, however, a proper question is propounded to a witness and the incompetency of the testimony elicited does not become apparent until the witness answers or until subsequent evidence is introduced, the opposing party may then make a motion to strike the testimony then shown to be incompetent. *Moore v. Insurance Co.,* 266 N.C. 440, 146 S.E. 2d 492; *Gatlin v. Parsons,* 257 N.C. 469, 126 S.E. 2d 51; *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196; *Ziglar v. Ziglar,* 226 N.C. 102, 36 S.E. 2d 657; *Hodges v. Wilson,* 165 N.C. 323, 81 S.E. 340. If, therefore, the in-court identification of the defendant by Wood was competent on its face when such testimony was given and its incompetency became apparent only when the subsequent testimony by Wood relating to his observation of the defendant in the lineup at the jail was given, it was then not too late for the defendant to move to strike the testimony relating to the in-court identification.

[5, 6] However, the ruling of the trial court upon that motion must be judged in the light of matters in the record at the time the motion was made, there having been no renewal of it at a later stage of the trial. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511. In the present case, the testimony of Wood with reference to the in-court identification of the defendant as the man who robbed him was competent per se. At the time of the motion to strike, the only evidence in the record concerning Wood's observation of the defendant at the jail lineup was that he had so observed the defendant sixteen days after the robbery at the jail in a lineup composed of eight people, two police officers being present.

Evidence that the victim of a crime has identified the defendant as the perpetrator of it at a police lineup is not incompetent per se. *State v. McKissick,* 271 N.C. 500, 157 S.E. 2d 112. It follows, necessarily, that such evidence alone does not make incompetent an in-court identification of the defendant as the perpetrator of the crime and, consequently, does not require or permit the striking of the previously admitted in-court identification testimony.

[7] Furthermore, it is the well settled rule in this jurisdiction that even though subsequently admitted evidence discloses the incompetency of earlier testimony, apparently competent when admitted, a motion to strike the entire testimony of the witness in question will not be allowed where some of that testimony remains competent, notwithstanding the subsequent development. *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138; *Nance v. Telegraph Co.,* 177 N.C. 313, 98 S.E. 838. In such case, the moving party must designate the incompetent evidence to be stricken from the record. This the defendant did not do, so far as the record shows. The trial judge is under no duty to go back and study the earlier testimony in order to separate the competent from the incompetent portions of it.

The defendant was clearly not entitled to have stricken testimony by Wood to the effect that the crime of robbery had been committed against him by someone. For this reason, if for no other, his broadside motion to strike the entire testimony of Wood was properly overruled. He made no other motion and, in this Court, relies on no other ground for the granting of a new trial. In the dead silence of the record as to what transpired in the "discussion off record," which occurred in the absence of the jury following his motion to strike the testimony of Wood, we would not be justified in granting a new trial on the basis of speculation as to what may have been presented to the trial judge or speculation as to what his

rulings and "off the record" findings were or were not prior to and leading to his overruling of the motion.

[8] It is also the well established rule in the courts of this State that an objection, even though seasonably made upon a sound ground, is waived when like evidence is thereafter admitted without objection, and especially so where like evidence is subsequently offered by the objecting party himself. *Adams v. Godwin,* 254 N.C. 632, 119 S.E. 2d 484; *Shelton v. R. R.,* 193 N.C. 670, 139 S.E. 232; *Willis v. New Bern,* 191 N.C. 507, 132 S.E. 286. The Court of Appeals relied, in part, upon this rule in support of its decision. We do not, however, rest our decision upon that ground since one does not waive an objection or a motion to strike, otherwise sound and seasonably made, by offering evidence for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question. *State v. Aldridge,* 254 N.C. 297, 118 S.E. 2d 766; Stansbury, North Carolina Evidence 2d ed., § 30.

The defendant's cross-examination of the witness Wood with reference to his observation of the defendant at the jail lineup, his failure to object to the testimony of Officer Stephenson and his own testimony as to the lineup, all appear to have been for the purpose of impeaching the credibility of the lineup identification by Wood or for the purpose of establishing the alleged incompetency of Wood's lineup and in-court identification of the defendant. Regardless of their ineffectiveness for those purposes, we think the defendant was entitled to offer such testimony without thereby losing the benefit of his earlier motion to strike, assuming for the moment that there was merit in that motion. However, the denial of the motion to strike the testimony of Wood was in accord with the law of this State for the reasons heretofore mentioned.

Furthermore, under the law of this State, as distinguished from the Constitution of the United States, there was no error in denying the motion to strike, even if the matter of identification of the defendant with the robber be deemed so inextricably woven through the testimony of Wood as to affect the whole of it, and even though it be assumed that the entire testimony in the record concerning the jail lineup was placed before the trial judge in the course of the "discussion off record" immediately preceding the denial of the motion to strike.

In *State v. McKissick, supra,* the facts were strikingly similar to those in the present case. There the defendant was convicted of the robbery of an operator of a service station. The victim identified the defendant in court as the perpetrator of the robbery. The State's

evidence showed that between the robbery and the trial the victim had observed the defendant in a police lineup composed of six persons and had there identified him as the perpetrator of the robbery. The defendant was not represented by counsel at the police lineup. We affirmed the conviction, being then free from the compulsion of *United States v. Wade,* 388 U.S. 218, 18 L. ed. 2d 1149 87 S. Ct. 1926, the conviction having occurred prior to the date of that decision by the Supreme Court of the United States. See also *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140.

State v. Wright, 274 N.C. 84, 161 S.E. 2d 581, was not decided by this Court on the basis of the law of this State. The ground for our decision in that case was that the Sixth and Fourteenth Amendments to the Constitution of the United States, as interpreted by the United States Supreme Court in *United States v. Wade, supra,* and companion cases, made incompetent an in-court identification of the defendant as the perpetrator of a rape, the victim having, in the meantime, identified him as her assailant when she observed him in police custody. Furthermore, the *Wright* case is easily distinguishable from the present case. There, the victim of the crime first observed the defendant at a police lineup and was unable to identify him as her assailant. He was then taken out of the lineup, required to put on clothing similar to that worn by the assailant at the time of the crime and required to speak words uttered at that time by the assailant. The defendant was the only person so exhibited to the victim at this second stage of the out-of-court confrontation. She then identified him, not by his appearance but by his voice and manner of walking. There was nothing to indicate that at the time of her in-court identification she heard the defendant speak or observed him walking. Thus, it was clear from the record that her in-court identification was, in reality, an identification of the defendant as the man she had previously identified in the police confrontation, not as the man who had raped her. On these facts, we held that *United States v. Wade, supra,* and its companion cases, required the granting of a new trial.

We, therefore, now turn to the question of whether the Sixth and Fourteenth Amendments to the United States Constitution, as distinguished from the law of this State require the granting of the defendant's motion to strike the testimony of the witness Wood.

In *United States v. Wade, supra,* and the companion case of *Gilbert v. California,* 388 U.S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951, the Supreme Court of the United States set aside convictions, pending further hearings by the respective trial courts. Mr. Justice Brennan,

who wrote what appears to be the opinion of the Court, although no other Justice concurred fully therein, stated the question for decision in the *Wade* case as follows:

> "The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel."

The decision was that the Sixth Amendment right to counsel at "critical" stages of a criminal proceeding includes the right to counsel at a police lineup and that a subsequent in-court identification by the victim of a robbery must be stricken unless the government establishes "by clear and convincing evidence that the in-court identifications were based upon observation of the suspect other than the lineup identification." *Gilbert v. California, supra,* decided the same day, held that the Fourteenth Amendment imposes the same limitation upon efforts by state courts to administer justice.

In *State v. McKissick, supra,* this Court expressed its inability to concur in the rule of the *Wade* and *Gilbert* cases as a correct interpretation of the Sixth and Fourteenth Amendments to the United States Constitution. We continue to adhere to the view we there expressed. It is not necessary for us to state again our reasons for believing that in the *Wade* and *Gilbert* cases the Supreme Court of the United States made a grievous error in the construction of these provisions of the Constitution. That it did so was demonstrated with eloquence and compelling logic in the opinions of the four dissenting Justices. Perhaps, however, the most convincing demonstration was supplied by the majority themselves in the third case decided on that day, *Stovall v. Denno,* 388 U.S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967, in which Mr. Justice Brennan, again writing the opinion of the Court, said:

> "Today's rulings were not foreshadowed in our cases; no court announced such a requirement until Wade was decided by the Court of Appeals for the Fifth Circuit, 358 F 2d 557. The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury. * * * Law enforcement authorities fairly relied on this virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel. It is, therefore, very clear that retroactive application of Wade and Gilbert 'would seriously disrupt the administration of our criminal laws.' * * * We conclude,

therefore, that the Wade and Gilbert rules should not be made retroactive."

In view of the unnumbered thousands of police lineups which had been conducted throughout the nation prior to the *Wade* and *Gilbert* decisions, and the "virtually unanimous weight of authority" holding them constitutional, it would seem that any court would have hesitated to announce a contrary rule unless that court within itself, at least, had no doubt about the matter. Four Justices dissented from the *Wade* and *Gilbert* decisions. Four joined in the decisions on the basis of conviction as to the merits. Mr. Justice Clark, who cast the deciding vote in favor of the decisions, stated expressly that he did so solely because he felt bound by the earlier decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, *from which earlier decision he, himself, had dissented.* Upon so slender a basis the Constitution of this country has been drastically altered. Mr. Justice Clark has since retired and been succeeded by Mr. Justice Marshall, whose views upon the soundness of the *Wade* and *Gilbert* decisions do not appear in the reports.

Be that as it may, the decision of the United States Supreme Court, however erroneous we may believe it to be, is binding upon us as an authoritative construction of the Constitution of the United States. Though we look hopefully for the dawn of a new day, we must, therefore, decide the present case as if we, ourselves, fully concurred in the construction placed upon the Sixth and Fourteenth Amendments by the *Wade* and *Gilbert* cases. We are not, however, required to extend those cases to situations not fairly within the scope of the rule there announced.

[9-11] One may waive his constitutional right to counsel provided he does so freely, voluntarily and with full understanding that he has such right. See: *United States v. Wade, supra; Miranda v. Arizona, supra; Moore v. Michigan,* 355 U.S. 155, 2 L. ed. 2d 167, 78 S. Ct. 191; *State v. Wright, supra.* The right to have counsel appointed and to consult with him prior to participation in a police lineup is not to be deemed waived merely because of a failure by the defendant to request such appointment or consultation. *Burgett v. Texas,* 389 U.S. 109, 19 L. ed. 2d 319, 88 S. Ct. 258; *Swenson v. Bosler,* 386 U.S. 258, 18 L. ed. 2d 33, 87 S. Ct. 996. However, it is not required that the waiver be in writing. See *State v. Wright, supra; State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667. Obviously, it is the part of wisdom for the officer in charge of the stage of the proceeding at which there is a right to counsel to reduce to writing a waiver of such right by the accused, but the crucial question, whether the

waiver be oral or written, is whether the accused clearly understood that he had the right and voluntarily elected to waive it.

[12] In the instant case, the lineup was arranged and supervised by Detective Sergeant Stephenson of the Raleigh Police Department. As shown above, in the statement of facts, Sergeant Stephenson advised the defendant in detail concerning his rights prior to requesting Wood to view the lineup. Specifically, the defendant was told that if he could not afford to employ counsel one would be appointed to represent him and that he had the right to see an attorney before he was placed in the lineup. The two statements, made in immediate succession, must be construed together and, so considered, could mean only that if the defendant wished to have the advice of counsel at the lineup and could not afford to employ one, a lawyer would be appointed for that purpose. There is not the slightest indication in the entire record that the defendant could not or did not understand this clear and explicit statement to him by the officer. The officer then testified that the defendant did not want any counsel and stated to the officer that he, the defendant, had not committed any crime and did not object to being in a lineup.

After Sergeant Stephenson had so testified, the defendant took the stand and testified in his own behalf. On direct examination, he did not once mention the police lineup. On cross-examination, he denied that he had ever seen Wood prior to the time Wood picked him out of the lineup and identified him as the perpetrator of the robbery. Thereupon, on further cross-examination, the defendant testified that he was then standing in a lineup of six people and that Wood walked straight to him and picked him out of the group. Not another word did the defendant say with reference to the lineup. He never mentioned Stephenson's testimony concerning the defendant's waiver of his right to counsel at the lineup. Consequently, taking the entire record into consideration, there is not one word of evidence tending to contradict the testimony of Sergeant Stephenson that the defendant was clearly told of his right to court-appointed counsel at the lineup and that he consented to stand in the lineup without counsel.

Nothing whatever in this record suggests an unfair lineup or any effort or arrangement calculated to suggest to Wood that the defendant was the member of the group who was suspected by the police of being the perpetrator of the robbery. All six men in the lineup were Negroes. There is nothing to indicate any notable discrepancy in their ages, sizes or other physical characteristics. It is further to be noted that at the lineup the defendant wore different colored cloth-

ing from that worn by the robber at the time of the offense. The lineup occurred only sixteen days after the crime was committed. The identification at the lineup was prompt and unhesitating. We find nothing in this record which would support a finding that the lineup violated any constitutional right of the defendant. Consequently, we hold that the evidence of the identification of the defendant by Wood at the lineup was competent.

[13] Giving the rule of *United States v. Wade, supra,* and *Gilbert v. California, supra,* its full effect, as we are required to do and as we do, even an unconstitutional lineup does not necessarily make an in-court identification inadmissible in evidence. The opinion of the Court in *United States v. Wade, supra,* states:

> "We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States,* 371 U.S. 471, 488, 9 L ed 2d 441, 455, 84 S Ct 407, '"[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."' * * * Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup."

Here, in contrast to *State v. Wright, supra,* the offense was committed not in a dimly lighted room but in a service station open for business; the victim of the crime was not aroused from sleep but was the service station attendant who had sold a bottled drink to the robber and had observed him standing in the station for a substantial period of time prior to the robbery, and who also observed him for "three or four minutes" after the robbery was commenced by the sticking of a pistol into the victim's ribs. Only ten weeks elapsed between the robbery and the in-court identification. There is nothing whatever in the record to contradict or cast doubt upon any of this evidence as to the conditions under which Wood observed the robber at the time of the crime. To use again language from the opinion of

the Court in *United States v. Wade, supra,* the State has established "by clear and convincing evidence that the in-court identification was based upon observation of the suspect other than the lineup identification."

The in-court identification of the defendant by Wood was, therefore, not "fruit of a poisonous tree." First, the lineup was not "a poisonous tree." Second, the in-court identification was not fruit of the lineup, but was an independent identification based upon what the witness observed at the time of the robbery. See *State v. Covington, supra.*

[14] It is regrettable that when the jury was sent from the courtroom upon the making of the motion to strike, the presiding judge did not cause the full hearing on voir dire to be placed in the record and did not put into the record his specific findings of fact concerning the conduct of the lineup and the defendant's waiver of counsel thereat. This should have been done. See: *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. ed. 1461, 58 S. Ct. 1019. We have, however, given to the defendant the benefit of every reasonable assumption in his favor by searching through the entire record of the trial for every particle of information concerning the events relating to the lineup just as if all of it had been presented on the voir dire.

If there were any conflicts in the evidence or any suggestion whatever in the entire record that the lineup was unfairly conducted or that the defendant did not waive his right to counsel thereat, as the State's evidence clearly shows he did, we would reverse the conviction and grant a new trial because of the failure of the trial judge to find the crucial facts. Where, however, as here, there is no conflict in the evidence, it is abundantly clear that the defendant did waive his right to counsel at the lineup, it is equally clear that the lineup was conducted fairly and without prejudice to him, and perfectly obvious that the in-court identification was not fruit of the lineup but had its independent origin in the witness' observation of the crime itself, this failure of the trial court to insert such findings into the record must be deemed harmless error. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Bishop, supra.* The record would not support findings to the contrary. The record shows that the defendant has had a fair trial and a contrary result could not reasonably be expected upon a retrial of the case even if all evidence of the identification of the defendant at the lineup were withheld from the jury.

No error.

SHARP, J., concurs in result.

E. H. HARRIS, LOMER DAVENPORT, RAMONA DAVENPORT, C. W. HARRIS, ELIZABETH HARRIS, AND HARLIN PATRICK v. THE BOARD OF COMMISSIONERS OF WASHINGTON COUNTY AND THE INDIVIDUAL MEMBERS THEREOF, NAMELY, W. R. OWENS, P. B. BROWN, H. W. PRITCHETT, J. C. HASSELL, W. W. WHITE, AND RALPH HUNTER, TAX COLLECTOR OF WASHINGTON COUNTY

No. 27

(Filed 9 October 1968)

1. Schools § 7; Taxation §§ 6, 36— tax levy by county commissioners — necessity for vote of the people — injunction

In an action to restrain the board of county commissioners from levying an increase in the county property tax to supplement teachers' salaries without approval of the county electorate, findings supported by the evidence that the amount budgeted to supplement teachers' salaries was to be paid from funds wholly derived from fines, penalties, forfeitures and Alcoholic Beverage Control funds constitute sufficient ground for denying plaintiffs' application for a temporary restraining order pending a final hearing on the merits, Article VII, § 6, Constitution of North Carolina not applying if no funds derived from taxation would be used to supplement the teachers' salaries.

2. Counties § 1— nature and powers of a county

Counties are creatures of the General Assembly and constituent parts of the State government and possess only such powers and delegated authority as the General Assembly may confer upon them.

3. Counties § 1— governmental functions — State agency

In the exercise of governmental functions, counties are agencies of the State and are subject to almost unlimited legislative control within constitutional limitations.

4. Counties § 3; Schools § 7; Taxation §§ 3, 6— levy of tax to supplement teachers' salaries — necessity for vote — G.S. 115-80(a)

G.S. 115-80(a), as amended by Ch. 1263, Session Laws of 1967, authorizes a board of county commissioners to levy a tax on property to supplement teachers' salaries without approval of the electorate.

5. Pleadings § 29— judgment on demurrer

When a demurrer is sustained, the action will be dismissed only if the allegations of the complaint affirmatively disclose a defective cause of action.

6. Appeal and Error §§ 1, 3— appeal of right from Court of Appeals to Supreme Court — substantial constitutional question

Appellant's contention that action of the board of county commissioners in levying an additional property tax for supplementing teachers' salaries without a vote of the people as authorized by G.S. 115-80(a) violates Article VII, § 6 of the North Carolina Constitution presents a substantial constitutional question which authorizes an appeal of right from the Court of Appeals to the Supreme Court.

7. Schools § 1— duty of legislature to provide for public schools

The mandate of Article IX, § 2, requiring the General Assembly to provide by taxation or otherwise for a general and uniform system of public schools contemplates a system of public schools sufficient to meet, within the bounds of available sources, the educational needs of the people of the State.

8. Counties §§ 2, 3; Schools § 7; Taxation §§ 3, 6— tax levy for supplementing teachers' salaries — county acts as State agency

In levying an additional tax for the purpose of supplementing teachers' salaries under the authority conferred by G.S. 115-80(a), the county, through its Board of Commissioners and its Board of Education, acts in its capacity as an integral part of the State school system and as an administrative agency of the State.

9. Schools §§ 1, 7; Taxation § 6— constitutionality of G.S. 115-80(a)

The provision of G.S. 115-80(a) authorizing county commissioners to levy an additional property tax for supplementing salaries of school personnel without a vote of the people *is held* a valid exercise of the authority of the General Assembly to provide adequately for the schools throughout the State in compliance with the mandate of Article IX, § 2, of the Constitution of North Carolina, the limitations on taxation contained in Article VII, § 6, not being applicable to counties when acting as agencies of the State in carrying out the mandate of Article IX, § 2.

APPEAL by plaintiffs under G.S. 7A-30(1) from the decision of the Court of Appeals (1 N.C.App. 258, 161 S.E. 2d 213) upon cross appeals by plaintiffs and defendants from an order of *Peel, J.*, entered November 16, 1967, in the Superior Court of WASHINGTON County.

Action by plaintiffs-taxpayers for injunctive relief.

The cause was heard by Judge Peel (1) on the application in plaintiffs' amended complaint for a temporary restraining order; (2) on defendants' demurrer to the amended complaint; and (3) on defendants' motion to strike designated portions of the amended complaint.

Pertinent to their application for a temporary restraining order, plaintiffs offered affidavits, including the verified complaint; and defendants offered affidavits and exhibits, including original and revised budgets for 1967-1968 and excerpts from minutes of meetings of the Board of Commissioners of Washington County.

Judge Peel's order, after setting forth his findings of fact and conclusions of law, (1) denied plaintiffs' application for a temporary restraining order "pending the final hearing of this matter on its merits"; (2) overruled defendants' demurrer; (3) denied defendants' motion to strike; and (4) allowed defendants thirty days in which

to file answer. Plaintiffs and defendants appealed to the Court of Appeals from the portions adverse to them.

The portion of Judge Peel's order denying plaintiffs' application for a temporary restraining order, which was challenged by plaintiffs' appeal, was affirmed. The portions of Judge Peel's order, challenged by defendants' appeal, were reversed; and, in respect thereof, it was held that defendants' demurrer should have been sustained and the action dismissed.

In their notice of appeal, plaintiffs specified, in accordance with Rule 3 (as amended April 30, 1968) of the Supplementary Rules of this Court, that the substantial constitutional question directly involved was whether the action of the Board of Commissioners plaintiffs seek to restrain is in violation of Article VII, Sec. 6, of the Constitution of North Carolina.

Wilkinson & Vosburgh for plaintiff appellants.

Norman, Rodman & Hutchins and Bailey & Bailey for defendant appellees.

Attorney General Bruton and Deputy Attorney General Moody for the State, amicus curiæ.

BOBBITT, J.

The amended complaint is set out in full in the preliminary statement of the Court of Appeals. In brief summary, plaintiffs alleged that the Board of Commissioners of Washington County, in the county tax levy for 1967-1968, had voted an increase from $1.70 to $1.85 per $100.00 valuation; that the increase of 15¢ per $100.00 was to supplement the salaries of teachers in the public schools of the county; and that a tax levy for this purpose had not been approved by the electorate of Washington County. Asserting the Board of Commissioners lacked both statutory and constitutional authority for such levy, plaintiffs prayed that the court restrain the levy and collection of this increase in the county property tax.

Article VII, Sec. 6, of our Constitution, which, prior to renumbering as provided by the constitutional amendment (Session Laws 1961, c. 313, s. 5) adopted at the general election held November 6, 1962, was Article VII, Sec. 7, provides: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority of those who shall vote thereon in any election held for such purpose."

[1] Judge Peel found as facts, in substance, that the $21,750.00 in the 1967-1968 current expense budget to supplement teachers' salaries was to be paid from funds "wholly derived from fines, penalties, and forfeitures, and from Alcoholic Beverage Control funds"; that $34,000.00 would be available from these sources, of which $21,750.00 had been earmarked for use in the payment of such supplement; and that "there are no other stipulated uses of these two non-tax funds in said county budget or school budget." (Note: Funds derived from fines, penalties and forfeitures belong to the county school fund by virtue of Article IX, Sec. 5, of our Constitution.)

Article VII, Sec. 6, is not apposite if, as set forth in Judge Peel's said findings, no funds derived from taxation would be used to pay the supplement ($21,750.00) to teachers' salaries. These findings, which are amply supported by evidence, constituted sufficient ground for the denial of plaintiffs' application for a temporary restraining order "pending the final hearing of this matter on its merits." Although Judge Peel based his decision in part on this ground, the decision of the Court of Appeals is based solely on its holding that the demurrer to the amended complaint should have been sustained and the action dismissed.

It is unnecessary, in view of the ground of decision by the Court of Appeals and by this Court, to set forth additional findings of fact made by Judge Peel. Suffice to say, in addition to a finding that the Board of Commissioners at a regular meeting held July 10, 1967, adopted a resolution providing "that the Board of Education had shown necessity and peculiar local conditions to necessitate a supplement to the current expense fund," Judge Peel found that, in fact, "there was necessity and peculiar local conditions such as to warrant a supplement to said current expense fund."

[2, 3] Counties are creatures of the General Assembly and constituent parts of the State government. *DeLoatch v. Beamon*, 252 N.C. 754, 757, 114 S.E. 2d 711, 714, and cases cited. "(T)hey possess only such powers and delegated authority as the General Assembly may deem fit to confer upon them." *Surplus Co. v. Pleasants, Sheriff*, 264 N.C. 650, 654, 142 S.E. 2d 697, 701, and cases cited. "In the exercise of ordinary governmental functions, they are simply agencies of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such functions they are subject to almost unlimited legislative control, except where this power is restricted by constitutional provision." *Jones v. Commissioners*, 137 N.C. 579, 596, 50 S.E. 291, 297. Accord: *Ramsey v. Comrs. of Cleveland*, 246 N.C. 647, 651, 100 S.E. 2d 55,

57, and cases cited. "(T)he powers and functions of a county bear reference to the general policy of the State, and are in fact an integral portion of the general administration of State policy." *O'Berry, State Treasurer, v. Mecklenburg County,* 198 N.C. 357, 360, 151 S.E. 880, 882, and cases cited; *Martin v. Comrs. of Wake,* 208 N.C. 354, 365, 180 S.E. 777, 783. Hence, we consider first whether there was sufficient *statutory* authority for the challenged action of the Board of Commissioners.

[4] Prior to the effective date (July 6, 1967) of Chapter 1263, Session Laws of 1967, the last paragraph of G.S. 115-80(a), relating to County-Wide Current Expense Fund Budget, read as follows: "When necessity is shown by county or city boards of education, or peculiar local conditions demand, for adding or supplementing items of expenditure not in the current expense fund provided by the State, the board of county commissioners may approve or disapprove, in part or in whole, any such proposed and requested expenditure. For those items it approves, it shall make a sufficient tax levy to provide the funds: Provided, that nothing in this chapter shall prevent the use of federal or privately donated funds which may be made available for the operation of the public schools under such regulations as the State Board of Education may prescribe."

The amended complaint refers to other provisions of G.S. Chapter 115, namely, G.S. 115-116, G.S. 115-124, and G.S. 115-80(b). Plaintiffs allege, as a legal conclusion, that these statutes required approval by the electorate before the Board of Commissioners was authorized to levy a tax on property to supplement teachers' salaries. The gist of each of these statutory provisions is stated by Judge Brock in his opinion for the Court of Appeals. Suffice to say, any doubt as to the *statutory* authority of the Board of Commissioners to levy a tax on property to supplement the salaries of school teachers was dispelled by the enactment of the 1967 Act, which deleted the last paragraph of Subsection (a) of G.S. 115-80, quoted above, and substituted in lieu thereof the following: *"Notwithstanding any other provisions of this chapter,* when necessity is shown by the county and city boards of education, or peculiar local conditions demand, for adding or supplementing items of expenditure in the current expense fund, *including additional personnel and/or supplements to the salaries of personnel,* the board of county commissioners may approve or disapprove, in part or in whole, any such proposed and requested expenditure. *For those items it approves, the county commissioners shall make a sufficient tax levy to provide the funds:* Provided, that nothing in this chapter shall prevent the use of federal or privately donated funds which may be made available for the

operation of the public schools under such regulations as the State Board of Education may prescribe." (Our italics.)

[5] When a demurrer is sustained, the action will be then dismissed only if the allegations of the complaint affirmatively disclose a defective cause of action, that is, that the plaintiff has no cause of action against the defendant. *Skipper v. Cheatham,* 249 N.C. 706, 711, 107 S.E. 2d 625, 629; *Parrish v. Brantley,* 256 N.C. 541, 543, 124 S.E. 2d 533, 535.

[6] In our view, the only reasonable interpretation of plaintiffs' factual allegations is that the Board of Commissioners on July 10, 1967, adopted the 1967-1968 budget and the tax levy of $1.85 per $100.00 valuation after determining that the Board of Education had shown such necessity and peculiar local conditions as to necessitate the increased levy of 15¢ per $100.00 valuation to supplement the current expense fund, inclusive of teachers' salaries. It appearing therefrom that the Board of Commissioners acted in accordance with authority conferred by G.S. 115-80(a), as amended by said 1967 Act, plaintiffs' allegations disclose affirmatively they have no cause of action unless, as they assert, said 1967 Act is unconstitutional and therefore void because violative of said Article VII, Sec. 6, of our Constitution.

This is a substantial question arising under the Constitution of North Carolina and, with reference thereto, G.S. 7A-30(1) authorizes an appeal *of right* to this Court.

Provisions of Article IX of our Constitution pertinent to decision are quoted below.

"Section 1. Education shall be encouraged. — Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

"Sec. 2. General Assembly shall provide for schools; separation of the races. — The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. (And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race.)

"Sec. 3. Counties to be divided into districts. — Each county of the State shall be divided into a convenient number of districts, in

which one or more public schools shall be maintained *at least six months* in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." (Our italics.)

The *second* sentence in Article IX, Sec. 2, enclosed by parentheses, following the decision in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 98 L. ed. 873, 74 S. Ct. 686, 38 A.L.R. 2d 1180, was held invalid in *Constantian v. Anson County,* 244 N.C. 221, 93 S.E. 2d 163, as violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Article IX, Sec. 3, of the Constitution of 1868, was amended by the constitutional amendment (Public Laws of 1917, c. 192) adopted at the general election held November 5, 1918, by striking therefrom the words "four months" and inserting in lieu thereof the words "six months."

In 1923, the General Assembly enacted legislation providing generally for "(a) general and uniform system of public schools . . . throughout the State, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years," the length of term of each school "not (to) be less than six months." Public Laws of 1923, c. 136. The 1923 Act and amendments thereto required each county to provide support for its schools in compliance with the Article IX, Sec. 3, constitutional mandate; and budgets were required for Current Expenses, Capital Outlay and Debt Service. The General Assembly appropriated money to constitute "The State Equalizing Fund," which the Board of Education was authorized to apportion so that the burden of counties less able to make the required provisions would be to some extent equalized. *Board of Education v. Comrs. of Onslow,* 240 N.C. 118, 124, 81 S.E. 2d 256, 260. However, except for assistance, if any, from "The State Equalizing Fund," the support of schools in North Carolina was provided by each county or by a special school district acting under authority of a special act of the General Assembly. As noted by Clarkson, J., in *School District v. Alamance County,* 211 N.C. 213, 223, 189 S.E. 873, 880: "The duty imposed on the State, under Art. IX of the Constitution of North Carolina, is mandatory. This sacred duty was neglected by the State for long years, for various reasons, chiefly on account of the lack of means — the State having been crushed and impoverished by four years of war. In different parts of the State, as they became more prosperous, patriotic men and women obtained acts from the General Assembly by which schools

could be established for the education of the children of their communities. . . ."

Decisions of this Court, which considered a county's obligation under Article IX, Sec. 3, in relation to the tax limitation provisions of Article V, Section 1, of the Constitution of 1868, bear upon the constitutional question presently before us.

Article V, Section 1, of the Constitution of 1868, provided: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each, to the tax on property valued at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head." (This provision of the Constitution of 1868 was stricken, and in lieu thereof the present Article V, Section 1, was adopted by amendment approved by the electorate on November 2, 1920, pursuant to Public Laws, Extra Session 1920, c. 93, s. 2.)

This Court held, under the tax equation and limitation prescribed by the above quoted provision of the Constitution of 1868, that the combined State and county tax could not exceed "two dollars on the head" or 66⅔¢ on each $100.00 of property valuation. *R. R. v. Holden,* 63 N.C. 410 (1869); 18 N.C.L.R. 275 *et seq.*

Acting under authority of Laws of 1885, c. 174, s. 23, the Board of Commissioners of Sampson County, to provide for the support and maintenance of county schools for the term of four months prescribed by Article IX, Sec. 3, levied taxes which, combined with State taxes, aggregated $2.65 on the poll and 88⅓¢ on each $100.00 of property valuation. It was held in *Barksdale v. Comrs. of Sampson County,* 93 N.C. 472, that the commissioners, in discharging their duty under Article IX, Sec. 3, could not disregard the tax limitations imposed by Article V, Section 1; and that the provisions of the Act of 1885, which purported to authorize the commissioners to exceed the limits prescribed by Article V, Section 1, were unconstitutional. The *Barksdale* decision was approved and followed in *Board of Education v. Commissioners (of Bladen County),* 111 N.C. 578, 16 S.E. 621. Dissents of Merrimon, J. (later C.J.), in the *Barksdale* case, and of Avery, J., in the *Bladen County* case, foreshadowed the decision in *Collie v. Commissioners (of Franklin County),* 145 N.C. 170, 59 S.E. 44, which, in express and positive terms, overruled the *Barksdale* and *Bladen County* decisions.

In *Collie,* Brown, J., referring to the *Barksdale* and *Bladen*

County decisions, said "We agree with the Court in those cases, that Article V is a limitation, generally, upon the taxing power of the General Assembly. Nor are we called upon to hold that the tax to supplement the school fund in each county, directed by the statute to be levied in case of need, may be upheld as a 'necessary county expense' or as a 'special tax' for a special purpose. It is unnecessary in the construction we give to the Constitution, to place our decision upon any such grounds. We hold . . . that, while this limitation upon the taxing power of the General Assembly prevails generally, *it does not always prevail, and that it should not be allowed to prevent the giving effect to another article of the same instrument equally peremptory and important.*" (Our italics.) In the opinion of Brown, J., for the Court, and in the concurring opinions of Walker, J., and Clark, C.J., in *Collie,* as well as in the dissenting opinions of Merrimon, J. (later C.J.), and Avery, J., in the earlier cases, the emphasis placed by the Constitution of 1868 upon education as prerequisite to an enlightened electorate, essential to democratic government, is set forth eloquently and convincingly. Reference was made to the fact that "(t)he only criminal offense created and defined by the Constitution itself" (Avery, J., 111 N.C. p. 585) is the failure of county commissioners to comply with the mandatory provisions of Article IX, Sec. 3.

The conclusion reached in *Collie* was that Article V, Section 1, placed no limitation upon the board of commissioners when acting to carry out the mandate of Article IX, Sec. 3, to support and maintain the schools of the county for the constitutional term of four (later six) months. The constitutionality of a 1901 statute, codified as Section 4112 of the Revisal of 1905, which contained substantially the same provisions as said 1885 Act, and the action of the board of commissioners in accordance therewith, were upheld.

In *Hollowell v. Borden,* 148 N.C. 255, 61 S.E. 638, Brown, J., referring to *Collie,* said: "(T)he opinion regards the public-school system as a State institution, founded in the Constitution and governed and controlled by the General Assembly. In order to reconcile clauses of the Constitution apparently conflicting, we held in that case that the provision for four months school terms was mandatory, and that in order to give effect to it the General Assembly could compel the counties of the State, when necessary, to disregard the limitation upon taxation contained in Article V, section 1."

In *Board of Education v. Commissioners (of Cherokee County),* 150 N.C. 116, 121, 63 S.E. 724, 726, Hoke, J. (later C.J.), said: "(I)n *Collie v. Commissioners,* 145 N.C. 170, the Court held that the

duty of the county commissioners to provide by taxation for maintaining the public school for the minimum period of four months was not affected by the restrictions on the power of taxation contained in Articles V and VII of the Constitution; and from this it follows that the requirements of section 3, Article IX, to the extent indicated, are peremptory, and a failure on the part of the commissioners to perform the duty thereby imposed is or must be made an indictable offense."

[7] In the cases cited above, the emphasis was on the mandate of Article IX, Sec. 3, to county commissioners, rather than on the mandate of Article IX, Sec. 2, requiring that the General Assembly "provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." The authority and obligation of the General Assembly under Article IX, Sec. 2, are not restricted by references in Article IX, Sec. 3, to a school term of four (later six) months. The constitutional mandate to the General Assembly is to provide by taxation and otherwise for a general and uniform system of public schools. This mandate contemplates a system of public schools sufficient to meet, within the bounds of available resources, the educational needs of the people of the State.

In *Frazier v. Comrs. (of Guilford County)*, 194 N.C. 49, 62, 138 S.E. 433, 440, the question was whether the defendant, although acting in compliance with the County Finance Act (of 1927), had authority to issue bonds and notes of the county for the purpose of erecting and equipping schoolhouses, and purchasing land necessary for school purposes, and to levy taxes for the payment of said bonds and notes, without first obtaining the approval of the voters of the county. It was held that the limitations of Article VII, Sec. 7 (now Sec. 6) were not applicable to bonds and notes issued by a county, "as an administrative agency of the State, under authority conferred by the County Finance Act," for such purposes. Connor, J., for the Court, said: "The counties of the State are authorized by this statute to issue bonds and notes for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, not as municipal corporations, organized primarily for purposes of local government, but as administrative agencies of the State, employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools." Accord: *Hall v. Commissioners of Duplin*, 194 N.C. 768, 140 S.E. 739; *Owens v. Wake*

County, 195 N.C. 132, 141 S.E. 546; *Julian v. Ward,* 198 N.C. 480, 152 S.E. 401; *Evans v. Mecklenburg County,* 205 N.C. 560, 172 S.E. 323; *Taylor v. Board of Education,* 206 N.C. 263, 173 S.E. 608.

In *Julian v. Ward, supra,* Clarkson, J., citing *Frazier* and prior cases, stated: "Under the mandatory provision in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation either by State appropriation or through the county acting as an administrative agency of the State."

With reference to the authority of the General Assembly, when acting in obedience to and in compliance with the constitutional mandate, Article IX, Sec. 2, Connor, J., in *Frazier,* said: "The mandatory provision of section 3 of Article IX, to the effect that 'one or more public schools shall be maintained at least six months in every year' in each school district of the State, wherein tuition shall be free of charge to children of the State between the ages of six and twenty-one, is not a limitation as to the length of the school term; it is the minimum required by the Constitution. The General Assembly has the power to provide for a longer term for the public schools of the State. Whether the term shall exceed the minimum fixed by the Constitution must be determined from time to time by the General Assembly, in accordance with its judgment, and in response to the wishes of the people of the State."

The General Assembly, by the enactment of Chapter 562, Public Laws of 1933, adopted an entirely new policy with reference to the operation and support of the schools. The 1933 Act provided for a uniform system of State-supported operation of public schools for the entire State. *Board of Education v. Comrs. of Onslow, supra.* It repealed or subordinated all statutes relating to the public schools in conflict with its provisions. *Evans v. Mecklenburg County, supra.* It was provided, *inter alia,* "(t)hat the six months school term required by Article IX of the Constitution is hereby extended to embrace a total of one hundred and sixty days of school in order that there shall be operated in every county and district in the State which shall request the same a uniform term of eight months."

Section 17 of the 1933 Act, which was re-enacted in 1935 and in 1939, contained the following provision: "That the county board of education in any county administrative unit and the board of trustees in any city administrative unit, with the approval of the tax levying authorities in said county or city administrative unit and the State School Commission, in order to operate the schools of a higher standard than those provided for by State support, but in no

event to provide for a term of more than 180 days, may supplement any object or item of school expenditure: *Provided*, that before making any levy for supplementing State budget allotments an election shall be held in each administrative unit to determine whether there shall be levied a tax to provide said supplemental funds, and to determine the maximum rate which may be levied therefor." The quoted provisions were in force when *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E. 2d 825, which considered the factual situation stated below, was decided.

The Charlotte City Administrative Unit had voted supplements to State support of the schools, fixed the maximum for that purpose at 25¢ on the $100.00 property valuation, and proceeded to conduct a nine months school term and to pay teachers' salaries therefor. In 1941, the General Assembly enacted the "Teachers' and State Employees' Retirement Act." Chapter 25, Public Laws of 1941, as amended by Chapter 143, Public Laws of 1941. This 1941 Act required county administrative units and city administrative units which supplemented the State support of the eight months school term to secure schools of higher standard or a longer term or both to contribute to the State Retirement Fund. No provision was made for submitting the question of local taxation to popular vote. The entire amount provided by the 25¢ levy was for purposes other than the payment of the required amount (approximately $17,124.75) to the State Retirement Fund. The precise question was whether the City of Charlotte had authority to provide this amount for payment to the State Retirement Fund by the levy of a tax without approval of the voters.

In *Bridges*, the constitutionality of said 1941 legislation was sustained; and, by reason of authority conferred by said 1941 legislation, this Court upheld the right of the City of Charlotte to levy a tax without a vote of the people to provide the amount necessary for its contribution to the State Retirement Fund on account of supplements to teachers' salaries and teachers' salaries for the extended school term. It was held that the Board of School Commissioners of the City of Charlotte, although formerly an agency of the municipality was, by reason of the 1933 Act, "a part of the Public School System and henceforth an agency of the State." This Court based its decision on the proposition that city and county administrative units "are, as the name implies, units within the public school system — established agencies of the State to carry on the then existing functions of the public school system, and logical and convenient agencies for investment with further power and duties as might be found expedient or necessary."

In *Bridges,* Seawell, J., for the Court, said: "The plea that the levy of such a tax by a county, without submission to popular vote, is prohibited by Article VII, section 7 (now 6), of the Constitution, as not being for a necessary expense was raised and settled in *Collie v. Commissioners,* 145 N.C. 170, 59 S.E. 44, by the declaration that the requirement that the public schools be maintained is a mandate of a coordinate article of the Constitution of equal dignity and force, and must be obeyed; and that Article VII, section 7 (now 6), had no relation by way of limitation on the taxing power exercised for that purpose." Other excerpts from the opinion in *Bridges* are quoted in Judge Brock's opinion for the Court of Appeals.

Presently, G.S. Chapter 115, Article 1, sets forth the "State Plan for Public Education." G.S. 115-1 provides: "General and uniform system of schools. — A general and uniform system of public schools shall be provided throughout the State, in accordance with the provisions of Article IX of the Constitution of North Carolina, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years, and to every person twenty-one years of age, or over, who has not completed a standard high school course of study. The minimum six months school term required by Article IX of the Constitution is hereby extended to embrace a total of one hundred and eighty days of school in order that there shall be operated in every county and city administrative unit a uniform school term of nine months without the levy of a State ad valorem tax therefor, and in order that substantial equality of education opportunity may be available to all children of the State."

[8] Whether, under our present system, the board of commissioners of a county should be authorized, where necessity is shown by a county board of education, or peculiar local conditions demand, to add or supplement items of expenditure in the current expense fund, including additional personnel and/or supplements to the salaries of personnel, and to make a sufficient tax levy to provide the funds therefor, either with or without the approval of the voters of the county, is a matter for determination by the General Assembly. The General Assembly, by its enactment of Chapter 1263 of the Session Laws of 1967, quoted above, has conferred such authority on the Board of Commissioners of Washington County, without a vote of the people. In exercising the authority so conferred, Washington County, through its Board of Education and its Board of Commissioners, acted in its capacity as an integral part of the State school system and as an administrative agency of the State.

[9] "In considering the constitutionality of a statute, every pre-

sumption is to be indulged in favor of its validity." Stacy, C.J., in *State v. Lueders,* 214 N.C. 558, 561, 200 S.E. 22, 24. In our view, this principle applies with full vigor when considering the authority of the General Assembly to provide adequately for the schools throughout the State in compliance with the mandate of Article IX, Sec. 2, of our Constitution. The conclusion reached is that G.S. 115-80(a), as amended by said 1967 Act, as interpreted herein, is a valid exercise of legislative authority, and that the challenge to its validity on the asserted ground it is violative of Article VII, Sec. 6, of our Constitution, is without merit.

For the reasons stated, the decision of the Court of Appeals, which sustained the demurrer to the amended complaint and dismissed the action, is affirmed.

Affirmed.

MRS. WILLA BLANCHE HEWETT, WIDOW; BARBARA RUTH HEWETT, MINOR DAUGHTER, BY HER NEXT FRIEND, REBECCA WILSON; CARL HAYES HEWETT, DECEASED EMPLOYEE VS. S. W. GARRETT, EMPLOYER; GLENS FALLS INSURANCE CO., CARRIER

No. 193

(Filed 9 October 1968)

1. Master and Servant § 79— dependency requirement of G.S. 97-2(12)

The words "dependent upon the deceased" in G.S. 97-2(12) refer to a legal, not an actual, dependency.

2. Master and Servant § 79— acknowledged illegitimate child — failure of father-employee to support

Where the deceased employee acknowledged the paternity of an illegitimate child and contributed to its support, his discontinuance of support for the child did not work a forfeiture of the child's right to participate in benefits under the Workmen's Compensation Act resulting from the death of the employee-father, since his legal responsibility to support the child continued.

3. Master and Servant § 79— length of status as child for compensation purposes

When an illegitimate child qualifies as a child for compensation purposes, that status continues until the child becomes 18 years of age or marries before reaching that age.

4. Master and Servant § 79— when child loses right to share in compensation

A legitimate or acknowledged illegitimate child loses its right as a child

to share in compensation benefits (1) by reaching the age of 18 years, whether married or single, or (2) by marriage before 18 unless after marriage the child continues wholly dependent upon the parent. G.S. 97-2(12).

5. Master and Servant § 47— construction of Workmen's Compensation Act

The Workmen's Compensation Act should be liberally construed to the end that benefits may not be denied on narrow or technical grounds.

6. Master and Servant § 79— acknowledged illegitimate child — employee not supporting at his death — right to compensation

An acknowledged illegitimate child of a deceased employee is entitled to share with the deceased's widow the Workmen's Compensation award due his dependents as a result of his death in an industrial accident notwithstanding the employee-father was not contributing to the support of his illegitimate child at the time of his death, the father being legally responsible for his illegitimate child, and G.S. 97-39 providing a conclusive presumption that the child is wholly dependent for support on the deceased employee-father.

ON certiorari to review the decision of the North Carolina Court of Appeals (1 N.C.App. 234) holding that Barbara Ruth Hewett, acknowledged illegitimate daughter of Carl Hayes Hewett, was entitled to share equally with the widow, Willa Blanche Hewett, in the Workmen's Compensation award due his dependents as a result of his death in an industrial accident.

The proceeding originated before the North Carolina Industrial Commission as a claim filed by the widow and by the next friend of the illegitimate child against the employer and his surety for death benefits due them as dependents of Carl Hayes Hewett, whose death occurred on May 19, 1963 while he was at work for S. W. Garrett. Based on the stipulation of the parties and the uncontradicted evidence at the hearing before the Industrial Commission, the Commission found:

"6. The maternal grandmother, Rebecca Wilson, testified, and the undersigned finds as a fact, that she visited at Brevard, North Carolina, in June, 1957, and stayed with her daughter, Barbara Wilson, who went by the name Barbara Hewett, at Brevard and Carl Hayes Hewett, who were living together as husband and wife with the aforementioned child, Barbara Ruth Hewett; that on July 4, 1958, Barbara Wilson (Hewett) took the then thirteen month old daughter and moved in with her mother in New York at the above listed address. Approximately two weeks thereafter (on or about July 18, 1958) Carl Hayes Hewett moved into the household with Rebecca Wilson and

lived as husband and wife with Rebecca Wilson [sic] and the infant girl, Barbara Ruth Hewett. On or about the first part of October, 1958, Rebecca Wilson discovered that Carl Hayes Hewett and Barbara Wilson were not married. At that time Carl Hayes Hewett moved from the household. During this period from July to October in 1958 Carl Hayes Hewett paid part of the grocery bills for the four persons residing in the household in New York but has paid nothing toward the support of Barbara Wilson Hewett since that time."

The Commission concluded:

"1. Carl Hayes Hewett was injured by accident arising out of and in the course of his employment with the defendant employer resulting in his death . . .

2. Willa Blanche Hewett is the lawful widow of the deceased, Carl Hayes Hewett . . .

3. Barbara Ruth Hewett is the illegitimate daughter of the deceased, but was not a dependent of the deceased for some five years prior to May 19, 1963, and thereby is excluded from any recovery. . . ."

The Industrial Commission entered an award allowing full compensation to the widow and denying any recovery on behalf of the illegitimate child.

On the child's appeal to the North Carolina Court of Appeals, the Court reversed the Commission's award with respect to the child and held she was entitled to share equally with the widow and remanded the proceeding to the Industrial Commission with directions to enter an order allowing her to share equally with the widow in the award. The widow filed a petition with this Court seeking a review of the Court of Appeals decision. This Court, recognizing the importance of the decision involving the rights of a minor, as well as the conflict between the award of the Industrial Commission and the decision of the Court of Appeals, granted certiorari.

James, James & Crossley by John F. Crossley for plaintiff widow.

Aaron Goldberg for minor plaintiff.

HIGGINS, J.

The Industrial Commission found upon plenary and uncontradicted evidence that Barbara Ruth Hewett is the illegitimate child of the deceased employee, Carl Hayes Hewett. All the evidence disclosed that the father and mother, Barbara Wilson, although unmar-

ried, lived together in North Carolina prior to and at the time of their daughter's birth on June 8, 1957. The birth certificate, filed at Brevard, gives to the daughter the Hewett name and lists Carl Hayes Hewett as her father. The evidence further disclosed, and the Commission found, that the mother and the child left North Carolina and moved into the home of the child's maternal grandmother in New York, and continued to live thereafter for several months in her home. During that time, Carl Hayes Hewett contributed to the support of the mother and the child.

We note the record does not contain a pointed and specific finding or conclusion that Carl Hayes Hewett acknowledged Barbara Ruth Hewett as his illegitimate daughter. However, Finding of Fact No. 6 has been treated by the parties, by the Industrial Commission, and by the Court of Appeals as the equivalent of such a specific finding. The widow's brief before this Court thus states the question presented:

> "1. Is the North Carolina Court of Appeals in error in holding in its opinion, rendered May 15, 1968, that an illegitimate child, acknowledged by its father, however, not supported by its father and not in fact dependent upon its father, is conclusively presumed by statute law to be entitled to share in an award arising out of the death of its father?"

The acts and conduct of Carl Hayes Hewett as disclosed by Finding of Fact No. 6 permits no reasonable conclusion except his acknowledgment that Barbara Ruth Hewett is his illegitimate daughter. The parties, the Industrial Commission, and the Court of Appeals were fully justified in so treating the finding.

Apparently not because of lack of evidence that Carl Hayes Hewett actually acknowledged Barbara Ruth Hewett as his illegitimate daughter, but lack of evidence that he actually contributed to her support for 4½ years preceding his death, the Industrial Commission concluded that Barbara Ruth Hewett did not qualify as a child and was not entitled to participate in the compensation benefits.

This review involves the validity of the Court of Appeals decision reversing, in part, the award of the Industrial Commission and remanding the cause to the Commission with directions to enter an award permitting the illegitimate child to share equally with the widow in the death benefits. The legal validity of that decision is the sole question of law presented for our review. Does Barbara Ruth Hewett qualify as an acknowledged illegitimate child of Carl Hayes Hewett?

G.S. 97-2(12) provides:

". . . The term 'child' shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. . . ."

[1] It should be noted the wholly dependent provision applies only in case of married children. It does not apply to acknowledged illegitimates or other children who are unmarried and who are under 18. The statute recognizes a distinction between actual and legal dependency. A legal dependence is sufficient and the law fixes that type of responsibility on the father of an illegitimate. Moreover, G.S. 97-39 provides: ". . . a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. . . ."

[2] In this case certain it is that at birth and thereafter for approximately 16 months Carl Hayes Hewett acknowledged Barbara Ruth as his illegitimate child. In the records of births, he is listed as the father. He lived in the house with her and her mother and contributed to their support from her birth until her grandmother broke up the family arrangement when she discovered her daughter and Carl Hayes Hewett were not married. Although evidence is lacking that he contributed to the child's support after he separated from the mother, his legal responsibility continued. His failure to support did not work a forfeiture of the child's right to participate in the death benefits under Workmen's Compensation.

[3, 4] When an illegitimate child qualifies as a child (as Barbara Ruth did in this case) the status, for compensation purposes, continues until the child becomes 18 years of age or unless she marries before reaching that age. G.S. 97-2(12) clearly sets out how a child, legitimate or acknowledged illegitimate, may lose its right as a child to share in compensation benefits:

1. By reaching the age of 18 years, whether married or single.
2. By marriage before 18 unless after marriage the child continues wholly dependent upon the parent.

[5] It must be remembered that the Compensation Act should be liberally construed to the end that benefits may not be denied on narrow or technical grounds. *Johnson v. Hosiery Co.*, 199 N.C. 38, 153 S.E. 591.

[6] In construing the provisions of the Workmen's Compensation

Act here involved, Justice Connor, in *Lippard v. Express Co.*, 207 N.C. 507, 177 S.E. 801, used this language:

> "1. 'A widow, a widower, and . . . child shall be conclusively presumed to be wholly dependent for support on the deceased employee. . . .'
>
> 2. 'The term "child" shall include . . . a child legitimately adopted prior to the injury of the employee, and a step-child or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him.'
>
> . . . The dependency which the statute recognizes as the basis of the right of the child to compensation grows out of the relationship, which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial.
>
> The philosophy of the common law, which denied an illegitimate child any rights, legal or social, as against its father, and imposed no duty upon the father with respect to the child, is discarded by the statute. . . ."

In *Lippard,* an acknowledged illegitimate, though unborn at the death of the father, was permitted to share in his death benefits under Workmen's Compensation. Justice Connor's opinion was filed January 1, 1935. Since then, the General Assembly has convened in 17 regular and a number of special sessions and has failed to make any change in the statute. We may assume the law-making body is satisfied with the interpretation this Court has placed upon its Workmen's Compensation Act. See also annotation, 100 A.L.R. 1098, Note (b), Illegitimate Children; *Martin v. Sanitarium,* 200 N.C. 221, 156 S.E. 849. The case of *Wilson v. Construction Co.*, 243 N.C. 96, 89 S.E. 2d 864 is not in conflict. In that case there was no evidence the deceased employee had ever acknowledged, as his, the illegitimate child.

[6] After careful review, we conclude, the decision of the North Carolina Court of Appeals holding that Barbara Ruth Hewett is entitled to share equally with the widow is correct.

The decision is

Affirmed.

CAROLINA BEACH FISHING PIER, INC. v. THE TOWN OF CAROLINA BEACH, NORTH CAROLINA

No. 192

(*Filed 9 October 1968*)

1. Appeal and Error § 26— assignment of error to signing of judgment

A sole assignment of error to the signing of the judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record; the findings of fact or the sufficiency of the evidence to support them are not presented for review.

2. Eminent Domain § 13; Municipal Corporations § 43— landowner's action for damages to or for taking of land — limitation of actions

Section of statute which gives landowner affected by municipality's construction of a beach erosion seawall the right to assert claims against the municipality within six months after a "building line" of the altered beach has been surveyed and established must be read in conjunction with another section of the statute which provides that the municipality shall survey and establish the building line and record a map thereof with the register of deeds "within thirty (30) days from date of the completion" of the seawall; consequently, a landowner who brings action against the municipality more than six months after the survey and establishment of the building line is not barred from asserting his claim when the findings of fact affirmatively show that the building line was established before the completion of the seawall. Sections 2 and 3 of Chapter 511, Session Laws of 1963.

3. Statutes § 5— statutory construction — sections dealing with same subject

Parts of the same statute, and dealing with the same subject, are to be considered and interpreted as a whole.

4. Registration § 3— registration as notice

Registration is not constructive notice as to provisions not coming within the purview of the registration statutes even though such provisions are embodied in any instrument required to be registered.

5. Limitation of Actions § 1— nature and construction of statute

A statute of limitations should not be applied to cases not clearly within its provisions, nor should it be extended by construction.

6. Limitation of Actions § 1— nature and construction of statute

When there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen.

7. Constitutional Law § 21— inalienable right of property

The right of private property is a fundamental, material, inherent and inalienable right; it is a common-law right and it is a right guaranteed by the Federal and State Constitutions.

8. Eminent Domain § 1— constitutional extent of power

The private property of a citizen cannot be taken for a public use by the State or by a municipal corporation without the payment of just compensation. U. S. Constitution, 14th Amendment; N. C. Constitution, Article I, Sec. 17.

9. Eminent Domain § 1— constitutional limitation on power

The constitutional prohibition against taking the private property of a citizen for public use without payment of just compensation is self-executing and is not subject to impairment by legislation.

10. Eminent Domain § 13— owner's common-law right of action

A citizen may sue the State or one of its subdivisions, namely, a municipality, for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy.

APPEAL by plaintiff from *Mintz, J.*, 27 November 1967 Civil Session of NEW HANOVER to the North Carolina Court of Appeals. The appeal was filed in the North Carolina Court of Appeals on 25 April 1968. After the filing of the appeal and before the case was heard in the North Carolina Court of Appeals, plaintiff filed a motion in this cause petitioning the Supreme Court to have the cause certified to the Supreme Court for review. The Supreme Court in conference on 14 June 1968 in its discretion allowed plaintiff's motion and set the case for argument the first week of the Fall Term 1968. G.S. 7A-31; Rule 1, Supplementary Rules of the Supreme Court, 271 N.C. 744.

Civil action to recover from the town of Carolina Beach, a municipal corporation duly organized and existing by virtue of the laws of the State of North Carolina, just compensation by reason of the defendant town's allegedly having taken plaintiff's property, to wit, Lots 1 through 6 and Lot 9 in Block 216, according to the official plan or map of Carolina Beach, and the fishing pier located on one of the aforesaid lots, for a public purpose without the payment of just compensation, in violation of plaintiff's rights under Article I, Section 17, of the North Carolina Constitution, and under the Fourteenth Amendment to the United States Constitution. Plaintiff alleges that the fair market value of its property taken by defendant at the time it was taken was $41,000, and plaintiff prays for recovery from defendant of the amount of $41,000, with legal interest thereon from 30 March 1964 until paid.

Defendant filed an answer in which, after admitting that plaintiff was a North Carolina corporation and that it (defendant) was a North Carolina municipal corporation, that it built a berm or seawall as alleged in the complaint, and that the construction of the berm or seawall was in the exercise of a governmental function for

a public purpose, it denied all the other material allegations of the complaint. In its further answer and defense, defendant alleged in substance as follows: (1) During the course of many years much of the land abutting and fronting on the Atlantic Ocean within the town limits of Carolina Beach has been washed away by successive storms, tides, winds, and other natural forces, and as a result the Atlantic Ocean moved westwardly for a great distance particularly along the northern end of Carolina Beach, and further erosion and washing away of the beach was threatened. As a result of such erosion of the beach and the moving westwardly of the Atlantic Ocean prior to the construction of the berm or seawall by the defendant, the eastern boundary of the property described in plaintiff's complaint and claimed by the plaintiff moved gradually westwardly until such property described in the complaint was completely washed away and submerged by the waters of the Atlantic Ocean, which resulted in divesting plaintiff by action of the ocean from the ownership of the described property. If in fact plaintiff ever had a valid claim to the ownership of the described property, defendant denies its claim. (2) In the construction of the said berm or seawall, defendant replaced sand where it had been washed away and thereby created new land owned by the State of North Carolina. All the land described in the complaint was formed by restoring and filling in the shoreline along the Atlantic Ocean by pumping sand from Myrtle Grove Sound and pushing up and hauling sand onto the beach. On 22 May 1963 the General Assembly of North Carolina enacted Chapter 511 of the 1963 Session Laws entitled "An act relating to the title to the land built up and constructed in the town of Carolina Beach in the county of New Hanover as a result of certain erosion control work in said town." Section 1 of the said Act provides that so much of the lands filled in and restored which lie east of the "building line" established in said Act is granted and conveyed in fee simple to the town of Carolina Beach. All the land filled in and restored by defendant is east of the said "building line," which is shown on a map recorded in Map Book 8, page 52, of the New Hanover County Registry. The said map and "building line" were approved by the town council of Carolina Beach at a regular meeting held on 14 January 1964. By virtue of said Act the land described in the complaint belongs to defendant. (3) Section 3 of Chapter 511 of the 1963 Session Laws provides: "Any property owner or claimant of land who is in any manner affected by the provisions of this Act, and who does not bring suit against the Town of Carolina Beach, or assert such claims by filing notice thereof with the governing body of the town, either or both, as the case may be, or any claimant

thereto under the provisions of this Act, or their successor or successors in title, within six (6) months after 'the building line' is surveyed and established, and the map thereof recorded, as provided for herein, shall be conclusively presumed to have acquiesced in, and to have accepted the terms and conditions hereof, and to have abandoned any claim, right, title or interest in and to the territory immediately affected by and through or as a result of the doing of act or acts or thing or things herein mentioned, and shall be forever bound from maintaining any action for redress upon such claim." The map showing said "building line" was recorded on 8 May 1964, and this action was filed more than six months after the recording of said map; and said failure to bring this action within six months after the recording of the said map is a bar to any recovery by the plaintiff and is hereby expressly pleaded as a bar to any recovery. (4) The construction of the berm or seawall was essential as a matter of public necessity to prevent a complete eventual erosion of the beach and the destruction of the town itself. The construction of the berm or seawall was the most effective plan to control the erosion which defendant could accomplish. Defendant denies that it has damaged plaintiff's fishing pier in any way, and defendant has in no way restrained or prevented the plaintiff from moving its pier farther out into the Atlantic Ocean. Though denying that it has taken any property or rights claimed by plaintiff, defendant alleges that if any such property or rights were taken by it that such taking was not done under any power of eminent domain but under the general police power of the State to cope with public necessity and the emergency situation caused by the erosion and threatened erosion, and plaintiff is entitled to no compensation. Defendant prays that plaintiff have and recover nothing by this action.

At the November 1966 Civil Session of the Superior Court of New Hanover County, George M. Fountain, Judge Presiding, entered an order appointing James D. Carr as referee to hear said case and to find all issues both of fact and law according to the provisions of G.S. 1-195. To the signing of this order of compulsory reference all parties excepted and demanded a jury trial on all the issues of fact arising in the case. At the January 1967 Session of the New Hanover County Superior Court, Joseph W. Parker, Judge Presiding, entered an order in which, after reciting that James D. Carr was presently indisposed, he appointed Joshua S. James as referee to hear and determine said case. To this order of compulsory reference all parties excepted and demanded a jury trial.

On 18 September 1967 Joshua S. James filed his report as referee, which is in substance as follows, except when quoted:

After summarizing the pleadings in the case, the referee recited that before any hearings in the case the parties entered into three stipulations. The first two stipulations were in connection with the presentation of record evidence of title to the beach lots claimed by the plaintiff, and the third stipulation was as follows: "It is stipulated between the parties that the plea in bar set up by the defendant may be heard and determined by the Referee without prior determination by the Judge of the Superior Court, without prejudice to the rights of the parties to appeal from the Referee's findings and conclusions and their demand for a jury trial thereon, for the reason that the evidence to be adduced at the hearing before the Referee is so intertwined with the question of the validity of the plea in bar, that it is deemed advisable to hear all the evidence with respect to this controversy during this reference."

At the same time counsel agreed upon the issues to be determined as follows:

"1. Is the plaintiff's cause of action barred by the six-months statute of limitations set forth in the Legislative Act?

"2. Did the plaintiff own the property mentioned in the complaint at the time of the alleged taking?

"3. Did the defendant take any of the plaintiff's property for a public purpose?

"4. What amount in compensation, if any, is the plaintiff entitled to receive from the defendant for such taking?"

The referee's report, after reciting that he heard evidence of oral testimony and in addition illustrative photographs and color slides, as well as maps, records, written documents, reports, etc., made the following findings of fact:

FINDINGS OF FACT

"In accordance with the stipulation and agreement hereinbefore mentioned, the first issue to be determined is whether plaintiff's cause of action is barred by the six-months limitation set out in the Legislative Act.

"Section 2 and Section 3 of Chapter 511, Session Laws of 1963, entitled 'An act relating to the title of land built up and constructed in the Town of Carolina Beach in the County of New Hanover as a result of certain erosion control work in said Town' are as follows:

" 'Sec. 2. Within thirty (30) days from the date of the completion of said work to be carried on by the Town of

Carolina Beach and referred to in the preamble hereof, the said Town of Carolina Beach shall, at its own cost, survey or have surveyed by a competent engineer a line to be known as "the building line," and which shall constitute and define "the building line" referred to in Section 1 of this Act, and which shall run the full length of the beach within the town limits, and after "the building line" shall have been surveyed and fixed and determined, the said authorities of the Town of Carolina Beach shall immediately cause to be prepared a map showing, fixing, and determining "the building line," which map so prepared shall be immediately recorded in the office of the Register of Deeds of New Hanover County in a map book kept for said purposes, after the engineer has appended an oath to the effect that said line has been truly and properly surveyed and laid out and marked on said map, and the register of deeds shall properly index and cross-index said map, and when so recorded in said map book or entered or placed therein, in lieu of inserting a transcript thereof, and indexed, the said map shall be competent and prima facie evidence of the facts thereon, without other or further proof of the making of said map, and shall conclusively fix and determine "the building line" referred to in Section 1 of this Act.

" 'Sec. 3. [Section 3 is set forth verbatim above in this opinion, and is not copied here.]'

"It is not in dispute that a 'building line' was surveyed, determined and a map thereof prepared which was properly recorded in the Office of the Register of Deeds of New Hanover County on May 8, 1964. The plaintiff's action was not instituted until May 19, 1965, or something more than a year after the recordation of the map showing the building line. However, the evidence shows and it is not in dispute that the 'building line' was surveyed and established and the map thereof recorded *before* the completion of the work in construction of the sand berm. In fact, actual work of constructing the sand berm did not begin until December 15, 1964, and was not completed until June 9, 1965. Thus, the establishment and recordation of the building line was not only before the work was completed but before the work was even begun."

CONCLUSIONS OF LAW IN SUBSTANCE

Plaintiff did not see fit to file any reply to the answer and plead any facts upon which it would rely to avoid or repel defendant's plea in bar. When the date on which the cause of action accrued appears

in the complaint and a statute of limitations barring the action is pleaded, the defendant's plea in bar must be allowed when the plaintiff fails to allege by reply any facts which would avoid the plea in bar. The referee concluded as a matter of law that plaintiff's action is barred by the six months' statute of limitations set out in the legislative Act specifically pleaded in defendant's answer. He further concluded that defendant's motion for judgment as of nonsuit, previously denied, should be granted and this action dismissed. Having reached that conclusion the referee decided that it had become unnecessary to discuss or answer any of the other issues.

To the referee's report the plaintiff filed specific exceptions and appealed to the judge. The appeal from the referee came on for hearing before Judge Mintz at the November 1967 Civil Session of New Hanover. Judge Mintz entered an order overruling all plaintiff's exceptions, approving and confirming the referee's report, and decreeing that the defendant's plea in bar of the statute of limitations was properly allowed; and the action was dismissed with the cost taxed against the plaintiff.

To the signing and entry of the judgment, plaintiff excepted and appealed to the North Carolina Court of Appeals. As heretofore stated, the Supreme Court, upon motion of plaintiff, ordered the case transferred to it to be passed upon for review.

John C. Wessell, Jr., and George Rountree, Jr., for plaintiff appellant.

Addison Hewlett, Jr., and Hogue, Hill & Rowe by Ronald D. Rowe for defendant appellee.

PARKER, C.J.

Plaintiff has one assignment of error, which reads as follows: "That the lower Court erred in signing the Judugment of Record dismissing the plaintiff's cause of action as being time barred by the provisions of Chapter 511, Session Laws of 1963."

[1] This sole assignment of error to the signing of the judgment presents the face of the record proper for review, but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. Plaintiff's sole assignment of error does not present for review the findings of fact or the sufficiency of the evidence to support them. 1 Strong, N.C. Index 2d, Appeal and Error, § 26.

Section 2 of Chapter 511, Session Laws of 1963, at its beginning reads as follows:

> *"Within thirty (30) days from the date of the completion of said work to be carried on by the Town of Carolina Beach and referred to in the preamble hereof,* the said Town of Carolina Beach shall, at its own cost, survey or have surveyed by a competent engineer a line to be known as 'the building line' referred to in Section 1 of this Act . . ., and after 'the building line' shall have been surveyed and fixed and determined, the said authorities of the Town of Carolina Beach shall immediately cause to be prepared a map showing, fixing, and determining 'the building line,' which map so prepared shall be immediately recorded in the office of the Register of Deeds of New Hanover County in a map book kept for said purposes. . . ." (Emphasis ours.)

The preamble of the Act referred to is as follows:

> "WHEREAS, during the course of many years in the Town of Carolina Beach, in the County of New Hanover, North Carolina, much of the land abutting and fronting on the Atlantic Ocean in said town formerly belonging to various property owners has been and is now being washed away by successive storms, tides and winds; and
>
> "WHEREAS, the said Town of Carolina Beach, with aid from the State of North Carolina, the United States Government, and with its own funds, has from time to time made available funds with which to control the erosion caused by said tides and winds and other causes, and to that end the said town has pumped sand from Myrtle Grove Sound and also pushed up sand and hauled sand, and as a result thereof there has been, is now, and will be made and constructed new land on the ocean front of said town which will change the ordinary and usual low water mark of the waters of the Atlantic Ocean along the front of said town, and when the work has been completed the question will arise as to whom title to the said new land shall belong; and
>
> "WHEREAS, it is the desire of the authorities of the Town of Carolina Beach, as well as the State of North Carolina, to fix and define the title to such new land and to fix and determine its use, and to further define the littoral rights of the property owners abutting on the ocean front which will be destroyed or taken by and through the making of such new made lands; Now, therefore: . . ."

[2] Section 2 of Chapter 511, Session Laws of 1963, at its beginning states in positive, clear, and unambiguous words that "within thirty (30) days from the date of the completion of said work to be carried on by the Town of Carolina Beach and referred to in the preamble hereof" the Town of Carolina Beach shall, at its own cost, survey or have surveyed by a competent engineer a line to be known as "the building line," and that after "the building line" shall have been surveyed and fixed and determined, the authorities of the said town of Carolina Beach shall immediately cause to be prepared a map and record the map in the Register of Deeds office in New Hanover County in a map book kept for said purpose. The word "complete" is defined in Webster's Third New International Dictionary in part as follows "1: to bring to an end often into or as if into a finished or perfected state . . . 2 a: to make whole, entire or perfect . . . ; b: to mark the end of. . . ."

This is said in *Daniel v. Casualty Co.*, 221 N.C. 75, 18 S.E. 2d 819:

> "We do not consider that the work is complete within the meaning of the insurance contract so long as the workman has omitted or altogether failed to perform some substantial requirement essential to its functioning, the performance of which the owner still has a contractual right to demand."

Section 3 of the Act referred to states as follows:

> "Any property owner or claimant of land who is in any manner affected by the provisions of this Act, and who does not bring suit against the Town of Carolina Beach, or assert such claims by filing notice thereof with the governing body of the town, either or both, as the case may be, or any claimant thereto under the provisions of this Act, or their successor or successors in title, within six (6) months after 'the building line' is surveyed and established . . . shall be forever bound from maintaining any action for redress upon such claim."

[3] This is said in *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129:

> "In this connection, in *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505, this Court, in opinion by Hoke, J., stated that parts of the same statute, and dealing with the same subject are 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment, and it is further and fully established that where a literal interpretation of the language of a statute

will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded,' citing *S. v. Earnhardt,* 170 N.C. 725, 86 S.E. 960; *Abernethy v. Comrs.,* 169 N.C. 631, 86 S.E. 577; *Fortune v. Comrs.,* 140 N.C. 322, 52 S.E. 950; *Keith v. Lockhart,* 171 N.C. 451, 88 S.E. 640; Black on Interpretation of Laws (2d), pp. 23-66."

[2, 4] Considering and interpreting the statute here as a whole, and giving effect to every part of it, we think the fair and reasonable intendment and language of the statute is that the limitation of actions set forth in Section 3 of the Act does not begin to run until 30 days from the date of the completion of said work to be carried on or carried on by the Town of Carolina Beach. In other words, a reasonable reading of the Act indicates that it was the intention of the Legislature that the work of building the berm or seawall by defendant should be completed prior to the surveying and determining and fixing and recording a map of "the building line," and that then "the building line" was to be surveyed, fixed and determined, and mapped, and the map recorded within the office of the Register of Deeds within 30 days thereafter. It seems to have been the plain purpose of the Act to have the work completed before "the building line" was established as provided in the Act, so that all property owners whose land was taken would have full and actual notice of the taking, and they could then have six months to inquire, after registration, for exact information and to take steps for just compensation. Until the berm or seawall was completed a person could not tell by seeing his land what land of his would be taken, or if any at all would be taken. The legislative purpose could not have been to make a survey party and a map recorded in the Registry (little visited except by lawyers) constructive notice of taking a man's private property for public use without payment of just compensation, even if, which we do not concede, the language of the Act requiring a recordation of the map as aforesaid comes within the purview of the registration statutes. Registration is not constructive notice as to provisions not coming within the purview of the registration statutes even though such provisions are embodied in an instrument required to be registered. *Chandler v. Cameron,* 229 N.C. 62, 47 S.E. 2d 528; 3 A.L.R. 2d 571. The procedure of making a survey and recording a map before the work is completed, and thereby starting the running of the statute, could scarcely be said to afford an adequate remedy to plaintiff for the determination of

damages to it for its private property taken by the town of Carolina Beach for a public use.

[5, 6] This is said in 53 C.J.S. Limitations of Actions § 3, p. 912: ". . . (I)t is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions; it should not be extended by construction." In 34 Am. Jur. Limitation of Actions § 37, it is said: "It is well settled that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen."

[7-9] Plaintiff's suit here is for damages for taking its private property for a public use without the payment of just compensation. As has been repeatedly said, the right of private property is a fundamental, material, inherent and inalienable right. It is a common-law right which existed before the adoption of the Federal and State Constitutions. Such a right is guaranteed by the Federal and State Constitutions. 16 C.J.S. Constitutional Law § 209a; 16 Am. Jur. 2d Constitutional Law § 362. It is hornbook law that the private property of a citizen cannot be taken for a public use by the State or by a municipal corporation without the payment of just compensation. This legal requirement is guaranteed by the 14th Amendment to the Federal Constitution and by Article I, section 17, of the State Constitution. *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219; *Sale v. Highway Commission,* 242 N.C. 612, 89 S.E. 2d 290; *Mt. Olive v. Cowan,* 235 N.C. 259, 69 S.E. 2d 525; *Madisonville Traction Co. v. St. Bernard Min. Co.,* 196 U.S. 239, 49 L. Ed. 462; 3 Strong, N. C. Index 2d, Eminent Domain, § 1; 26 Am. Jur. 2d Eminent Domain § 7; 29A C.J.S. Eminent Domain § 97. The constitutional prohibition against taking the private property of a citizen for public use without the payment of just compensation is self-executing and is not subject to impairment by legislation. *Sale v. Highway Commission, supra.*

[10] There is nothing in the record to indicate that the town of Carolina Beach has brought any condemnation proceeding against plaintiff. It is familiar learning that a citizen may sue the State or one of its subdivisions, namely, a municipality, for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy. *Midgett v. Highway Commission,* 260 N.C. 241, 132 S.E. 2d 599.

This is said in *Aylmore v. City of Seattle,* 100 Wash. 515, 171 P. 659, L.R.A. 1918E 127:

"Upon what principle of law, justice, or reason can it be

said that because one clothed with the right to condemn private property fails to exercise it, and without complying with the law goes upon the property of another and carries out its public purposes without hindrance or interference from the owner, it should not thereafter be required to do what it should have done in the first instance — make just compensation to the owner? Why should the property holder whose acquiescence has redounded to the benefit and convenience of the taker and whose right to compensation is in lieu of his property have any less period in which to recover the amount due him than he would have had to reclaim his property had he not thus accommodated the corporation? Why should a municipality which has not exercised a right conferred upon it by the sovereignty in the manner defined by the author of the right gain an additional advantage over a private owner by virtue of its own unauthorized procedure?"

[2] In its answer the defendant admitted that it built a berm or seawall as alleged in the complaint and pleaded Chapter 511, Session Laws of 1963, and that the map showing said "building line" was recorded on 8 May 1964, and this action was filed more than six months after the recordation of said map, and that plaintiff's failure to bring this action within six months after the recording of said map is a bar to any recovery by it and is expressly pleaded as a bar to recovery. Defendant has not pleaded that the work was completed when "the building line" was surveyed and established and a map recorded. The defendant contends here, as concluded as a matter of law in the referee's report, that plaintiff instituted this action on 19 May 1965; that when the date on which the cause of action accrued appears in the complaint and a statute of limitations barring the action is pleaded, the defendant's plea in bar must be allowed when plaintiff fails to allege by reply any facts which will avoid the plea in bar by bringing the action within any particular exception or saving provision of the statute; that the plaintiff failed to file any reply in the action; and, consequently, plaintiff's action is barred. The fallacy in the conclusion of law by the referee and in the argument of defendant that plaintiff's action was barred by the limitation of time in which its action could be brought as set forth in Section 3 of the Act is demonstrated by the fact that defendant's plea of the time limitation upon the bringing of the action shows on its face that the action is not barred by the provisions of Section 3 of the Act.

This is clearly demonstrated by the referee's findings of fact as follows:

"It is not in dispute that a 'building line' was surveyed, determined and a map thereof prepared which was properly recorded in the Office of the Register of Deeds of New Hanover County on May 8, 1964. The plaintiff's action was not instituted until May 19, 1965, or something more than a year after the recordation of the map showing the building line. However, the evidence shows and it is not in dispute that the 'building line' was surveyed and established and the map thereof recorded *before* the completion of the work in construction of the sand berm. In fact, actual work of constructing the sand berm did not begin until December 15, 1964, and was not completed until June 9, 1965. Thus, the establishment and recordation of the building line was not only before the work was completed but before the work was even begun."

Defendant's answer and the findings of fact of the referee do not support the referee's conclusion and judgment that plaintiff's action was barred by limitation of time, as set forth in Section 3 of Chapter 511, Session Laws of 1963. The trial judge committed reversible error in approving and affirming the referee's report that the action of the plaintiff is barred by the provisions of the Act and dismissing the action.

The judgment of the lower court is reversed and the case is remanded to the Superior Court of New Hanover County, which court shall enter an order remanding the case to the referee with directions that the referee shall consider and answer the second, third, and fourth issues which were agreed upon by counsel for both sides, and shall make and deliver his report within the time ordered by the court to the clerk of the Superior Court of New Hanover County.

Reversed and remanded.

CHARLES D. OWENS AND WIFE, EDNA OGLE OWENS v. ROY BOLING, RUBY L. BOLING, W. D. BOLING AND AGNES BOLING

No. 28

(Filed 9 October 1968)

1. Appeal and Error § 39— waiver of Supreme Court rules — agreement by attorneys to bypass term

Counsel may not waive the rules of the Supreme Court; consequently, it was beyond the authority of the attorneys to bypass the term at which the appeal was required to be docketed.

2. Appeal and Error § 39— dismissal of appeal not aptly docketed

Where the appeal is not docketed in the Supreme Court within the time allowed by the rules so that the appeal is carried beyond the term at which it should have been heard, the Supreme Court will dismiss the appeal *ex mero motu.*

3. Venue § 5— motion to remove under G.S. 1-76(1)

An action to recover the amount paid toward the purchase price of real property for breach of covenants against encumbrances and for fraudulent misrepresentations as to the lack of restrictions on the property is not an action involving the title to real estate, and defendants' motion to remove the action as a matter of right under G.S. 1-76(1) to the county in which the land is situated is properly denied.

APPEAL by defendants from *Bryson, J.,* 1967 Mixed Session of RUTHERFORD.

Motion under G.S. 1-83(1) for a change of venue.

Plaintiffs, residents of Rutherford County, instituted this action in that county on 16 June 1967. They make the following allegations:

On 1 September 1964, by warranty deed, defendants conveyed to plaintiffs a tract of land in Brunswick County containing 125 acres and known as Horse Island. The northern boundary line of the property is the Inland Waterway Canal. The only encumbrance excepted from the warranty was a certain deed of trust upon which a balance of $2,228.07 was due. At the time of the conveyance to plaintiffs, defendants knew that the land was subject to an easement giving the United States Corps of Engineers the right to pump sand, mud, silt or other refuse from the Inland Waterway onto the island. Plaintiffs, who had no knowledge of the easement, bought the island for the purpose of developing it as a resort community. Defendants knew of this purpose. Despite their knowledge that the island was subject to the "dump" easement, defendants assured plaintiffs that there were no restrictions on the property and that lots could be sold for $60.00-$70.00 per front foot. The easement renders the island totally worthless. Prospective purchasers, as soon as they learned of the easement, declined to buy. Plaintiffs have paid defendants $22,142.77 toward the purchase price of the property; $19,497.47 remains unpaid.

In two causes of action plaintiffs seek to recover the $22,142.77 that has been paid. The first is based upon the alleged breach of covenants against encumbrances contained in the warranty deed; the second, upon defendants' alleged fraudulent misrepresentations as to the property's resale value and the lack of restrictions upon it.

On 17 July 1967, defendants filed a motion to remove the cause

to Brunswick County. They assert: Rutherford is not the proper venue because each alleged cause of action involves the determination of a right or interest in real property, and, under G.S. 1-76(1), these causes must be tried in the county where the land is situated.

Judge Bryson entered an order on 25 September 1967 in which he denied the motion to remove. At the same time, in open court, defendants gave notice of appeal. On 24 July 1968, defendants docketed their appeal in this Court.

Hamrick & Hamrick for plaintiff appellees.

Sullivan & Norne and Frink & Gore for defendant appellants.

PER CURIAM.

When the order from which defendants gave notice of appeal was entered on 25 September 1967, appeals from the Twenty-Ninth District had already been called at the 1967 Fall Term of this Court. Therefore, appellants were required to docket their appeal not later than "at the next succeeding term," that is, the Spring Term 1968. Rule 5, Rules of Practice in the Supreme Court, 254 N.C. 785; *State v. Farmer,* 188 N.C. 243, 124 S.E. 562. The deadline for docketing appeals from the Twenty-Ninth District at the Spring Term was 10:00 a.m. on Tuesday, 9 January 1968. Notwithstanding, appellants ignored that term of Court and waited until 24 July 1968 to docket their appeal. This delay carried the case beyond the Spring Term.

[1, 2] Counsel may not waive the rules of this Court. *In re Suggs,* 238 N.C. 413, 78 S.E. 2d 157; *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *State v. Butner,* 185 N.C. 731, 117 S.E. 163. Consequently, it was beyond the authority of the attorneys to bypass a term. *Mimms v. R. R.,* 183 N.C. 436, 111 S.E. 778. "The rules of practice in the Supreme Court are mandatory, not directory, and must be uniformly enforced. . . . Neither the judges, nor the solicitors, nor the attorneys, nor the parties have any right to ignore or dispense with the rules requiring such docketing within the time prescribed. . . . If the rules are not observed the Court may *ex mero motu* dismiss the appeal" *Stone v. Ledbetter,* 191 N.C. 777, 779, 133 S.E. 162, 163. In *Kernodle v. Boney,* 260 N.C. 774, 133 S.E. 2d 697, the defendant-appellant's delay in docketing carried the case beyond the Spring Term at which it should have been heard. This Court, *ex mero motu,* dismissed that appeal. Appellants' appeal in this case is likewise dismissed.

[3] We note, however, that the dismissal works no injury to defendants. The ruling of the trial judge, from which defendants gave

notice of appeal, was clearly correct; the action does not affect the title to real estate. *Rose's Stores v. Tarrytown Center,* 270 N.C. 201, 154 S.E. 2d 320; *White v. Rankin,* 206 N.C. 104, 173 S.E. 282; *Causey v. Morris,* 195 N.C. 532, 142 S.E. 783; *Griffin v. Barrett,* 176 N.C. 473, 97 S.E. 394; *Eames v. Armstrong,* 136 N.C. 392, 48 S.E. 769.

Appeal dismissed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BRITTON v. GABRIEL

No. 442

Case below: 2 N.C. App. 213.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 October 1968.

EATON v. KLOPMAN MILLS, INC.

No. 603

Case below: 2 N.C. App. 363.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 October 1968.

HUGHES v. HIGHWAY COMM. and OIL CO. v. HIGHWAY COMM. and EQUIPMENT, INC. v. HIGHWAY COMM.

No. 443

Case below: 2 N.C. App. 1.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 9 October 1968.

IN RE FILING BY FIRE INSURANCE RATING BUREAU

No. 525

Case below: 2 N.C. App. 10.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 9 October 1968.

LIENTHALL v. GLASS

No. 109

Case below: 2 N.C. App. 65.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 October 1968.

MOSS v. RAILWAY CO.

No. 527

Case below: 2 N.C. App. 50.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 October 1968.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PATTERSON v. PARKER & CO.

No. 526

Case below: 2 N.C. App. 43.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 8 October 1968.

STATE v. BROOKS

No. 688

Case below: 2 N.C. App. 115.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 9 October 1968.

STATE v. MARTIN

No. 2

Case below: 2 N.C. App. 148.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 October 1968.

STATE v. MERCER

No. 251

Case below: 2 N.C. App. 152.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 15 October 1968.

STATE v. WILLIAMS

No. 412

Case below: 2 N.C. App. 194.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 9 October 1968.

STATE v. BERTHA MAE WRIGHT, MADELINE PEARSOLL, SARAR MIDGETTE, PHOEBE PEARSOLL AND FRANCES MARSHALL, CASES #504 AND #513

No. 84

(Filed 30 October 1968)

1. Criminal Law §§ 146, 174— appeal to Supreme Court from Court of Appeals — abandonment of assignments of error

Upon appeal to the Supreme Court from a decision of the Court of Appeals, assignments of error presented to the Court of Appeals which are not brought forward to the Supreme Court are deemed abandoned.

2. Grand Jury § 3— challenge to composition of grand jury

Upon motion to quash an indictment based on the racial composition of the grand jury, the validity or invalidity of grand juries selected in years prior to the return of the indictment against defendant is immaterial if the grand jury which indicted defendant was properly constituted; if the grand jury which indicted defendant was not properly constituted, it is immaterial that the constitutional and statutory requirements were met in the selection of former or subsequent grand juries.

3. Grand Jury § 3— evidence of racial composition of previous grand juries

Evidence of past practices and of the racial composition of grand juries selected when those practices prevailed is material only insofar as it tends to establish the presence or absence of unconstitutional discrimination in the selection of the grand jury which indicted the defendant on trial, the probative value of such evidence being diminished or entirely dissipated by proof of a subsequent material change in the selective process.

4. Grand Jury § 3— jurisdiction — indictment by improperly constituted grand jury

An indictment returned by a grand jury from which persons of defendant's race have been excluded solely because of their race does not confer jurisdiction upon the superior court to try defendant upon the charge named in the bill. N. C. Constitution, Art. I, § 17; U. S. Constitution, Amendment XIV.

5. Grand Jury § 3— racial composition of grand jury

A defendant is not entitled to have the charge against him considered by a grand jury composed entirely or partially of members of his own race, nor is he entitled to have the grand jury composed of members of the white and Negro races in proportion to their representation in the county population or upon the tax books or other source from which the names on the jury list were taken, since the State and Federal constitutions merely forbid eliminating or limiting the representation of members of defendant's race on the grand jury by intent and design on account of race.

6. Grand Jury § 3— discrimination in selection of grand jury — burden of proof

Defendant has the burden of proving discrimination against members of his race in the process by which the grand jury which indicted him was selected.

7. Grand Jury § 3— prima facie showing of discrimination in grand jury selection

It is not enough for a Negro defendant to show that the names which went into the jury box were taken originally from a source, such as tax lists, which disclosed the race of the persons named therein; where, however, such defendant also shows that throughout a substantial period of years in which essentially the same procedures as those in question were used in compiling jury lists, there was repeatedly a marked discrepancy between the number of Negroes drawn for grand jury service and the number of Negroes whose names appeared on the source material, defendant has made a prima facie showing of unconstitutional discrimination in the selection of the grand jury which places the burden on the State to go forward with competent evidence to rebut the prima facie case.

8. Grand Jury § 3— rebuttal of prima facie showing of discrimination

Where defendant has made a prima facie showing of racial discrimination in the selection of the grand jury, the State may rebut the prima facie case by explanation of the discrepancy or by other evidence showing no intentional or designed discrimination against members of defendant's race at any part of the grand jury selection process, a mere denial of wrongful intent not being sufficient for such purpose.

9. Grand Jury § 3— sufficiency of evidence for prima facie showing of discrimination

Defendant's evidence that the tax lists and voter registration books used in compiling the jury list designated the race of each person named therein, together with testimony by the county sheriff identifying from one to three members of each grand jury during the preceding ten years who were known by him to be Negroes *is held* insufficient to make a prima facie showing of unconstitutional discrimination against Negroes in the grand jury selection where (1) the sheriff's testimony establishes that virtually every grand jury drawn in the county during the preceding ten years had one or more Negro members, (2) the sheriff did not testify that every other person on the grand jury lists was known by him to be white, and (3) defendant's evidence establishes that a completely new jury list and jury box were prepared the preceding year for the purpose of compiling a more representative jury list, defendant having failed to show repeated substantial discrepancies between the number of Negroes drawn for grand jury duty and the number to be anticipated from those named in the source material during the period when the selective process under attack was in use.

10. Grand Jury § 3— rebuttal of prima facie case by defendant's own witnesses

The State may rely upon the testimony of witnesses called by the defendant, including their testimony on cross-examination, to rebut defendant's prima facie showing of unconstitutional discrimination in the grand jury selection.

11. Grand Jury § 3— inference of intentional exclusion of Negroes rebutted

Any inference from defendant's evidence of a conscious, intentional, designed exclusion of Negroes from the jury list was rebutted by defendant's further evidence that those who compiled the jury list endeavored to take the names of white and Negro persons from the source materials in approxi-

mate proportion to the number of each race on the tax books, there being no contention that any discriminatory elimination of names occurred after the jury list was compiled.

12. Witnesses § 4— party may not impeach own witness

A party may not attack the credibility of his own witnesses. G.S. 8-50(b).

13. Criminal Law § 175— appellate review — findings of fact

Findings of fact by the trial judge are binding upon the State appellate courts if supported by evidence.

14. Grand Jury § 3— defendant's right to have legality of jury box determined

A person indicted for a criminal offense is entitled to a fair opportunity to have it determined by adequate and timely procedure whether members of his race who are legally qualified to serve as jurors have been intentionally excluded from the grand jury on account of their race or color.

15. Grand Jury § 3; Judgments § 35— determination of legality of jury box — res judicata

A determination of the legality of the jury box in the case of one defendant would not be res judicata as against a defendant charged in another indictment.

16. Grand Jury § 3— examination of names in jury box

Upon the hearing of a motion to quash an indictment on the ground of racial discrimination in the selection of the grand jury, it was within the discretion of the trial court, having heard for more than an entire day the testimony of defendant's witnesses and having concluded therefrom that there was no intentional, designed exclusion of Negroes from the grand jury which indicted defendant, to refuse to permit defendant to examine the scrolls in the jury box for the purpose of determining the race of the person named thereon, the scrolls containing no racial designation, where an examination of the names in the jury box and testimony as to the race of each would protract the hearing for many days.

APPEAL by defendants from the Court of Appeals.

Upon indictments, proper in form, the defendants were convicted in the Superior Court of Pamlico County of the offense of wilfully and unlawfully resisting, delaying and obstructing the sheriff of the county in his attempt to arrest Bertha Mae Wright upon a capias issued by the clerk of the county recorder's court. Each was sentenced to imprisonment for a time less than the maximum authorized for this offense. By consent the cases were consolidated for trial.

On appeal to the Court of Appeals numerous rulings of the trial court were assigned as errors. The Court of Appeals found no merit in any of these assignments, its opinion being found in 1 N.C. App. 479.

As grounds for appeal to the Supreme Court, the defendants assert:

1. The denial by the trial court of their motions to quash the bills of indictment on the ground of systematic exclusion of Negroes from the grand jury was a violation of the rights of the defendants under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States;

2. The denial by the trial judge of their requests for permission to inspect the jury box, from which the names of the prospective jurors were drawn, was a denial to the defendants of "the effective assistance of counsel," in violation of the Due Process Clause of the said Amendment; and

3. The Court of Appeals erred in its failure to decide whether or not the defendants had made a prima facie showing of unlawful discrimination in the selection of jurors and in its holding that there was no error in the denial of the defendants' request to examine the jury box.

The defendants having moved for a change of venue on the ground of local prejudice, by reason of the popularity in Pamlico County of the sheriff whom they were charged with resisting, the petit jury was, by consent, drawn from Pitt County and the motion for change of venue was denied. The defendants did not and do not take any exception to the method of selection or composition of the petit jury and make no reference in the notice of appeal to the Supreme Court, or in their brief upon such appeal, to any exception to any ruling at the trial on the merits or to the charge of the trial judge to the jury.

Prior to the trial on the merits, the trial court conducted an extensive hearing upon the motion to quash the bills of indictment. Subpœnas were issued for all witnesses whom the defendants requested to be subpœnæd. The clerk to the board of county commissioners was directed to produce in open court, for such hearing, "the jury boxes of Pamlico County to the end that the scrolls in said boxes contained may be examined by counsel for the defendants," by the solicitor and by the court. Other documents, the presence of which was desired by the defendants, were likewise produced.

At the hearing upon the motion the defendants called as their witnesses all members of the present and former boards of county commissioners who had participated in the preparation of any jury list, the former sheriff [the officer whom the defendants were charged with resisting], the register of deeds [ex officio clerk to the board of county commissioners], and two ladies who were employed in

the offices of the sheriff and the register of deeds and who actually compiled in 1966 the jury list in question. The evidence introduced by the defendants in support of their motion and developed on cross-examination of their witnesses, summarized except as indicated, was as follows:

A new jury list was prepared in April 1966, seven months prior to the alleged offenses. It was prepared by the two ladies under the general supervision of the sheriff, who, in turn, was acting under the direction of the board of county commissioners. When so compiled, the list was delivered to the board of county commissioners, who deleted the names of persons known by them to be dead, removed from the county or physically, mentally or morally unfit to serve. Each name remaining on the list was then copied upon a separate scroll of paper and each such scroll was placed in the jury box, the total number being 1,014. Each scroll contained nothing save the name and address of the prospective juror, there being nothing whatever on any scroll to indicate the race of such person. When the time came, in January and April 1967, for drawing the jury panels from which the grand juries in question were taken, the designated number of scrolls was drawn from the box by a child under the age of six years in the presence of the board of county commissioners. The names so drawn were placed upon the jury panel with no exceptions save those known to have died or to have removed from the county or to have become physically incapacitated since their names so went into the jury box. The names of the grand jury were then drawn from this panel as prescribed by statute.

In former years, the names which went upon the jury list, and so into the jury box, were taken from the tax books of the county. For the reason that this practice had resulted in too few women on the jury list, the board directed the sheriff to cause the compilers of the 1966 jury list to use, in addition to the tax books, the voter registration books for the several townships of the county, which was done. The list was compiled in the sheriff's office where the tax books were regularly kept, the sheriff being also the tax collector.

The two ladies were instructed to compile a list of approximately 1,200 names, which they did, taking them from the 1965 tax book for each of the five townships and from the voter registration book for each of the 17 precincts in the county. Each such tax book listed, in alphabetical order, first the white taxpayers and then the Negro taxpayers. Each voter registration book showed the name, residence, age, party affiliation, race, and other identifying data for each registered voter in the precinct.

Without using any system of selection from any page of any tax book, the ladies turned first to the section for white taxpayers and selected names at random. They then turned to the section of the same book for Negro taxpayers and selected names in like manner. This process they repeated for each of the five townships. They then turned to the voter registration book for each of the 17 precincts and, in like manner, selected therefrom names so as to have upon the list more names of women.

One of the ladies testified:

> "[W]e used no system, we just went down and selected some names. * * * I went down the list alphabetically in the township both white and colored. * * * When I got back to the alphabetized list for Negro taxpayers, I used the same system as we did for the whites. * * * We would go down and get quite a few of the colored in proportion to the whites. * * * [N]aturally we copied more whites than we did colored because the colored are smaller in number and we took quite a few of the colored people from all of the townships. * * * I think we were instructed to copy along the percentage lines. Now, not exactly the percentage, not going by any percentage, but to get them as near equal as we could. The Sheriff gave those instructions. * * * We tried to equal the proportion of Negroes to whites as best we could. * * * I would say we made an attempt to include from [sic] the list we were preparing approximately one-fourth Negro persons, because I am sure we got that many, if not more. * * * I would say there was [sic] approximately three hundred names of Negro persons on the list we prepared. That would be roughly one-fourth of twelve hundred."

During the 30 years Sheriff Whorton was in office, terminating after the compilation of the jury list in question, there was never anything on the scrolls put into the jury box to indicate the race of the persons whose names appeared thereon. No name drawn from the box was ever discarded unless the person was known to be deceased, too old to serve, or otherwise unable to attend. No name was ever discarded for the reason of race. The sheriff never wilfully failed to summon any person whose name was so drawn.

The sheriff did not recall any term of court at which Negroes did not serve, both on the grand jury and on the petit jury. He testified, "There was at all times a considerable number of people of the Negro race on the petit jury." Taking the Minute Book for each term of court back to 1957, the sheriff pointed out on the list of grand

jurors for each such term one, two or three persons known by him to be Negroes, with the exception of one term in 1957 and one term in 1960. He was not certain as to the race of some other grand jurors whose names so appeared in the Minute Book for sessions of the court in those former years, and so could not testify that there were not additional Negroes on some of such grand juries.

The list, compiled by the ladies and turned over to the board of commissioners for the deletion of names of deceased persons and of those known to be physically, mentally or morally unfit for jury service, contained nothing to indicate the race of any person whose name appeared thereon. No name was stricken from such list because of race. After such revision of the list by the board there remained 1,014 names, all of which were placed in the jury box, each on a separate scroll with no indication of race.

The tax books for 1965, from which the names were so taken by the compilers of the jury list, showed the following numbers of white and Negro taxpayers.

TOWNSHIP	#1	#2	#3	#4	#5	Total
White	957	485	771	437	861	3,511
Negro	86	202	481	0	352	1,121

The voter registration books contained the names of 3,141 white voters and 763 Negro voters, distributed in wide variations among the 17 precincts.

The 1960 Census showed a total of 3,708 white and 1,593 non-white adults in the county.

At the conclusion of the foregoing testimony, counsel for the defendants stated they wanted "to go into the jury box"; that is, examine the 1,014 scrolls therein, one by one, "by letting some citizens in the County who are familiar with the names go through the names rather than do this from the witness stand," so as to determine how many were names of Negroes and how many were names of white persons. The trial judge denied the request, saying, "Well, that would be quite time consuming, and furthermore * * * what person in this county is sufficiently familiar with all of the people whose names appear upon the scrolls to identify them as to whether or not they are members of the white or Negro race." The defendants assign this ruling as error.

The State offered no evidence, but cross-examined the witnesses called by the defendants.

The trial judge made findings of fact from which he concluded that the board of county commissioners, in the preparation of the

jury list, had complied with the applicable statutes; that the use of the tax scrolls and voter registration books in compiling the jury list was not, in itself, discriminatory and the defendants were not entitled to quash the bills of indictment. The motion to quash was therefore denied, which ruling the defendants assign as error.

The material findings of fact by the trial judge were:

"2. That Pamlico County is a rural county of small size with few small incorporated towns. * * *

"6. The jury list of Pamlico County was again revised in 1966 and * * * the Board of County Commissioners directed the Sheriff along with the Clerk of the Board of Commissioners or the deputy or the assistant Register of Deeds to compile a list of eligible jurors and submit said list to said Board for approval. The * * * Board of Commissioners desired to have more women in the jury box and authorized and directed the Sheriff who had the tax scrolls in his possession to have the list made from the tax scrolls and from the Voter Registration Books and to submit such list to the Board of Commissioners for its approval or rejection; * * * the Board of Commissioners caused a total of 1,014 scrolls bearing the names of eligible jurors to be placed in the jury box; that said list of 1,014 persons was selected without reference to race or color and that no indicia appears on any scroll of any nature or description that would indicate in any manner the race of any person whose name the scroll bears; that the list from which said jury list was made or copied was made by Mrs. Robert A. Whorton and Mrs. Ida MacCotter, Assistant Register of Deeds, and who in so doing acted for the Register of Deeds who is ex officio Clerk of the Board of County Commissioners. That the actual selection of the jury list was made by the Board of County Commissioners without references to race or color and in substantial accordance with Chapter 9 of the General Statutes of North Carolina.

"7. The * * * tax scrolls of Pamlico County showed the white taxpayers in the front of the scroll or tax book and the Negroes in the back portion of said each book and said scroll [i.e., the tax books, not the scrolls in the jury box] indicated whether the taxpayer was white or Negro. The Court further finds that the Voter Registration Book shows the name of the voter, first, last and middle, the party he or she affiliated, the sex, the race, whether it was white or Negro, the age, the address, the place of birth of the voter and a space for the notation of

change of party affiliation, that to that extent the person or persons making up the tax list [i.e., the jury list] would have benefit of the knowledge of the race of the proposed juror.

"8. [A]t each term of Superior Court of Pamlico County for the trial of criminal cases over a period of ten years from this date with the exception of the August Term, 1957, and the August Term of 1960, the Grand Juries of each other Term had one to three members of the Negro race who served as Grand Jurors. That at the January Term, 1967 [i.e., the term at which the indictment against Bertha Mae Wright was returned], there were three members of the Negro race upon the Grand Jury. That at the April Term, 1967 [i.e., the term at which the indictment against the other defendants was returned], there was one possibly two members of the Grand Jury who were members of the Negro race.

"9. The Court further finds as a fact and does take judicial notice of the fact that at least two members of the Negro race have served as jurors this week and that on Wednesday a.m. the undersigned at the request of one of them for good and sufficient cause shown excused him for the remainder of the Term.

"10. The Court further finds as a fact that the present and former Board of Commissioners of the County of Pamlico have not systematically excluded members of the Negro race from the jury list of Pamlico County; that the scrolls bearing the name of eligible jurors now in the jury box bear no indicia of any kind or nature or description to identify such person as white or Negro."

Attorney General Bruton and Deputy Attorney General Moody for the State.

J. LeVonne Chambers, James E. Ferguson II and James E. Lanning for defendant appellants.

LAKE, J.

[1] The two questions for this Court are: (1) Did the trial court err in denying the motions to quash the bills of indictment made on the ground that members of the Negro race were systematically excluded from the jury list from which were selected the grand juries which indicted these defendants? (2) Did the trial judge err in denying the defendants' request "to go into the jury box," at the hearing on the motion to quash, to determine "the numerical break-

down as the names appear in the jury box"? Assignments of error presented to the Court of Appeals relative to rulings made by the trial judge at the trial on the merits were not brought forward to this Court and are, therefore, deemed abandoned. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353.

With reference to the first question, we note that we are not concerned here with the procedure now required by statute, and presumably followed in Pamlico County, in compiling the jury list and selecting names to go into the jury box. The General Assembly, at its 1967 Session, completely revised Chapter 9 of the General Statutes and established a new statewide procedure for the compilation of the jury list and the selection of grand and petit jurors. That Act took effect after the drawing of the grand juries which returned these indictments and after the indictments were returned.

It is undisputed that in 1966 a completely new jury list and jury box were compiled and prepared in Pamlico County and the grand juries in question were selected from such then new jury box. The procedure followed in compiling the 1966 jury list was materially different from the procedures used in earlier years. The full extent of the difference does not appear in this record since the procedures formerly used are not set forth in detail. One substantial difference was that in 1966 names were taken from the voter registration books as well as from the tax books — a procedure suggested by this Court in *State v. Lowry and Mallory,* 263 N.C. 536, 139 S.E. 2d 870.

We are, therefore, dealing here neither with the present, the future nor the remote past methods of selecting grand juries in Pamlico County. We have before us for determination the validity of the method of selecting grand juries in use in a narrowly limited period from mid-1966 to early 1967.

[2, 3] If the grand juries which indicted these defendants were properly constituted, the judgments before us must be affirmed, irrespective of the validity or invalidity of grand juries selected in years prior to the return of these indictments. Conversely, if the grand juries which indicted these defendants were not properly constituted, it is immaterial that the constitutional and statutory requirements were met in the selection of former or subsequent grand juries. *Cassell v. Texas,* 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839; *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386. In *Brown v. Allen,* 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469, the Supreme Court of the United States said, "Assuming that before the *Brunson* case, 333 U.S. 851, there were unconstitutional exclusions of Negroes in this North Carolina county [Forsyth], the present record does not show

such exclusions in this case." See also, *Cassell v. Texas, supra.* Evidence of past practices, and of the racial composition of grand juries selected when those practices prevailed, is material only insofar as such evidence tends to establish the presence or absence of unconstitutional discrimination in the selection of the grand jury which indicted the defendant on trial. The probative value of such evidence is greatly diminished or entirely dissipated by proof of a subsequent material change in the selective processes.

[4] It has long been recognized by the courts of this State that an indictment of a defendant by a grand jury, from which persons of the defendant's race have been intentionally excluded solely because of their race, does not confer jurisdiction upon the superior court to try the defendant upon the charge named in the bill. *State v. Yoes,* 271 N.C. 616, 630, 157 S.E. 2d 386; *State v. Lowry and Mallory, supra; State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109; *State v. Covington,* 258 N.C. 501, 128 S.E. 2d 827; *State v. Perry,* 250 N.C. 119, 108 S.E. 2d 447; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *State v. Speller,* 231 N.C. 549, 57 S.E. 2d 759; *State v. Peoples,* 131 N.C. 784, 42 S.E. 814. It is well established, by these and numerous other decisions of this Court, that this result is compelled by the Constitution of North Carolina, Art. I, § 17, as well as by the Fourteenth Amendment to the Constitution of the United States. So far as this State is concerned, the recognition of the right of a person to have criminal charges against him considered by a grand jury, from which the members of his race are not excluded by intent and design because of their race, did not originate in decisions of the Supreme Court of the United States. Prior to the decision by that Court in *Strauder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664, this Court, in *Capehart v. Stewart,* 80 N.C. 101, held that the selection of jurors on the basis of race was forbidden.

As Stacy, C.J., observed, in *State v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77, the controlling principles of both the State and the Federal law in this respect are clear. It is the application of these principles to the facts of the particular case which presents difficulty and causes occasional disagreement among the courts. As the founders of our State reminded us, "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Constitution of North Carolina, Art. I, § 29. Consequently, in passing upon this and similar motions to quash bills of indictment, it is desirable to refresh our recollection concerning the basic rules governing the application of the broad constitutional principle invoked by these defendants, even though those rules have already been well estab-

lished by the decisions of this Court and of the Supreme Court of the United States.

[5, 6] A defendant is not entitled to have the charge against him considered by a grand jury composed entirely of members of his own race, or even by a grand jury containing any member of his race. *Cassell v. Texas, supra; State v. Wilson, supra.* It follows that, for an indictment to be valid, it need not have been returned by a grand jury composed by members of the white and Negro races in proportion to the representation of these races in the population of the county, or upon the tax books or other source from which the names upon the jury list were taken. *Brown v. Allen, supra; Akins v. Texas,* 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *State v. Wilson, supra; Miller v. State, supra; State v. Koritz, supra.* That which is forbidden by the State and Federal Constitutions is the elimination of members of the defendant's race from, or a limitation upon the representation of his race on, the grand jury, which considers the charge against him, by intent and design on account of race. *Hernandez v. Texas,* 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866; *Brown v. Allen, supra; State v. Wilson, supra; Miller v. State, supra.* The burden rests upon the defendant to prove that there was such discrimination against the members of his race in the process by which the grand jury, which indicted him, was selected. *Whitus v. Georgia,* 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599; *Fay v. New York,* 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043; *Akins v. Texas, supra; State v. Wilson, supra; State v. Perry, supra; Miller v. State, supra.*

Obviously, if there was intentional discrimination against members of the defendant's race in the compiling of the list of names from which was selected the names which went into the jury box, out of which came the names of the grand jury which indicted the defendant, the indictment is not saved by the purity of the processes used in transferring names from that jury list into the jury box or in drawing names from the jury box. However, the use of tax lists as a source of names to be placed upon the jury list, and then to be put into the jury box, does not render illegal a grand jury drawn from the box, even though the tax lists separated Negro and white taxpayers or otherwise designated their respective races. *Brown v. Allen, supra; State v. Yoes, supra; State v. Lowry and Mallory, supra.*

[7, 8] Thus, it is not enough for the defendant to show that the names which went into the jury box were taken originally from a source which disclosed the race of the persons named in such source material. Where, however, the defendant also shows that, throughout

a substantial period of years, in which essentially the same procedures as those now in question were used in compiling jury lists, there was repeatedly a marked discrepancy between the number of Negroes drawn for grand jury service and the number of Negroes whose names appeared on the source material, such circumstances, in their totality, make out a prima facie case of unconstitutional discrimination in the selection of the grand jury which indicted the defendant. *Whitus v. Georgia, supra; State v. Wilson, supra.* Upon such showing by the defendant, the burden rests upon the State to go forward with competent evidence to rebut the prima facie case, by explanation of the discrepancy or by other evidence showing no intentional and designed discrimination against the members of the defendant's race at any part of the processes culminating in the selection of the grand jury by which he was indicted. *Whitus v. Georgia, supra; State v. Wilson, supra.* Of course, a mere denial of the wrongful intent does not suffice to rebut such prima facie showing of the forbidden discrimination. *Hernandez v. Texas, supra; State v. Wilson, supra.*

[9] We turn now to the application of these established rules to the facts shown in this record. After showing that the source materials (the tax lists and the voter registration books) used in the compilation of the jury list designated the race of each person named therein, and thus afforded an opportunity for intentional discrimination against members of the defendants' race in the compilation of the 1966 jury list, the defendants called as their witness the sheriff of the county. Taking the court minute book, at the request of the defendants' counsel, the sheriff examined the names of the members of each grand jury selected in Pamlico County in the preceding ten years. In each instance, with the exception of two, he pointed out from one to three members of such grand jury who were known by him to be Negroes.

The defendants contend that this makes out a prima facie case of unconstitutional discrimination within the rule of *Whitus v. Georgia, supra.* On the contrary, this evidence, in its totality, presents a picture quite different from that drawn in the *Whitus* case. First, the sheriff's testimony clearly establishes that, in the preceding ten years, virtually every grand jury drawn in the county had one or more Negro members. Second, he was identifying, merely by reading lists of names from one to ten years old, persons on each such list known by him to be Negro. We do not understand his testimony to be that every other person on each such list was known by him to be white. Notwithstanding the sheriff's claim to have been

well acquainted with the people of his county, which claim we have no doubt was well founded, it is obvious that even a well informed sheriff could not be expected to identify instantly every person whose name appeared on one of many lists compiled several years earlier. Third, it appears from the defendants' evidence, without dispute, that a complete recompilation of the jury list and jury box was ordered by the county commissioners and was accomplished in 1966 for the purpose of compiling a more representative jury list. In the *Whitus* case the evidence was that the jury list and jury box there in question were compiled, in part at least, from an old jury list and jury box previously adjudged illegal because of unconstitutional discrimination against Negroes. In the present case, on the contrary, the 1966 jury list and jury box were completely new and the procedures used in compiling them were described in detail by the defendants' own witnesses, there being no testimony as to the procedures used in former years.

Thus, in the present case, as contrasted with the *Whitus* case, the defendants have not shown repeated substantial discrepancies between the number of Negroes drawn for grand jury duty and the number to be anticipated in view of the number named in the source materials during the period when the selective processes which they attack were in use. Consequently, the defendants did not establish a prima facie case of unconstitutional discrimination against Negroes in the selection of the grand jury by which these defendants were indicted.

[10, 11] Even if it could be said that the defendants offered evidence of long continued discrepancies between the number of Negroes drawn for grand jury duty and the number of Negroes in the county qualified for such duty, the evidence offered by the defendants themselves rebuts any inference of conscious, intentional, designed exclusion of Negroes from the 1966 jury list. The above mentioned rule that, upon the establishment of a prima facie case of unconstitutional discrimination, the burden of going forward with evidence to rebut such showing rests upon the State, does not mean that the State cannot rely for this purpose upon the testimony of witnesses called by the defendants, including the testimony of these witnesses upon cross-examination. If at the close of the defendants' evidence, including the cross-examination of their witnesses, the prima facie case has been rebutted, it is not necessary for the State to call witnesses of its own to gild the lily. This is especially true where, as here, the defendants themselves called as their own witnesses all of the county officials who participated in, or who reasonably could have had knowledge of the processes by which the selection of the grand jury

was made. It would be absurd to require the State then to recall to the stand the same officials to give the same testimony, as witnesses for the State, which they had already given as witnesses for the defendants.

[11, 12] The processes used in compiling the jury list of 1966 were described in detail by the ladies who compiled that list from the tax and voter registration books. Their testimony is a far cry from a mere denial of intent to discriminate. They testified that, while they used no percentage and no arithmetical formula or system for the selection of names from the source materials, they endeavored to take the names of white and Negro persons in an approximate proportion to the number of each race on the tax books and that, in their opinion, at least one-fourth of the 1,200 names selected by them were names of Negro people. There is no contention that after this jury list was so compiled by these ladies any discriminatory elimination of names occurred. The trial judge observed the demeanor of these witnesses and heard their testimony. In any event, the defendants do not attack their credibility, and, having called them as their witnesses, are not in a position to do so. G.S. 8-50(b); *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473; Stansbury, North Carolina Evidence, 2d Ed., § 40.

[13] The findings of fact by the trial judge are binding upon the appellate courts of this State if supported by evidence. *State v. Wilson, supra; Miller v. State, supra; State v. Walls,* 211 N.C. 487, 191 S.E. 232; *State v. Cooper,* 205 N.C. 657, 172 S.E. 199. The findings of fact by the superior court, set forth in the foregoing statement of facts, are fully supported by testimony of the defendants' own witnesses. Upon the facts so found, there was no error in the denial of the motion to quash the bills of indictment.

[16] There remains for consideration the defendants' contention that they should have been permitted, in the course of the hearing upon their motion to quash, to "go into the jury box" and to examine the 1,014 scrolls contained therein to determine what proportion of these bore the names of Negroes; there being nothing on the scrolls, themselves, to indicate race.

[14] It is well settled in this State that one who is indicted for a criminal offense must have "a fair opportunity to have it determined by adequate and timely procedure" whether members of his race, legally qualified to serve as jurors, have been intentionally excluded, on account of their race or color, from the grand jury returning the indictment. *State v. Inman,* 260 N.C. 311, 132 S.E. 2d 613; *Miller v. State, supra.* The two indictments upon which these

defendants were tried were returned by the respective grand juries in January and April 1967. The motions to quash were not filed until the cases were called for trial on 24 October 1967. Even then, it was not until after more than an entire day had been consumed in presentation of testimony by the defendants' witnesses, concerning the processes by which the grand juries in question were selected, that the defendants requested the permission of the trial court to "go into the jury box" and have some citizen or citizens of the county take each of the 1,014 scrolls therein and determine, presumably from personal knowledge or comparison with the tax or voter registration books, the race of the persons whose names appeared thereon.

[15] The trial judge correctly observed that to do what the defendants proposed would require many hours, if not days, of the time of the court. Obviously, if these defendants had such a right, so would every other person charged in Pamlico County with a criminal offense. A determination of the legality of the jury box in the case of one defendant would not be res judicata as against a defendant charged in another indictment. It is equally obvious that if these defendants had such a right so would a defendant in any other county of the State. Pamlico County is a small, rural county with 1,014 names in its jury box. Approximately 70,000 names are contained in the jury box of Guilford County. See *State v. Yoes, supra.* In Mecklenburg County the jury box may well contain in excess of 100,000 names. To hold that these defendants have a legal right, under the circumstances, to examine every scroll in the jury box and determine the race of the person named thereon, would put it in the power of persons charged with criminal offenses to paralyze completely the entire system of criminal courts of this or any other state.

There is ample authority to the effect that the judge presiding at the trial of a law suit may, in his sound discretion, limit the examination and cross-examination of a witness so as to prevent needless waste of the time of the court. See *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704. After stating that courts have like authority to limit the number of expert witnesses or of character witnesses, Professor Wigmore states:

> "For witnesses upon *any point whatever* a similar rule of limitation may be enforced. * * * The reason for the rule — namely, that the disadvantage of confusion preponderates over the testimony of value, little or none, of the additional witnesses — may come to be applicable at any time * * *
>
> "A Court occasionally declares the rule applicable only where the fact is not actually controverted. But this limitation

is unsound, because the value of merely cumulative witnesses may become trifling even where the point is controverted, and the policy of the rule rests on the proportion between the probative value of the additional witnesses and the disadvantages they bring. * * *

"Sometimes a Court declares the qualification that the limiting of numbers is proper only upon *collateral issues;* though there is little authority for this * * * Moreover, there is no reason here for such a restriction of the rule; the exigency may equally arise upon any part of the issue * * *" Wigmore on Evidence, 3d Ed., § 1908.

In Hyatt, Trials, § 1,003, it is said:

"One of the most important parts of his [the trial judge's] duty is to expedite so far as he can do so, without interfering materially with the rights of the parties, the business of the court. In criminal cases the defendant has not only a constitutional right to a fair and impartial trial, but also to a speedy trial, but apart from this it is the duty of the court, not only in criminal but in civil cases, to so arrange and supervise the public business as to insure a reasonably speedy settlement of questions in which the life, liberty, or property of the litigants before it is involved. * * * The court may in its discretion limit the number of witnesses testifying to a particular fact in a case. * * *"

In Thompson on Trials, § 352, it is said:

"[I]t has been laid down, generally, that where, in the progress of a trial, it appears obvious that a party, either in the examination of his witnesses or in his argument, is consuming time unnecessarily, the court may, in its discretion, arrest the examination; and the exercise of this discretion will not be reviewed unless its abuse manifestly appears. So it is the obvious duty of the judge to interpose his own motion, when a useless and irrelevant examination of the witnesses is going on, and prevent a waste of time and the distraction of the attention of the jury from the real issues."

In § 353 of the same treatise, it is said, "So, a reasonable limitation of the number of witnesses who shall testify to a particular fact is within the discretion of the trial court." To the same effect, see: *Walker v. State,* 240 Ark. 441, 399 S.W. 2d 672; *Gray v. St. John,* 35 Ill. 222, 238; *Dobbs v. State,* 237 Ind. 119, 143 N.E. 2d 99; *Bays v. Herring,* 51 Iowa 286, 1 N.W. 558; *State v. Lee,* 203 S.C. 536, 28

S.E. 2d 402, 149 A.L.R. 1300; *Shields v. State,* 197 Tenn. 83, 270 S.W. 2d 367; *Meier v. Morgan,* 82 Wis. 289, 52 N.W. 174; 53 Am. Jur., Trial, § 107; Annot., 21 A.L.R. 335.

Especially pertinent in the present case is *State v. Whiton,* 68 Mo. 91, in which the trial court limited the witnesses to be heard upon a motion for change of venue on account of local prejudice against the defendant. Sherwood, C.J., speaking for the Court in affirming the ruling, said:

> "We regard such ruling clearly within the domain of judicial discretion, with which, unless arbitrarily and abusively exercised, we should refrain from interfering. * * * Any other theory of the law would permit, nay prompt, a crafty criminal to block the wheels of both punitive and remedial justice, by using the latest census returns of the county as a fecund source of limitless supply for countless subpœnas, thus securing a continuance under the pretense of securing a change of venue. And to those who, from long practice at the bar, are familiar with artifices of criminals, such an one will seem neither impossible nor improbable."

In *Burgman v. United States,* 188 F. 2d 637, cert. den. 342 U.S. 838, 72 S. Ct. 64, 96 L. Ed. 634, the defendant, prosecuted for treason, pleaded insanity as a defense. Upon appeal, he asserted that the trial court had abused its discretion in failing to provide, at government expense, psychiatrists to examine the defendant and testify. Two psychiatrists, who had examined the defendant earlier, in the course of military service, had testified for the defendant and the prosecution had presented another. Speaking for the Court of Appeals for the District of Columbia, Prettyman, Cir. J., said:

> "In the situation which then confronted the court, we think its decision was within its established discretion in such matters. A call of witnesses at Government expense is a matter for the trial court in its sound discretion. Moreover, numerous cases, stemming from *Winans v. N. Y. & Erie R. Co.* [21 How. 88, 16 L. Ed. 68], support the power of the court to limit reasonably the witnesses upon any single point; in other words, to curtail cumulative evidence."

[16] We think it was clearly within the discretion of the trial court, having heard for more than an entire day the testimony of witnesses called by the defendants, and having concluded therefrom that there was no intentional, designed exclusion of Negroes from the grand jury which indicted these defendants, to refuse to permit the

defendants to embark upon a fishing expedition which would, in all probability, be so extensive as to prevent the court from transacting any other business at that term.

Affirmed.

THOMAS H. SYKES ON BEHALF OF HIMSELF AND OTHER INTERESTED TAXPAYERS AND RETAIL MERCHANTS OF MECKLENBURG COUNTY v. I. L. CLAYTON, COMMISSIONER OF THE DEPARTMENT OF REVENUE OF THE STATE OF NORTH CAROLINA; DR. JAMES G. MARTIN, CHAIRMAN OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, AND JOHN A. CAMPBELL, M. W. PETERSON, ROBERT D. POTTER AND SAM T. ATKINSON, JR., BEING THE MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY; MRS. SAMUEL C. HAIRE, CHAIRMAN OF THE MECKLENBURG COUNTY BOARD OF ELECTIONS; AND OTHER INTERESTED PARTIES

No. 273

(Filed 30 October 1968)

1. Taxation §§ 5, 31— constitutionality of Mecklenburg local sales tax act

The provisions of Chapter 1096, Session Laws of 1967, authorizing the imposition of a one per cent (1%) sales and use tax in Mecklenburg County upon approval by the voters of the County *is held* not void as violative of N. C. Constitution, Art. V, §§ 3 and 5, since the constitutional limitations set forth in these sections relate solely to the taxation of real and personal property, tangible and intangible, according to the value thereof, and are irrelevant in respect to the validity of the sales and use tax imposed by the 1967 Act.

2. Statutes § 4— construction in regard to constitutionality

In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity.

3. Constitutional Law § 6— legislative powers

The General Assembly is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom.

4. Appeal and Error § 3— review of constitutional questions

The Supreme Court will not determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings.

5. Appeal and Error §§ 3, 45— review of constitutional contentions — the brief

Appellant's contention that enforcement of statute would violate his constitutional rights under N. C. Constitution, Art. I, § 17 and under U. S. Constitution, XIV Amendment, is deemed abandoned on appeal

where no reason or argument is stated or authority cited in his brief with reference to these constitutional provisions. Rule of Practice in the Supreme Court No. 28.

6. Taxation § 15— distinctions between sales and use taxes and property taxes

The sales tax imposed by G.S. 105-164.4 and the use tax imposed by G.S. 105-164.6 are distinguishable from property taxes: (1) the sales tax is a privilege or license tax based on the sale or rental price of tangible personal property and is imposed only on transactions of persons engaged in specific businesses; (2) the use tax is an excise tax based on the cost or rental price of tangible personal property and is imposed only on transactions of a specific character.

7. Statute § 5— rules of construction — title of act

When the meaning of an act is at all doubtful, the title or caption thereof should be considered as a legislative declaration of the tenor and object of the act.

8. Constitutional Law § 7— delegation of taxing power by legislature

The enactment of Chapter 1096, Session Laws of 1967, authorizing the imposition of a one per cent sales and use tax in Mecklenburg County upon approval by the voters of that County does not constitute a surrender by the General Assembly of its powers of taxation.

APPEAL by plaintiff from a judgment entered by *Ervin, J.*, at April 15, 1968 Regular Schedule "A" Civil Session of MECKLENBURG, certified, pursuant to G.S. 7A-31, for review by the Supreme Court before determination by the Court of Appeals.

Plaintiff seeks to have declared void as violative of Article V, Section 3, and of Article V, Section 5, of the Constitution of North Carolina, the 1967 Act entitled, "AN ACT ENABLING MECKLENBURG COUNTY TO HOLD A SPECIAL ELECTION FOR THE PURPOSE OF CONSIDERING WHETHER THE COUNTY SHALL OR SHALL NOT IMPOSE AND LEVY A SALES AND USE TAX OF ONE PER CENT UPON THE SALE, USE AND OTHER TAXABLE TRANSACTIONS UPON WHICH THE STATE NOW IMPOSES A THREE PER CENT SALES AND USE TAX," being Chapter 1096, Session Laws of 1967. He prays that defendants be enjoined from enforcing its provisions and from collecting the tax imposed thereby.

The cause came on for hearing before Judge Ervin on March 7, 1968, on plaintiff's motion for an interlocutory order restraining defendants until the final determination of the action. At said hearing, the City of Charlotte applied for and was granted permission to intervene as a party defendant. The verified complaint was the only evidence. Decision was deferred.

On March 28, 1968, separate demurrers to the complaint were filed (1) by defendant Clayton, Commissioner of Revenue, and (2)

by defendants Martin, *et al.*, County Commissioners of Mecklenburg. On April 2, 1968, a demurrer to the complaint was filed by defendant City of Charlotte.

Judgment for defendants was entered by Judge Ervin at April 15, 1968 Civil Session. It contains no reference to any of said demurrers.

The findings of fact which Judge Ervin incorporated in his judgment and the factual allegations of the complaint are identical.

The final portion of the judgment is as follows:

"Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

"1. That the plaintiff is not entitled to the injunctive relief sought in this action because he and the other interested persons on whose behalf this action has been brought have an adequate remedy at law through the use of G.S. 105-406 and related statutes.

"2. That, even if the plaintiff does not have an adequate remedy at law in accordance with the preceding paragraph, the Court concludes as a matter of law that the tax authorized by Chapter 1096 of the 1967 North Carolina Session Laws, which tax has been approved by the voters of Mecklenburg County, is constitutional and that this action should therefore be dismissed on its merits.

"Based upon the foregoing conclusions of law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action be, and the same hereby is dismissed with the costs to be taxed to the plaintiff."

Plaintiff excepted and appealed.

Peter A. Foley for plaintiff appellant.

Attorney General Bruton and Assistant Attorney General Gunn for I. L. Clayton, Commissioner of Revenue, defendant appellee.

James O. Cobb and William H. Cannon for the Board of County Commissioners of Mecklenburg County, and Henry W. Underhill, Jr., for the City of Charlotte, defendant appellees.

BOBBITT, J.

[1] We pass, without decision or discussion, questions as to whether plaintiff has an adequate remedy at law and, if not, whether the facts alleged are sufficient to show enforcement of the 1967 Act would cause irreparable injury to plaintiff. Having reached the conclusion the 1967 Act is not void as violative of Sections 3 and 5 of

Article V of our Constitution, we deem it in the public interest to base decision on that ground without regard to procedural questions.

The portions of the 1967 Act (Chapter 1096, Session Laws of 1967) pertinent to decision of the questions presented by plaintiff's appeal are summarized (except where quoted) below.

Section 1 of the 1967 Act declares the purpose thereof is "to provide Mecklenburg County and its municipalities with an added source of revenue and to assist them in meeting their growing financial needs by providing that said county may by special election adopt and levy a one per cent (1%) sales and use tax as (thereinafter) provided."

Section 2 thereof provides: "The Board of Elections of Mecklenburg County, upon the written request of the Mecklenburg Board of County Commissioners, or upon receipt of a petition signed by qualified voters of the county equal in number to at least fifteen per cent (15%) of the total number of votes cast in the county, at the last preceding election for the office of Governor, shall call a special election for the purpose of submitting to the voters of the county the question of whether a one per cent (1%) sales and use tax as (thereinafter) provided will be levied." In addition, Section 2 prescribes in detail the requirements and procedures for the conduct of such special election.

Section 3 provides: "In the event a majority of those voting in a special election held . . . shall approve the levy of the local sales and use tax, the tax shall be imposed on the first day of the month following the expiration of 90 days from the date of the election. Upon receipt of a certified statement from the Mecklenburg County Board of Elections of the results of a special election approving the tax in Mecklenburg County, the Commissioner of Revenue shall proceed as authorized . . . to administer the tax in said county."

In the event of approval by a majority of those voting in such special election, the tax imposed under Section 4 is a one per cent (1%) sales tax on items on which the State imposes a three per cent (3%) sales tax under G.S. 105-164.4, and the tax imposed under Section 5 is a tax of one per cent (1%) on items on which the State imposes a three per cent (3%) use tax under G.S. 105-164.6, the maximum "additional tax" on one sale being ten ($10.00) dollars. The 1967 Act provides that its provisions and "the provisions of the State Sales and Use Tax Act," being Article 5 of Chapter 105 of the General Statutes, "insofar as it is practicable, shall be harmonized."

Since the 1967 Act is attacked in its entirety by plaintiff on the ground *the imposition of a tax* pursuant to its terms contravenes Sections 3 and 5 of Article V of our Constitution, it is unnecessary to set forth provisions of the 1967 Act relating to requirements and procedures with reference to the collection and distribution of the proceeds. Suffice to say, other sections of the 1967 Act provide (1) that the retailers pay the additional tax to the North Carolina Commissioner of Revenue in accordance with regulations promulgated by him; (2) that the retailers collect from purchasers in accordance with a prescribed schedule; and (3) that the Commissioner of Revenue, after deducting the cost of collection, distribute the net proceeds to Mecklenburg County and the municipalities therein in accordance with a prescribed formula.

[2-4] "In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity." Stacy, C. J., in *State v. Lueders*, 214 N.C. 558, 561, 200 S.E. 22, 24. Too, ". . . under our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom." Hoke, J. (later C.J.), in *Thomas v. Sanderlin*, 173 N.C. 329, 332, 91 S.E. 1028, 1029. And, ordinarily, this Court will not undertake to determine whether a statute is unconstitutional except with reference to a ground on which it is attacked and definitely drawn into focus by the attacker's pleadings. *Hudson v. R. R.*, 242 N.C. 650, 667, 89 S.E. 2d 441, 453; *Surplus Stores, Inc., v. Hunter*, 257 N.C. 206, 211, 125 S.E. 2d 764, 768.

[5] It is noted that plaintiff alleged *generally* that enforcement of the 1967 Act would violate his constitutional rights under Article I, Section 17, of the Constitution of North Carolina, and under the Fourteenth Amendment to the Constitution of the United States. However, his complaint does not set forth any specific contention with reference thereto. On appeal, "no reason or argument is stated or authority cited" in his brief with reference to these constitutional provisions. Hence, whatever contention plaintiff may have had in mind is taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810.

Our question is whether the General Assembly *is prohibited* by Sections 3 and 5 of Article V of the Constitution of North Carolina from imposing, for the benefit of Mecklenburg County and its municipalities, the one per cent (1%) sales and use tax prescribed by Chapter 1096, Session Laws of 1967, when such tax is approved by

a majority of those who vote in a special Mecklenburg County election held and conducted pursuant to the provisions of said 1967 Act.

The additional one per cent (1%) Mecklenburg County tax is essentially the same in nature as the three per cent (3%) State tax imposed by G.S. 105-164.4 and by G.S. 105-164.6. The provisions of the "North Carolina Sales and Use Tax Act" (Article 5 of Chapter 105 of the General Statutes), including G.S. 105-164.4 and G.S. 105-164.6, are set forth in detail and discussed by Moore, J., in *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 123 S.E. 2d 582, 91 A.L.R. 2d 1127.

In *Canteen Service v. Johnson, Comr. of Revenue, supra,* the question was whether a retailer who sold articles at less than ten cents (10¢) each through coin operated automatic vending machines was required to pay the three per cent (3%) sales tax on the amount of such sales. The retailer (Canteen Service) contended the North Carolina tax, although denominated a sales tax, was in law a purchasers' tax; and that, since the retailer could not collect from the purchaser on such sales, the retailer was not obligated to pay tax on such sales. Rejecting this contention, this Court held the retailer was obligated to pay the tax on the aggregate of all sales. The basis of decision was the holding that "the tax is primarily and essentially a privilege or license tax imposed on retailers." Accord: *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505.

G.S. 105-164.4 levies and imposes *"a privilege or license tax* upon every person who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State. . . ." (Our italics.)

G.S. 105-164.6 levies and imposes *"(a)n excise tax* . . . on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State. . . ." (Our italics.)

[6] The privilege or license tax imposed by G.S. 105-164.4 is based on the *sale* or *rental price* of *tangible* personal property and on receipts from the rental of "rooms, lodgings and accommodations" to transients. The excise tax imposed by G.S. 105-164.6 is based on the *cost* or *rental price* of tangible personal property. The amount of the sales tax and of the use tax is not determined by the *value* of the property involved. Taxes are imposed only on *transactions* of persons engaged in specific businesses (sales tax) or on *transactions*

of a specific character (use tax). They are not imposed generally on all persons according to the value of real property and personal property, tangible and intangible, owned by them.

In holding the Tennessee Retail Sales Tax Act imposed a privilege tax and not a property or ad valorem tax, the Supreme Court of Tennessee, in opinion by Chief Justice Neil, said: "Tax statutes similar to the one here assailed have been enacted in one form or another in 28 States of the United States. We find, without exception, that the courts have uniformly held them to have imposed an excise or privilege tax and not a tax upon property. See Annotations in 89 A.L.R. pp. 1432 to 1442; 110 A.L.R. pp. 1485 to 1486. In the last annotation it is said: 'In recent decisions the so-called "sales tax" has been regarded as an excise or privilege tax, and not a property tax.' See also *Western Lithograph Co. v. State Board of Equalization,* 11 Cal. 2d 156, 78 P. 2d 731, 117 A.L.R. 838, 846; 128 A.L.R. 894, 895." *Hooten v. Carson,* 186 Tenn. 282, 209 S.W. 2d 273.

This excerpt from 47 Am. Jur., Sales and Use Taxes § 2, is noted: "Where it is a question whether a sales tax is an excise tax as distinguished from a property tax, it frequently being necessary to determine this point because of the applicability of particular constitutional provisions to property taxes but not to excises, the view is uniformly held that sales taxes are not property taxes but are excise taxes. . . ."

Plaintiff attacks the 1967 Act as violative of Sections 3 and 5 of Article V *as amended in 1962.*

Amendments to Sections 3 and 5 of Article V, adopted by the people at the general election held on November 6, 1962, were submitted by the General Assembly by its enactment of Chapter 1169, Session Laws of 1961, entitled "AN ACT TO AMEND SECTION 3, ARTICLE V, AND SECTION 5, ARTICLE V, OF THE CONSTITUTION OF NORTH CAROLINA RELATIVE TO THE POWER OF THE GENERAL ASSEMBLY TO EXEMPT AND TO CLASSIFY PROPERTY FOR AD VALOREM TAX PURPOSES."

Section 3 of Article V, as amended in 1962, provides: "State taxation. — *The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away. Only the General Assembly shall have the power to classify property and other subjects for taxation, which power shall be exercised only on a State-wide basis. No class or subject shall be taxed except by uniform rule, and every classification shall be uniformly applicable in every county, mu-*

nicipality, and other local taxing unit of the State. The General Assembly's power to classify shall not be delegated, except that the General Assembly may permit the governing boards of counties, cities, and towns to classify trades and professions for local license tax purposes. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on income shall not in any case exceed ten per cent (10%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to wit: For a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all other persons not less than $1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed."

With reference to Section 3 of Article V, the 1962 Amendment substituted the sentences italicized above for the following (deleted) three sentences: "The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied." With reference to Section 3 of Article V, plaintiff's contentions are based upon the italicized sentences incorporated therein by the 1962 Amendment.

Section 5 of Article V, as amended in 1962, provides: "Property exempt from taxation. — Property belonging to the State, counties and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding three hundred dollars ($300.00), any personal property. The General Assembly may exempt from taxation not exceeding one thousand dollars ($1,000.00) in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be uniformly applicable in every county, municipality, and other local taxing unit of the State. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this Section."

In determining whether Sections 3 and 5 of Article V as amended in 1962 are relevant to the taxes imposed by the 1967 Act, consideration must be given the factors narrated below.

It is clear that Section 5 of Article V refers solely and directly to exemptions from ad valorem taxation of property otherwise sub-

ject thereto. The fact that the 1962 Amendments to Sections 3 and 5 of Article V were submitted as Sections 1 and 2 of the 1961 Act indicates an interrelation between the subjects involved therein.

[7] The caption (quoted above in full) of the 1961 Act declares the amendments thereby submitted relate "to the power of the General Assembly to exempt and to classify *property for ad valorem tax purposes.*" (Our italics.) This declaration in the caption is for consideration in the light of the rule stated by Clark, J. (later C.J.), in *State v. Woolard,* 119 N.C. 779, 25 S.E. 719, *viz.:* "(T)he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered." Later decisions in accord include the following: *State v. Keller,* 214 N.C. 447, 199 S.E. 620, and cases cited; *State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335; *State v. Harward,* 264 N.C. 746, 142 S.E. 2d 691.

Additional light is cast upon the significance and legal effect of Sections 3 and 5 of Article V by the study and recommendations (1) of the 1957 Commission for the study of the Revenue Structure of the State, appointed pursuant to Resolution 41 of the General Assembly of 1957 (S.L. 1957, p. 1696), and (2) of the 1957 Commission to study the State Constitution and submit recommendations with reference to amendments or a revision thereof, appointed pursuant to Resolution 33 of the General Assembly of 1957 (S.L. 1957, p. 1689).

The 1957 Tax Study Commission, in explanation of its recommendations that Sections 3 and 5 of Article V be amended, set forth in its report to the Governor and General Assembly, under the caption "Policy Objectives," the following: "To make the taxes on real and tangible and intangible personal property more equitable and effective in the counties, cities, towns, and special districts of North Carolina, the Commission recommends to the legislature and local taxing authorities the following statement of policy objectives: I. The property tax base should be as broad and inclusive as possible. . . . II. The property tax base should be uniform throughout the State. . . . III. The tax base should be stable throughout the State. . . ."

The 1957 Constitutional Commission submitted with its report a "Text of Proposed Constitution for the State of North Carolina." In accordance with the recommendation of the 1957 Tax Study Com-

mission, Sections 1 and 2 of Article V of this "Text of Proposed Constitution" contained provisions which, in all respects pertinent to this appeal, are identical to Sections 3 and 5 of Article V as amended in 1962.

Recommendation No. 38 of the Constitutional Commission was as follows:

"*Property taxation.* Because the Tax Study Commission has published an exhaustive report concerning problems of property taxation, lengthy discussion of the changes proposed here seems unnecessary. The Constitutional Commission worked closely with the Tax Study Commission in redrafting Sections 3 and 5 of Article V. The recommendations concerning classification and exemption of *property* for purposes of taxation are the same as those proposed by the Tax Study Commission.

"Briefly, however, the intent of the changes is to insure that the same class *of property* shall occupy the same status as a part of *the property tax base* in every county of the State. The General Assembly is required to make every classification by uniform rule, uniformly applicable in every county, municipality, and other local taxing unit of the State. In addition, the General Assembly is forbidden to delegate its power of classification, except that it may delegate to counties, cities, and towns the power to classify trades and professions for local license tax purposes.

"Similar restrictions have been placed upon exemption of *property* from taxation. Every exemption must be on a state-wide basis by uniform rule, uniformly applicable in every local taxing unit of the State. It is also provided that no taxing authority other than the General Assembly may exempt *property;* nor can the General Assembly delegate its power of exemption.

"It should be emphasized that the requirement of uniformity in classification does not prohibit fixing of basic tax *rates* by local units in accordance with their individual needs, but it does seek to insure that *the tax base* will be uniform throughout the State. Also, it should be pointed out that the changes recommended in these sections do not represent a change in the traditional concept of *property taxation* in North Carolina. The idea of uniformity is expressed in the present Constitution, and the recommendations are merely directed toward tightening the provisions of the Constitution relating to property taxation in an effort to assure uniformity of classification and exemption." (Our italics.)

Further quotation from the report of the 1957 Tax Study Com-

mission and of the 1957 Constitutional Commission are deemed unnecessary. Suffice to say, Sections 3 and 5 of Article V, as amended in 1962, now embody the recommended constitutional changes. It is quite evident that these constitutional provisions relate solely to uniformity, determinable by the General Assembly on a State-wide basis, as *to what property* is to be included in or excluded or exempted from *the property tax base* on which local ad valorem taxes may be imposed.

We have not overlooked the fact that Section 3 of Article V, as amended in 1962, provides: "Only the General Assembly shall have the power to classify property *and other subjects* for taxation," etc. (Our italics.) Possibly the additional phrase, "and other subjects," was included to dispel any doubt the provisions referred to "intangibles" as well as to real property and tangible personal property. In any event, this phraseology originated with the 1957 Tax Study Commission and was brought forward by the 1957 Constitutional Commission; and for the reasons stated above it seems inescapable the reference is to such "property and other subjects" as might be included in the property tax base on which local ad valorem taxes might be imposed.

[1] We are of opinion, and so decide, that the *constitutional limitations* set forth in Sections 3 and 5 of Article V relate solely to the taxation of real and personal property, tangible and intangible, according to the value thereof, and are irrelevant in respect of the validity of the sales tax and use tax imposed by the 1967 Act.

On this appeal, in passing upon the only question presented, we hold the 1967 Act is not void as violative of Sections 3 and 5 of Article V of our Constitution. Whether the 1967 Act, or any portion thereof, is vulnerable to attack as violative of other constitutional limitations is not presented.

[8] Plaintiff's contention that the General Assembly by enactment of the 1967 Act surrendered its power of taxation to the voters of Mecklenburg County is without merit. The only tax involved is the specific tax defined in the 1967 Act. The 1967 Act imposes this tax if and when imposition thereof is approved by a majority of those voting in the special election. The power to tax was exercised by the General Assembly.

On the ground and for the reasons stated, the judgment of Judge Ervin is affirmed.

Affirmed.

STATE v. JOHNNY STOKES, JR.

No. 248

(Filed 30 October 1968)

1. Criminal Law § 13— jurisdiction — valid indictment

It is an essential of jurisdiction that a criminal offense be sufficiently charged in a warrant or indictment.

2. Indictment and Warrant § 9— sufficiency of indictment

An indictment must allege all the essential elements of the offense with sufficient certainty so as to (1) identify the offense, (2) protect the accused from being twice put in jeopardy for the same offense, (3) enable the accused to prepare for trial, and (4) support judgment upon conviction or plea.

3. Criminal Law § 127— motion in arrest of judgment

A motion in arrest of judgment must be based on matters which appear on the face of the record proper or on matters which should, but do not, appear on the face of the record proper.

4. Criminal Law § 157— record proper

The evidence in a case is not part of the record proper, the record proper including only those essential proceedings which are made of record by the law itself.

5. Criminal Law §§ 127, 147— motion in arrest of judgment made in Supreme Court

A defendant has a right to file in the Supreme Court a written motion in arrest of judgment of the Superior Court upon the ground of the insufficiency of the indictment.

6. Criminal Law § 23— guilty plea — jurisdictional defects

A plea of guilty standing alone does not waive a jurisdictional defect.

7. Constitutional Law § 37— waiver of constitutional rights

Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights and do not presume acquiescence in their loss.

8. Criminal Law § 25— plea of nolo contendere

A plea of nolo contendere, like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all other defenses.

9. Crime Against Nature § 2; Indictment and Warrant § 11— indictment — name of other person involved in the crime

It is essential to a valid indictment charging the commission of a crime against nature to state with exactitude the name of the person with or against whom the offense was committed.

10. Indictment and Warrant § 13— bill of particulars

A bill of particulars is not part of the indictment and will not supply any matter which the indictment must contain.

11. Indictment and Warrant § 13— bill of particulars

A bill of particulars cannot cure a defective indictment.

STATE *v.* STOKES

ON Writ of Certiorari to the North Carolina Court of Appeals. Same case below reported in 1 N.C. App. 245, 161 S.E. 2d 53.

At the October 1967 Criminal Session of Wilson County Superior Court, Bailey, J., presiding, defendant was tried upon the following indictment, as it appears in the original record on file in the office of the Clerk of the Court of Appeals:

> "The Jurors for the State upon their oath present, that Johnny Stokes, Jr., late of the County of Wilson, on the 10th day of September, in the year of our Lord one thousand nine hundred and sixty-seven, with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature, to wit: male with male, against the form of the statute in such case made and provided and against the peace and dignity of the State." (The indictment appearing in the opinion of the Court of Appeals is not exactly accurate, in that it states "male *and* male" instead of "male *with* male.")

When the case was called for trial, defendant was represented by court-appointed counsel, as he was so represented in the Court of Appeals and in this Court. Upon the trial defendant entered a plea of *nolo contendere,* which plea was accepted by the solicitor for the State. From a sentence of imprisonment, defendant appealed to the Court of Appeals. Immediately thereafter, in open court, defendant through his court-appointed counsel filed a motion in arrest of judgment, which motion the trial court denied. The Court of Appeals affirmed the judgment below.

Attorney General T. W. Bruton and Deputy Attorney General Harry W. McGalliard for the State.

David M. Connor for defendant appellant.

PARKER, C.J.

[1] Defendant's sole assignment of error in the Court of Appeals and his sole assignment of error here is the denial of his motion in arrest of judgment for the reason that it appears from the face of the indictment that the indictment fails to state the name of the person with whom the defendant committed the crime against nature. This assignment of error is good.

Article I, section 12, of the North Carolina Constitution requires an indictment, unless waived, for all criminal actions originating in the Superior Court, and a valid indictment is necessary to vest the

court with jurisdiction to determine the question of guilt or innocence. It is hornbook law that it is an essential of jurisdiction that a criminal offense should be sufficiently charged in a warrant or an indictment. *S. v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386; *S. v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901; *S. v. Bissette,* 250 N.C. 514, 108 S.E. 2d 858; *S. v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166.

[2] What are the essentials of a valid indictment? A clear and concise answer to this question appears in *S. v. Greer,* 238 N.C. 325, 77 S.E. 2d 917:

> "The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provision is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. [Cases cited.]"

The essentials of an indictment have been restated in equally clear and emphatic language in several recent cases. *S. v. Walker,* 249 N.C. 35, 105 S.E. 2d 101; *S. v. Banks,* 247 N.C. 745, 102 S.E. 2d 245; *S. v. Jordan,* 247 N.C. 253, 100 S.E. 2d 497; *S. v. Helms,* 247 N.C. 740, 102 S.E. 2d 241; *S. v. Cox,* 244 N.C. 57, 92 S.E. 2d 413; *S. v. Strickland,* 243 N.C. 100, 89 S.E. 2d 781; *S. v. Burton,* 243 N.C. 277, 90 S.E. 2d 390; *S. v. Scott,* 241 N.C. 178, 84 S.E. 2d 654.

[3, 4] Except where a pardon is pleaded before sentence, or except as otherwise provided by statute, a motion in arrest of judgment can be based solely on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. *S. v. Reel,* 254 N.C. 778, 119 S.E. 2d 876; *S. v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311; *S. v. Sawyer,* 233 N.C. 76, 62 S.E. 2d 515; 24 C.J.S. Criminal Law § 1515. The record proper, the true record, and not a false one, includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. *S. v. Gaston, supra; Thornton v. Brady,* 100 N.C. 38, 5 S.E. 910; 24 C.J.S. Criminal Law § 1515. The evidence in a case is no part of the record proper. *S. v. Gaston, supra; S. v. Matthews,* 142 N.C. 621, 55 S.E. 342.

[5] Defendant has a right to file in this Court a written motion

in arrest of judgment of the Superior Court upon the ground of insufficiency of the indictment. *S. v. Thornton, supra; S. v. Lucas,* 244 N.C. 53, 92 S.E. 2d 401.

[6] There is abundant authority that a plea of guilty standing alone does not waive a jurisdictional defect. *S. v. Covington,* 258 N.C. 501, 128 S.E. 2d 827; *S. v. Warren,* 113 N.C. 683, 18 S.E. 498; *Weir v. United States,* 92 F. 2d 634 (7th Cir. 1937), 114 A.L.R. 481; *People v. Green,* 368 Ill. 242, 13 N.E. 2d 278, 115 A.L.R. 348; *Berg v. United States,* 176 F. 2d 122 (9th Cir. 1949), cert. den. 338 U.S. 876, 94 L. Ed. 537; 22 C.J.S. Criminal Law § 424(7); *ibid* § 162; 4 Wharton, Criminal Law and Procedure § 1901 (Anderson Ed. 1957). See *People v. Green,* 329 Ill. 576, 161 N.E. 83. In *People v. Kelly,* 104 N.Y.S. 2d 385, 198 Misc. 1119, the Court said: "A plea of guilty standing alone does not constitute a waiver of fundamental constitutional rights in the protection of which every reasonable presumption is indulged. *Bojinoff v. People, supra* [299 N.Y. 145, 85 N.E. 2d 909]; *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680."

[7] Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights, and do not presume acquiescence in their loss. *Glasser v. United States,* 315 U.S. 60, 86 L. Ed. 680; *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 146 A.L.R. 357; *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 81 L. Ed. 1177; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292, 81 L. Ed. 1093.

In *Johnson v. Zerbst, supra,* the Court said: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

Defendant here entered a plea of *nolo contendere.* A plea of *nolo contendere,* like a plea of guilty, leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense. *S. v. Smith,* 265 N.C. 173, 143 S.E. 2d 293; *United Brotherhood of Carpenters v. United States,* 330 U.S. 395, 91 L. Ed. 973; *Crolich v. United States,* 196 F. 2d 879, reh. den. 17 June 1952, cert. den. 344 U.S. 830, 97 L. Ed. 646; 21 Am. Jur. 2d Criminal Law § 501; 22 C.J.S. Criminal Law § 425(4), p. 1208. In *United States v. Bradford,* 160 F. 2d 729, cert. den. 331 U.S. 829, 91 L. Ed. 1844, the Court said: "Defendant pleaded nolo contendere. . . . He now appeals from a sentence imposed pursuant to his plea. His contention, that the information fails to charge an offense, survives his plea. [Citing authority.]" For the purposes of the instant case only, defendant's plea of *nolo contendere* has the effect of a plea of guilty. *S. v. Smith, supra,* and authorities cited.

There is nothing in the record before us to indicate that defendant has waived his fundamental constitutional right to challenge the legal sufficiency of the indictment.

In *S. v. O'Keefe,* 263 N.C. 53, 138 S.E. 2d 767, cited and relied upon by the Court of Appeals, the indictment as it appears in our Supreme Court Reports shows that defendant was charged with unlawfully, wilfully, and feloniously committing the abominable and detestable crime against nature with one Peter P. Howe, a male person. In the *O'Keefe* case the Court said: "The practice in North Carolina has been to charge the offense in the manner employed in the bill of indictment in the instant case. This is in accord with the practice at common law. [Citing authority.] It was the practice to specifically allege the person with or against whom the offense was committed, by name or sex, but not the manner in which it was committed. An indictment which charges that defendant did unlawfully, wilfully and feloniously commit the infamous crime against nature with a particular man, woman or beast is sufficient. [Citing authority.]" An examination of the original records on file in the office of the Clerk of this Court shows that in each indictment in the following cases the victim with or against whom the offense was committed appears by name: *S. v. Stubbs,* 266 N.C. 295, 145 S.E. 2d 899; *S. v. Harwood,* 264 N.C. 746, 142 S.E. 2d 691; *S. v. O'Keefe, supra; S. v. Wright,* 263 N.C. 129, 139 S.E. 2d 10; *S. v. King,* 256 N.C. 236; 123 S.E. 2d 486; *S. v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396; *S. v. Williams,* 247 N.C. 272, 100 S.E. 2d 500; *S. v. Lance,* 244 N.C. 455, 94 S.E. 2d 335; *S. v. Spivey,* 213 N.C. 45, 195 S.E. 1; *S. v. Fenner,* 166 N.C. 247, 80 S.E. 970.

The one exception that we have been able to find in our Supreme Court Reports is *S. v. Callett,* 211 N.C. 563, 191 S.E. 27. In respect to this case this is said in *S. v. O'Keefe, supra:* "In *Callett* the substantive portion of the bill is, '. . . commit the abominable and detestable crime against nature.' It does not name the pathic nor even allege whether with mankind or beast. The bill was quashed for failure to use the word 'feloniously.'" In the *Callett* case the Court did not specifically decide that the bill of indictment was legally sufficient. In our opinion the indictment in the *Callett* case was also fatally defective because it did not name the pathic.

In Leviticus 18:22 (King James) there appears this commandment: "Thou shalt not lie with mankind, as with womankind: it is abomination." This commandment has become famous Biblical lore in the story of the destruction by fire and brimstone of the cities of Sodom and Gomorrah where the practice was prevalent. Genesis

19:24-25. From this Biblical genesis to the present day, the crime of sodomy and the crime against nature have been condemned by American and English jurisdictions. The early common law writers called it *peccatum illud horribile, inter christianos non nominandum* (that abominable sin, not fit to be mentioned among Christians). IV Blackstone's Commentaries 215-16 (Oxford, Clarendon Press, M.DCC.LXIX).

[9] In our opinion, and we so hold, it is essential to a valid indictment in this jurisdiction that the indictment must allege that the defendant did unlawfully, wilfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast. We are supported in our position by a long line of unbroken cases in our Supreme Court which are cited above, as well as by the following authorities: 1 Archbold's Criminal Practice and Pleading 1015 (8th Ed. Pomeroy's Notes 1880); 2 McClain on Criminal Law § 1154 (1897); 2 Chitty's Criminal Law 48 (2d Ed. 1832); 1 Wharton's Precedents of Indictments and Pleas 209 (3rd Ed. 1871); 3 Bishop's New Criminal Procedure §§ 1013-15 (2d Ed. 1913); 2 Wharton's Criminal Procedure § 1242 (10th Ed. Kerr 1918); *People v. Hopwood,* 19 P. 2d 824 (Cal. Dist. Ct. App. 1933); *People v. Gann,* 66 Cal. Rptr. 508 (Cal. Ct. App. 1968); *Commonwealth v. Dill,* 160 Mass. 536, 36 N.E. 472. It might be preferable to also state the sex of the pathic. In *S. v. O'Keefe, supra,* it is stated: "It was the practice to specifically allege the person with or against whom the offense was committed, by name or sex, but not the manner in which it was committed." If this sentence means that it was the practice to specifically allege the person with or against whom the offense was committed by sex and not name, we disapprove of it as not supported by our Supreme Court authorities and the common law.

[9] In our opinion, and we so hold, it is necessary to the legal sufficiency of an indictment charging the commission of a crime against nature to state with exactitude, *inter alia,* the name of the person with or against whom the offense was committed, in order that there can be certitude in the statement of the accusation as will identify the offense with which the accused is sought to be charged and to protect the accused from being twice put in jeopardy for the same offense.

The case of *S. v. Banks,* 263 N.C. 784, 140 S.E. 2d 318, is apposite. The warrant in that case read: "Sylvester Banks did unlawfully and wilfully peep secretly into a room occupied by a female person contrary to the form of the statute. . . ." Upon that warrant defendant was convicted, and from the judgment imposed he appealed. The

Supreme Court held in that case that the warrant was insufficient to charge a criminal offense. The Court in its opinion used this language: "The warrant fails to give sufficient information to enable the defendant to prepare for his trial. He is entitled to know the identity of the female person whose privacy he is charged with having invaded."

[10, 11] When the instant case was in the Court of Appeals, the Court used this language: "Defendant did not move for a bill of particulars in this case." A second headnote in this case in the Court of Appeals reads as follows: "The practice in this State has been to charge the offense of crime against nature in language closely following the wording of the statute, G.S. 14-177, and where defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may move for a bill of particulars." It is familiar learning that a bill of particulars is not a part of the indictment and will not supply any matter which the indictment must contain, and a bill of particulars cannot cure a defective indictment. *S. v. Cole,* 202 N.C. 592, 163 S.E. 594; *S. v. Thornton, supra; S. v. Banks, supra;* 5 A.L.R. 2d 447. The language in the second headnote in the Court of Appeals reads in part as follows: "(A)nd where defendant feels that he may be taken by surprise or that the indictment fails to impart information sufficiently specific as to the nature of the charge, he may move for a bill of particulars." If that means that a defective indictment as is present in the instant case can be cured by a bill of particulars, we disapprove of it.

The Court of Appeals was in error in holding that the indictment in this case was legally sufficient, and its opinion is reversed. We hold that the judgment in this case should have been arrested because of the legal insufficiency of the indictment, and we hereby arrest the judgment. The legal effect of arresting the judgment is to vacate the plea of *nolo contendere* and the judgment below, and the State, if it so desires, may proceed against the defendant on a legally sufficient indictment. *S. v. Thornton, supra; S. v. Wallace,* 251 N.C. 378, 111 S.E. 2d 714, and cases there cited.

The judgment below of the Court of Appeals is

Reversed.

LUCILLE CLEMMONS v. LIFE INSURANCE COMPANY OF GEORGIA

No. 191

(Filed 30 October 1968)

1. Pleadings § 19— demurrer

Upon a demurrer to a complaint on the ground that it does not state a cause of action, the allegations of fact, together with all relevant inferences of fact reasonably deducible therefrom, are taken to be true; the question is whether, such being the facts, the plaintiff is entitled to recover from the defendant.

2. Pleadings § 19— demurrer

The allegations of the complaint are to be liberally construed so as to give plaintiff the benefit of every reasonable intendment in his favor, but that does not mean that the court is to read into the complaint allegations which it does not contain. G.S. 1-151.

3. Pleadings § 19— demurrer

The demurrer does not admit inferences or conclusions of law drawn from the facts alleged in the complaint.

4. Pleadings § 19— demurrer — conclusion of the pleader

The allegation of a conclusion of the pleader adds nothing to the allegations of fact upon which it is based and is to be disregarded in determining whether the facts alleged in the complaint and admitted by the demurrer entitle plaintiff to recover from defendant.

5. Master and Servant § 34— employer's liability for injuries to third person — pleadings

The extent of the course or scope of the employment of an agent or servant is not a fact in itself but is the legal result of certain facts; consequently, a plaintiff's allegation that an employee was acting within the course and scope of his employment as agent of defendant is a conclusion and adds nothing to the facts alleged in the complaint.

6. Master and Servant § 34— employer's liability for assault by employee

In order to hold the employer liable for an assault committed by his employee, it is not enough to allege and prove that the assault was committed while the employee was at his post of duty during the hours of work.

7. Master and Servant § 34— employer's liability for assault by employee

It is not sufficient to hold an employer liable that the quarrel culminating in assault upon a third person by an employee was the result of the employee's resentment of some act of the third person, which act occurred while the employee was performing his duties.

8. Master and Servant § 34— liability of employer for employee's wrongful act

Mere fact that the purpose of the employee was to benefit the em-

ployer does not make the latter liable for the wrongful act of the employee.

9. Master and Servant § 34— assault while collecting accounts

Nothing else appearing, an agent employed to collect accounts turns aside from the course or scope of his employment when he assaults his employer's debtor as the result of a quarrel between the two, even though the quarrel originated in the effort of the agent to collect that which was due his employer; but where the assault, however misguided and unauthorized, was committed as an incident of the employee's duties in the collection of accounts, the employer is generally liable.

10. Master and Servant § 34— employer's liability for assault

It is not necessary in order to hold an employer liable for assault to allege and prove that the employer authorized the assault.

11. Master and Servant § 34— employer's liability for assault — sufficiency of pleadings

In action against insurance company to recover damages resulting from alleged assault by its agent, allegations that the agent was employed by the company to collect premiums due on policies issued by it, that he went to plaintiff's home for that purpose and for that purpose drew a pistol, pointed it at plaintiff and threatened to shoot her, *are held* sufficient to state a cause of action for assault.

12. Damages § 11— punitive damages

Punitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are recoverable by plaintiff.

13. Corporations § 27— liability for torts — punitive damages

Punitive damages may be awarded against a corporate employer in a case where the plaintiff alleges and proves she was assaulted by an agent of the corporation acting in the course of his employment wilfully, wantonly and maliciously.

14. Damages § 12— punitive damages — pleadings

Although it is not required that punitive damages be specifically pleaded by that name in the complaint or that there be a specific form of allegation, the complaint must allege facts showing the aggravating circumstances which would justify the award.

15. Assault and Battery § 3— allegations of punitive damages

In action against insurance company to recover damages resulting from alleged assault by its collecting agent, the allegations of the complaint *are held* sufficient to support an award of punitive damages.

APPEAL by defendant from the Court of Appeals.

The plaintiff brought suit to recover compensatory and punitive damages for an assault upon her by an agent of the defendant. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action in that it ap-

pears upon the face of the complaint that the alleged wrongful act was outside the scope of the employment of the agent. The Superior Court of New Hanover County sustained the demurrer. On appeal, the Court of Appeals reversed, Campbell, J., dissenting, 1 N.C. App. 215.

The material allegations of the complaint, summarized except as indicated, are as follows:

The defendant carries on a life insurance business in North Carolina. For many years the plaintiff, a resident of New Hanover County, had been a policyholder of the defendant and had paid premiums on such policies at her home to agents of the defendant.

On 21 November 1966, Morris Weeks, employed by defendant as its agent for the collection of premiums, went to the plaintiff's home for the purpose of collecting a premium which she owed the defendant, having so collected premiums from her for the defendant on many other occasions. At all times mentioned in the complaint, Weeks was acting "within the course and scope of his employment as such agent" of the defendant.

On the occasion in question, the plaintiff informed Weeks she did not have the money with which to pay the premium. Weeks became angered and, in a loud and rude voice, said to the plaintiff: "I am tired of you putting me off every time I come by. If you don't have it next time I am going to lapse the insurance." Thereupon the plaintiff asked Weeks to leave. He refused and replied, "You don't talk to me like that, woman." Weeks then drew a pistol, pointed it at the plaintiff and said, "I will shoot you." Weeks then walked out into the yard from which he continued to berate the plaintiff for not having the money to pay the premium, telling her she had better have it the next time he came. This continued until one Elsie Logan, who was present, said she would call the police. Weeks, after replying that he did not care whom she called, went to his car, stood there a few moments and then drove away.

"[T]he use of the pistol * * * the threatening gestures, the angry words and the hostile demeanor of * * * Weeks all constituted a means or method of doing that which he was employed to do by the defendant, that is * * * collecting insurance premiums which this plaintiff owed to the defendant * * * That one of the duties of the said Morris Weeks was the collection of premiums from this plaintiff and others and

all of his actions and words * * * were done and said in performance of that duty."

The defendant knew, or in the exercise of reasonable care should have known, that Weeks had secured a permit to buy a pistol.

As a result of the actions of Weeks, the plaintiff became nervous and suffered damages, "proximately caused by the intentional, wrongful and unlawful conduct" of Weeks, for which she is entitled to recover $2,500, "together with such punitive damages of not less than $10,000, which a jury may find the defendant should pay as a deterrent to others similarly situated from acting in the same unlawful, wrongful and outrageous manner."

Marshall & Williams for defendant appellant.

W. G. Smith and Jerry Spivey for plaintiff appellee.

LAKE, J.

[1-4] Upon a demurrer to a complaint on the ground that it does not state a cause of action, the allegations of fact, together with all relevant inferences of fact reasonably deducible therefrom, are taken to be true. *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98. The question is whether, such being the facts, the plaintiff is entitled to recover from the defendant. The allegations of the complaint are to be liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. G.S. 1-151; *Corprew v. Chemical Corp., supra;* Strong, N. C. Index, 2d Ed, Pleadings, § 19, and cases cited therein. Liberal construction, however, does not mean that the court is to read into the complaint allegations which it does not contain. *Brevard v. Insurance Co.*, 262 N.C. 458, 137 S.E. 2d 837; *Builders Corp. v. Casualty Co.*, 236 N.C. 513, 73 S.E. 2d 155. Furthermore, the demurrer does not admit inferences or conclusions of law drawn from the facts alleged in the complaint. *Corprew v. Chemical Corp., supra; Lindley v. Yeatman*, 242 N.C. 145, 87 S.E. 2d 5; Strong, N. C. Index, 2d Ed., Pleadings, § 19. The allegation of such a conclusion adds nothing to the allegations of facts upon which it is based, and, therefore, is to be disregarded in determining whether the facts alleged, and admitted by the demurrer, entitle the plaintiff to recover from the defendant. *Green v. Kitchin*, 229 N.C. 450, 50 S.E. 2d 545; 41 Am. Jur., Pleading, § 18. See also, Stacy, C.J., concurring, in *Brown v. Mewborn*, 218 N.C. 423, 11 S.E. 2d 372.

Obviously, the complaint in this action alleges an assault by Weeks upon the plaintiff. The question is whether it alleges facts giving rise to a cause of action in favor of the plaintiff against the defendant, Weeks' employer, by reason of this assault.

In *Terrace, Inc. v. Indemnity Co.*, 243 N.C. 595, 91 S.E. 2d 584, an allegation in a complaint that the person executing a contract "was acting in behalf of and as agent of the plaintiff" was held to be "a mere conclusion unsupported by any allegation of fact." In *Weiner v. Style Shop,* 210 N.C. 705, 188 S.E. 331, an allegation that the libelous publication "grew out of the same transaction sued upon by the plaintiffs" was held to be a conclusion of the pleader, the truth of which was not admitted by a demurrer. In *Brevard v. Insurance Co., supra,* it was held that a general allegation in a complaint to the effect that an insurance policy "covered the named assurred * * * for the liability arising out of the aforesaid judgment" was a conclusion of law, which was not admitted by the demurrer. In *Shives v. Sample,* 238 N.C. 724, 79 S.E. 2d 193, a complaint was held subject to demurrer for the reason that it alleged negligence without alleging the facts establishing such negligence, Johnson, J., speaking for the Court, saying:

> "[N]egligence is not a fact in itself, but is the legal result of certain facts. Therefore, the facts which constitute the negligence charged and also the facts which establish such negligence as the proximate cause * * * of the injury must be alleged."

[5] Like negligence, the extent of the course or scope of the employment of an agent or servant is not a fact in itself, but is the legal result of certain facts. Therefore, the plaintiff's allegation, in the present case, that at all times mentioned in the complaint, Weeks was acting "within the course and scope of his employment" as agent of the defendant, is an allegation of a conclusion of the pleader and adds nothing to the facts alleged in the complaint. See: 71 C.J.S., Pleading, § 27b; 41 Am. Jur., Pleading, § 19.

The allegation in the complaint that "one of the duties of * * * Weeks was the collection of premiums from this plaintiff and * * * all of his actions and words * * * were done and said in performance of that duty" is, however, somewhat different in nature. Interpreting this allegation liberally, we think it should be construed as an allegation that Weeks did the things alleged in the complaint for the purpose of collecting the premium due on the policy held by the plaintiff. This is an allegation of fact. As such, it must be considered with the allegations setting forth the actions of Weeks in

determining whether the complaint states a cause of action against his employer.

The complaint, so construed, alleges that Weeks, employed by the defendant to collect premiums due from its policyholders, went to the plaintiff's home for that purpose and for that purpose drew a pistol, pointed it at the plaintiff and said he would shoot her. For the purpose of testing the sufficiency of the complaint, the demurrer admits all of these allegations.

As Stacy, C.J., speaking for the Court in *Dickerson v. Refining* Co., 201 N.C. 90, 159 S.E. 446, said, "It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment." In *Roberts v. R. R.*, 143 N.C. 176, 55 S.E. 509, this Court held the employer was not liable for an assault by one of its employees upon another in the course of a quarrel between the two. Hoke, J., later C.J., speaking for the Court, said, "The test is not whether the act was done while [the employee committing the assault] was on duty or engaged in his duties, but was it done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do?" In *Colvin v. Lumber Co.*, 198 N.C. 776, 153 S.E. 394, this Court held an employer liable for the intentional shooting and killing of a third person by its employee, quoting 39 C.J. 1284 as follows: "Where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion, at least to the extent of requiring the question to be submitted to the jury for determination."

In *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804, we affirmed a judgment of nonsuit in an action for an assault by a busboy, employed in a restaurant, upon a customer of the establishment, the plaintiff's evidence failing to show that the assault was for the purpose of doing anything related to the duties of the busboy. We there said: "If the act of the employee was a means or method of doing that which he was employed to do, though the act be wrongful and unauthorized or even forbidden, the employer is liable for the resulting injury, but he is not liable if the employee departed, however briefly, from his duties in order to accomplish a purpose of his own, which purpose was not incidental to the work he was employed to do." Likewise, in *Robinson v. McAlhaney*, 214 N.C. 180, 198 S.E. 647, Barnhill, J., later C.J., speaking for the Court, said: "If an as-

sault is committed by the servant, not as a means or for the purpose of performing the work he was employed to do, but in a spirit of vindictiveness or to gratify his personal animosity or to carry out an independent purpose of his own, then the master is not liable."

[6-8] In order to hold the employer liable for an assault committed by his employee, it is not enough to allege and prove that the assault was committed while the employee was at his post of duty during the hours of work. *Robinson v. McAlhaney, supra; Snow v. DeButts,* 212 N.C. 120, 193 S.E. 224. It is not sufficient that the quarrel, culminating in the assault, was the result of the employee's resentment of some act of the third person, which act occurred while the employee was performing his duties. *State ex rel Gosselin v. Trimble,* 328 Mo. 760, 41 S.W. 2d 801; *Plotkin v. Northland Transportation Co.,* 204 Minn. 422, 283 N.W. 758; *Brown v. Boston Ice Co.,* 178 Mass. 108, 59 N.E. 644. The mere fact that the purpose of the employee was to benefit the employer does not make the latter liable for the wrongful act of the employee. *Dickerson v. Refining Co., supra.* "When, however, the employee is undertaking to do that which he was employed to do and, in so doing, adopts a method which constitutes a tort and inflicts injury on another it is the fact that he was about his master's business which imposes liability." *West v. Woolworth Co.,* 215 N.C. 211, 1 S.E. 2d 546.

[9] While the decisions from other jurisdictions are not in complete agreement, either as to theory or as to result, the great weight of authority is that, nothing else appearing, an agent, employed to collect accounts, turns aside from the course or scope of his employment when he assaults his employer's debtor as the result of a quarrel between the two, even though the quarrel originated in the effort of the agent to collect that which was due his employer. *Reece v. Ebersbach,* 152 Fla. 763, 9 So. 2d 805; *Moskins Stores, Inc. v. DeHart,* 217 Ind. 622, 29 N.E. 2d 948; *Hill v. McQueen,* 204 Okla. 394, 230 P. 2d 483, 22 A.L.R. 2d 1220; Annot., Liability for Assault by Employee in Collecting Debt, 22 A.L.R. 2d 1227, 1231; 35 Am. Jur., Master and Servant, § 575; Mechem on Agency, 2d Ed., § 1978; Restatement of the Law, Agency, 2d, § 245, App. Where, however, the assault, however misguided and unauthorized, was committed as an incident of the employee's duties in the collection of accounts, the better view appears to be that the employer is liable. *New Morgan County Bldg. & Loan Ass'n v. Plemmons,* 210 Ala. 286, 98 So. 12; *Antinozzi v. A. Vincent Pepe Co.,* 117 Conn. 11, 166 Atl. 392; *Moffit v. White Sewing Machine Co.,* 214 Mich. 496, 183 N.W. 198; Annot., 22 A.L.R. 2d, 1227, 1232, 1235.

[10] It is, of course, not necessary, in order to hold the employer liable for an assault, to allege and prove that the employer authorized the assault. In *Long v. Eagle Store Co.*, 214 N.C. 146, 198 S.E. 573, this Court held an employer liable for a false arrest of a customer on the charge of shoplifting, quoting *Dickerson v. Refining Co., supra,* as follows: "When the servant is engaged in the work of the master, doing that which he is employed and directed to do, and an actionable wrong is done to another, either negligently or maliciously, the master is liable, not only for what the servant does, but also for the ways and means employed by him in performing the act in question."

[11] In the present case, it is alleged in the complaint, and admitted by the demurrer, that Weeks, employed by the defendant to collect premiums due upon policies issued by it, went to the plaintiff's home for that purpose and for that purpose drew a pistol, pointed it at the plaintiff and threatened to shoot her. Upon these facts, the employer would be liable in damages for the injuries caused by the assault. If, on the trial on the merits, the plaintiff fails to prove that this was the purpose of the assault, she will not be entitled to recover, but she has alleged such purpose and, for the present, that is sufficient.

The plaintiff's case is not strengthened by her allegation that the defendant knew, or in the exercise of reasonable care should have known, that Weeks had applied for and obtained a permit to purchase a pistol. Assuming the defendant had actual knowledge of this circumstance, it would by no means be put on notice that Weeks intended to carry the pistol upon his collection calls or to use it in the collection of premiums due. The complaint does not state a cause of action against the defendant on the theory that the defendant was in any respect negligent in the employment of Weeks, or in sending him to the home of the plaintiff for the purpose of collecting the premium due it. Her case stands or falls upon her ability to prove, at the trial on the merits, her allegation that Weeks used the pistol for the purpose of collecting the premium. This she has alleged. Thus her complaint is sufficient to withstand the demurrer.

While the demurrer should have been overruled, irrespective of the sufficiency of the allegations of the complaint to support an award of punitive damages, since that question will arise upon the trial of the case on the merits, we deem it advisable to consider the sufficiency of the complaint for that purpose.

[12, 13] "Punitive damages may not be awarded unless otherwise a cause of action exists and at least nominal damages are re-

coverable by the plaintiff." *Worthy v. Knight,* 210 N.C. 498, 187 S.E. 771. Therefore, if, upon the trial on the merits, the plaintiff fails to prove that the assault upon her by Weeks was committed in the course of his employment by the defendant, she may not recover any damages, compensatory or punitive, from the defendant on account of that assault. Punitive damages may, however, be awarded against a corporate employer in a case where the plaintiff alleges and proves she was assaulted by an agent of the corporation acting in the course of his employment wilfully, wantonly and maliciously. "Punitive damages may be awarded * * * from [sic] a corporation for a tort wantonly committed by its agents in the course of their employment." *Binder v. Acceptance Corp.,* 222 N.C. 512, 23 S.E. 2d 894. See also: *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 88 S.E. 2d 333; *Tripp v. Tobacco Co.,* 193 N.C. 614, 137 S.E. 871.

In *Lutz Industries, Inc. v. Dixie Home Stores, supra,* this Court held that allegations in a complaint, designed to support an award of punitive damages, were insufficient for that purpose. The allegation in question was: "That by reason of the unlawful, wanton, wilful and gross negligent conduct of the defendant corporation and its agents and their failure to observe the rules and requirements of the National Electrical Code, and failure to observe the ordinance of the City of Lenoir, that this plaintiff is entitled to recover punitive damages of the defendant corporation in the amount of $50,000." Speaking through Parker, J., now C.J., this Court said that this paragraph of the complaint "merely states conclusions, not facts, and * * * should be stricken."

[14, 15] Since it is not sufficient, in order to allege a basis for an award of punitive damages, to allege merely that conduct of the defendant's employee was "wanton, wilful and gross," it follows that the insertion in the complaint of such adjectives is not essential to raise an issue of an award for punitive damages. The question is whether the facts alleged in the complaint are sufficient to show the requisite malice, oppression or wilful wrong. As Parker, J., now C.J., said in *Lutz Industries, Inc. v. Dixie Home Stores, supra:* "While it seems that punitive damages need not be specifically pleaded by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded. 25 C.J.S., p. 758. Though no specific form of allegation is required, the complaint must allege facts showing the aggravating circumstances which would justify the award, for instance, actual malice, or oppression or gross and wilful wrong, or a wanton and reckless disregard of plaintiff's rights." The allegations in the complaint before us meet this test. What the

plaintiff can prove at the trial on the merits is a different question, which is not before us.

The judgment of the Court of Appeals is, therefore,

Affirmed.

PEGGY LOUISE CLARKE v. RONALD EUGENE HOLMAN AND HUGHEY FRED TOWNSEND

No. 355

(Filed 30 October 1968)

1. Trial § 21— motion to nonsuit — consideration of evidence

On motion to nonsuit, all the evidence which tends to support plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom.

2. Trial § 21— motion to nonsuit — consideration of evidence

On motion to nonsuit, contradictions and discrepancies are resolved in plaintiff's favor, and only that part of defendant's evidence which is favorable to plaintiff may be considered.

3. Negligence § 26— actions based on negligence — burden of proof

To recover damages for personal injury resulting from alleged actionable negligence, plaintiff must show (1) that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed, and (2) that such negligent breach of duty was the proximate cause of the injury.

4. Negligence § 9— foreseeability — proximate cause

Reasonable foreseeability is an essential element of proximate cause.

5. Automobiles § 9— G.S. 20-154 — turning and turn signals

G.S. 20-154 requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal when the operation of any other vehicle may be affected.

6. Automobiles § 9— G.S. 20-154 — left turn

G.S. 20-154 does not preclude a left turn unless the circumstances are absolutely free from danger, but only requires a motorist to exercise reasonable care under existing conditions to ascertain that such movement can be made with safety.

7. Automobiles § 9— duty to give turn signal

When the surrounding circumstances afford a motorist reasonable grounds to conclude that his left turn might affect the operation of another vehicle, the duty to give the statutory signal is imposed upon him.

8. Automobiles § 9— duties of motorist making a left turn

Where the vehicles of plaintiff and defendant were approaching each other on the highway and defendant intended to turn left across plaintiff's lane of travel, defendant owed plaintiff the duty (1) to see that such movement could be made in safety and then (2) to give, during the last 200 feet traveled prior to stopping or making the turn, a plainly visible signal of his intention to turn. G.S. 20-154.

9. Automobiles § 58— failure to give left-turn signal — proximate cause

Where defendant stopped in his lane of travel preparatory to making a left turn across plaintiff's lane of travel when plaintiff's vehicle was 1700 feet away and the codefendant was nowhere in sight, and defendant's truck was struck from the rear by the codefendant's vehicle, which then struck plaintiff's oncoming vehicle, defendant's failure to give a left-turn signal during the last 200 feet traveled before stopping was not a proximate cause of the subsequent collision, and defendant was not required to maintain a signal after stopping, the codefendant's negligence in failing to keep a proper lookout being the sole proximate cause of the collision and the resulting injury to plaintiff.

10. Automobiles § 9— left-turn signal

One is not required to give a signal to a motorist who has not yet appeared on the horizon.

APPEAL by plaintiff from decision of the Court of Appeals reported in 1 N.C. App. 176.

This is a civil action to recover damages for personal injuries allegedly inflicted by the joint and concurrent negligence of defendants. The jury found both defendants negligent and awarded damages of $20,000. Townsend appealed to the Court of Appeals assigning as error the failure of the trial court to allow his motion for nonsuit at the close of all the evidence. The Court of Appeals reversed the trial court and nonsuited the case against Townsend, with Britt, J., dissenting. Plaintiff thereupon appealed as of right to the Supreme Court. Defendant Holman did not appeal.

West & Groome, Attorneys for plaintiff appellant.

Smathers and Hufstader; Larry W. Pitts, Attorneys for defendant appellee, Hughey Fred Townsend.

HUSKINS, J.

The sole question presented for decision is whether or not the Court of Appeals erred in allowing Townsend's motion for nonsuit.

On motion to nonsuit, all the evidence which tends to support plaintiff's claim must be taken as true and considered in its light

most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom. *Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329; *Insurance Co. v. Storage Co.,* 267 N.C. 679, 149 S.E. 2d 27. Contradictions and discrepancies are resolved in plaintiff's favor. *Watt v. Crews,* 261 N.C. 143, 134 S.E. 2d 199; *Nixon v. Nixon,* 260 N.C. 251, 132 S.E. 2d 590; *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894; *Raper v. McCrory-McLellan Corp.,* 259 N.C. 199, 130 S.E. 2d 281. Defendant's evidence which contradicts that of the plaintiff, or tends to show a different state of facts, is ignored. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307. Only that part of defendant's evidence which is favorable to plaintiff can be considered. *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

The evidence, when subjected to these rules, would permit a jury to find the following facts:

1. The Connelly Springs Road runs generally north-south from Lenoir to Connelly Springs. Six miles south of Lenoir it is intersected from the west by Rural Paved Road 1136 forming a "T" intersection. Looking south from that intersection, the Connelly Springs Road is straight and level for 300 to 528 feet. Looking north it is straight and level for one-half mile. Its pavement is 20 feet wide with a painted center line and a four-foot shoulder on each side. The maximum lawful speed for vehicular travel on this road is 55 miles per hour.

2. On 4 May 1966, during daylight hours with clear weather and dry pavement, defendant Townsend was driving north on the Connelly Springs Road intending to turn left on Rural Paved Road 1136. Upon reaching that intersection, he was unable to make a left turn due to southbound traffic on Connelly Springs Road. He therefore stopped to allow the oncoming traffic to pass before turning left himself. He had been stopped there for 30 seconds or more, possibly 45 seconds, when a vehicle driven by defendant Holman struck him from the rear.

3. The defendant Holman was driving a Ford pickup truck north on the Connelly Springs Road and came upon the stopped Townsend vehicle. He had not previously seen the Townsend vehicle that day and did not see it on this occasion until he was within 97 feet of it. He could have seen it when he rounded a curve at least 300 feet away, and his failure to do so is unexplained. Nothing obstructed his vision. When he did see it, he was then too close to stop. He skidded 57 feet, struck the Townsend vehicle in the left rear, then crossed into the southbound lane and struck the vehicle

of plaintiff Clarke, finally coming to rest after striking another vehicle which was following plaintiff. Had Holman seen the Townsend vehicle when he was 150 feet away from it, he could have stopped in time to avoid a collision.

4. Plaintiff Clarke was driving south on Connelly Springs Road at approximately 45 miles per hour followed by a 1957 Ford driven by Cecil Dennis Gragg. Several other vehicles were proceeding south in front of her. When she was about 1700 feet north of the "T" intersection at Rural Paved Road 1136, she saw the Townsend vehicle stopped there in the northbound traffic lane of Connelly Springs Road. No signals, mechanical or otherwise, were being given by Townsend. His pickup truck was sitting "dead still" in the road. When plaintiff's vehicle arrived at the intersection, it was struck by the Holman vehicle which she had not seen prior to that moment.

5. As a result of her collision with the Holman vehicle, plaintiff was seriously injured.

Although defendant Townsend testified that his vehicle was not equipped with mechanical turn signals and that he gave a hand signal during the last 200 feet traveled indicating his intention to turn left at Rural Paved Road 1136, we do not consider this evidence on motion to nonsuit but take the evidence in its light most favorable to plaintiff which tends to show that no signal of any kind was given before stopping or maintained thereafter while waiting to complete a left turn.

Plaintiff charges Townsend with negligence (1) in failing to signal his intention to stop, (2) in failing to give a signal of his intention to make a left turn, and (3) in failing to maintain such signal until the left turn was completed. Townsend contends that he was not required to maintain any signal after stopping and says that failure, if he did fail, to give a signal before stopping was not a proximate cause of the collision which later occurred.

[3, 4] Negligence has been defined as "the failure to exercise proper care in the performance of some legal duty which defendant owes the injured party under the circumstances in which they are placed." 6 Strong's N. C. Index 2nd, Negligence, Sec. 1. To be actionable, however, negligence must be the proximate cause of injury to another. *McGaha v. Smoky Mountain Stages, Inc.*, 263 N.C. 769, 140 S.E. 2d 355; *Reason v. Sewing Machine Co.*, 259 N.C. 264, 130 S.E. 2d 397; *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14. Thus, in an action to recover damages for personal injury resulting from alleged actionable negligence, such as this case, the plaintiff must show: "(1) That there has been a failure on the part of defendant

to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed; and (2) That such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed." *Luttrell v. Mineral Co.*, 220 N.C. 782, 789, 18 S.E. 2d 412, 416. Reasonable foreseeability is an essential element of proximate cause, and if the injury complained of is not reasonably foreseeable by the party charged, in the exercise of due care, he is not liable. "Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Osborne v. Coal Co.*, 207 N.C. 545, 546, 177 S.E. 796, 797.

G.S. 20-154 provides in pertinent part that the driver of any vehicle upon a highway "before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, . . . and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. . . . All hand and arm signals shall be given from the left side of the vehicle and all signals shall be maintained or given continuously for the last one hundred feet traveled prior to stopping or making a turn. Provided, that in all areas where the speed limit is 45 miles per hour or higher and the operator intends to turn from a direct line of travel, a signal of intention to turn from a direct line of travel shall be given continuously during the last 200 feet traveled before turning; and provided further that the violation of this section shall not constitute negligence per se." This statute further provides that, absent mechanical signals, a left turn signal shall be given by extending the hand and arm from and beyond the left side of the vehicle in a horizontal position, forefinger pointing.

[5-7] This safety statute requires a motorist intending to turn from a direct line (1) to see that the movement can be made in safety, and (2) to give the required signal *when the operation of any other vehicle may be affected. Tart v. Register*, 257 N.C. 161, 125 S.E. 2d 754; *Farmers Oil Co. v. Miller*, 264 N.C. 101, 141 S.E. 2d 41. The first requirement does not mean that a motorist may not make a left turn unless the circumstances are absolutely free from danger. It means that a motorist must exercise reasonable care under existing

conditions to ascertain that such movement can be made with safety. *Cooley v. Baker,* 231 N.C. 533, 58 S.E. 2d 115; *White v. Lacey,* 245 N.C. 364, 96 S.E. 2d 1; *Williams v. Tucker,* 259 N.C. 214, 130 S.E. 2d 306; *Farmers Oil Co. v. Miller, supra.* Infallibility is not required. *McNamara v. Outlaw,* 262 N.C. 612, 138 S.E. 2d 287. Furthermore, the duty to give a signal does not arise unless the operation of some other vehicle may be affected by such movement. When the surrounding circumstances afford him reasonable grounds to conclude that the left turn might affect the operation of another vehicle, then the duty to give the statutory signal is imposed upon him. *Blanton v. Carolina Dairy, Inc.,* 238 N.C. 382, 77 S.E. 2d 922.

[8, 9] Plaintiff Clarke and defendant Townsend were meeting each other on Connelly Springs Road. Townsend intended to turn left across plaintiff's lane of travel. Under these circumstances, Townsend owed plaintiff the duty (1) to see that such movement could be made in safety and then (2) to give, during the last 200 feet traveled *prior to stopping or making the turn,* a plainly visible signal of his intention to turn. G.S. 20-154; *Fleming v. Drye,* 253 N.C. 545, 117 S.E. 2d 416; *King v. Sloan,* 261 N.C. 562, 135 S.E. 2d 556. The first requirement was met when he stopped in his northbound lane to await the time when such movement could be made in safety. Failure to meet the second requirement was of no legal significance under the facts of this case. He stopped when plaintiff was 1700 feet away and defendant Holman was nowhere in sight. He never turned left. He never entered plaintiff's lane of traffic. Neither plaintiff's vehicle nor Holman's vehicle were in any wise affected by his stopping or standing without giving the left turn signal. Holman later came upon the Townsend vehicle lawfully stopped on the highway and crashed into it because he was not keeping a lookout in his direction of travel. It was encumbent upon Holman to keep a reasonably careful lookout in order to avoid collision with persons and vehicles upon the highway. This duty required Holman to be reasonably vigilant and to anticipate and expect the presence of others. *Hobbs v. Coach Co.,* 225 N.C. 323, 34 S.E. 2d 211; *Henson v. Wilson,* 225 N.C. 417, 35 S.E. 2d 245. "It is the duty of the driver of a motor vehicle not merely to *look,* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen." *Wall v. Bain,* 222 N.C. 375, 379, 23 S.E. 2d 330, 333. Holman's negligence in this respect was the sole proximate cause of the collision and the resulting injury to plaintiff. No other permissible inference of causation arises on the facts of this case. Holman did nothing whatever to avert a collision with the Townsend vehicle until it was too late. "This being so, the evidence war-

rants the inference that there was no causal connection whatever between the failure of the plaintiff to give a hand signal and the subsequent collision. The omission to perform a duty cannot constitute one of the proximate causes of an accident unless the doing of the omitted duty would have prevented the accident. 38 Am. Jur., Negligence, Section 54; 65 C.J.S., Negligence, Section 106." *Cozart v. Hudson,* 239 N.C. 279, 284, 78 S.E. 2d 881, 884.

[9, 10] It is sheer speculation to say that Holman might have seen an extended arm and hand with forefinger pointing when he didn't see an object the size of a pickup truck. Furthermore, one is not required to give a signal to a motorist who has not yet appeared on the horizon. In this case, such signal by Townsend for the last 200 feet traveled *before stopping* could not have affected Holman, and G.S. 20-154 does not require such signal to be maintained *after stopping.* While the facts and circumstances in a proper case may require a motorist in the exercise of due care to maintain a left turn signal after stopping and until the turn is executed, such was not required by the facts and circumstances revealed by the evidence here.

Plaintiff having failed to show any actionable negligence on the part of the defendant Townsend, the decision of the Court of Appeals is

Affirmed.

STATE v. JAMES JOSEPH EDWARDS

No. 821

(Filed 30 October 1968)

1. Criminal Law §§ 75, 76— general objection to admission of confession

A general objection is sufficient to challenge the admission of a proffered confession if timely made.

2. Criminal Law § 162— objection to evidence

An objection must be made in apt time, that is, as soon as the opponent has the opportunity to learn that the evidence is objectionable; unless prompt objection is made, the opponent will be held to have waived it.

3. Criminal Law § 162— objection to preliminary question

A preliminary question to a witness is not usually open to objection; ordinarily an objection must be interposed when evidence is offered and received.

4. Criminal Law §§ 76, 162— admissibility of confession — necessity for voir dire examination

Defendant interposed an objection, which was overruled, when a police officer was asked if defendant had made any statements to him. The officer answered in the affirmative and then volunteered, without being asked, the contents of defendant's alleged confession. *Held:* Upon defendant's objection the trial court should have excused the jury and heard evidence as to the voluntariness of the statement, since the objection was directed to the damaging effect of an involuntary confession and was in time to have alerted the court to forthcoming proffer of confession by the State.

APPEAL by defendant from *Carr, J.,* August 1967 Criminal Session of ORANGE.

Defendant was tried upon a bill of indictment charging breaking and entering with intent to commit a felony. He entered a plea of not guilty.

The State offered evidence which tended to show that the University Laundry building in Chapel Hill, North Carolina, had been broken into sometime between 4:30 P.M. on 9 February 1967 and 8:00 A.M. on 10 February 1967. Certain vending machines had been damaged and the money boxes were missing from a cigarette machine and a pastry machine. A small window pane had been broken out of the back door leading to the room in which the machines were located.

Arthur Summey, a detective with the Chapel Hill Police Department, in the course of his investigation "lifted" a palm print from one of the vending machines which was identified at the trial by S.B.I. Agent Steven Jones, an expert in the science of comparing fingerprints and palm prints, as being identical to a palm print of defendant.

Howard Pendergraph, an officer with the Chapel Hill Police Department, testified that he talked with defendant after his arrest about the breaking in at the University Laundry building. After Officer Pendergraph testified that he advised defendant of his constitutional rights, the following appears in the record:

"Q. After advising him of these things, did he make any statement to you about the breaking in at the University Laundry?

Defendant objects — Overruled.

A. Yes, sir.

Then the defendant said he wanted to talk to me alone and

asked Detective Summey to leave. I have known the defendant all his life. He wanted to tell me about the breakin. I told him I would rather he talked in the presence of Detective Summey about it, since Mr. Summey was assigned to the case. I called Mr. Summey back. He, the defendant, told us that on the night of February 9th he went down to the University Laundry and went in through the front door. This was about 8:00 P.M., and he broke into the cigarette machine, taking $3.00, then he left and went on home. He said it was snowing; he described it as being the night of the Carolina-Wake Forest basketball game. I know of my own knowledge that was February 9, 1967. I talked with him on February 21.

Q. Did he tell you why he went in this place?

Defendant objects — Overruled.

A. Yes, sir.

He told me he had been drinking; he did not have a job. He had either quit, or had been laid off; said he was working on a trash truck with an independent hauler. He said that was the only time he had ever been in the University Laundry plant. He did not say why he chose that place as opposed to some other."

The State rested at the conclusion of Officer Pendergraph's testimony. Defendant offered no evidence. The jury returned a verdict of guilty as charged and judgment was entered sentencing defendant to State's Prison for a term of seven to ten years. Defendant gave notice of appeal in open court, but his attorney failed to perfect the appeal within the time allowed. By certiorari defendant petitioned the court for an additional 30 days from date of the writ to make up and serve his case on appeal. The petition for certiorari was allowed by the Court in Conference on 10 October 1967.

Attorney General Bruton and Assistant Attorney General Rich for the State.

W. Harold Edwards for defendant.

BRANCH, J.

Defendant contends that the court erred in admitting his alleged confession without first conducting a voir dire examination.

In the case of *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, it is stated:

"When the State proposes to offer in evidence the defend-

ant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, both that of the State and that of the defendant, upon the question of the voluntariness of the statement. In the light of such evidence and of his observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. [Citations omitted.] The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record."

Accord: *State v. Barber,* 268 N.C. 509, 151 S.E. 2d 51; *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68; *State v. Inman,* 269 N.C. 287, 152 S.E. 2d 192; *State v. Ross,* 269 N.C. 739, 153 S.E. 2d 469; *State v. Barber,* 270 N.C. 222, 154 S.E. 2d 104; *State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286; *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Greenlee,* 272 N.C. 651, 159 S.E. 2d 22; *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868.

[1] A general objection is sufficient to challenge the admission of a proffered confession if timely made. *State v. Vickers,* 274 N.C. 311.

From a cursory examination of the record in the instant case it would seem that objection was made to a preliminary question and therefore not properly made. However, we deem it necessary to examine it with more care in order to determine whether the objection was sufficient to require the trial judge to conduct a voir dire examination.

[2] It is stated in Stansbury, North Carolina Evidence, § 27, at 51 (2d Ed. 1963): "An objection must be made in apt time, that is, as soon as the opponent has the opportunity to learn that the evidence is objectionable . . . Unless *prompt* objection is made, the opponent will be held to have waived it." (Emphasis ours)

In 6 Jones' Commentaries on Evidence, § 2518, at 4980 (2d Ed. 1926), we find the following:

"If a ground of objection is known and apparent, the objection should be immediate; . . . The practice of permitting a question to be answered without objection, and, if perchance the answer is unfavorable, then to object to both question and answer, is not proper or fair practice. It permits a party to speculate on the chances of a favorable answer before committing itself against the question."

[3, 4] A preliminary question to a witness is not usually open to objection, 2 Conrad, Modern Trial Evidence, § 1223, at 370; *Kersey v. State,* 73 Fla. 832, 74 So. 983, and ordinarily objection must be interposed when evidence is offered and received. *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598. In instant case the questions posed by the solicitor related to whether statements were made to the officers by defendant, and were immediately followed by defendant's objections. These objections were thereupon overruled. The affirmative answer to the question was expanded by the witness so as to volunteer the content of defendant's alleged confession. No other question was interposed to which defendant could object before the affirmative answer and volunteered testimony as to confession were given. The questions, objections, and answers all related to defendant's alleged confession. It is apparent to us that defendant's objection was directed to the damaging effect of an involuntary confession, rather than to the preliminary question of whether he had made statements to the officers. The objection was not late so as to allow defendant to choose between the favorable and unfavorable answer. The objection was immediately made when it became apparent that a confession was about to be offered, and was in time to have alerted the court to forthcoming proffer of confession by the State.

[4] While we recognize and reaffirm the general rule that unless an objection is made at the proper time it is waived, *State v. Bryant,* 235 N.C. 420, 70 S.E. 2d 186; *State v. Hunt, supra,* in our judgment it would be too strict and narrow a construction of the rule to hold that particular facts of this case show that objection was not properly and timely made.

Thus, upon defendant's objection the trial court should have excused the jury and in its absence heard the evidence of both the State and defendant and resolved the question of the voluntariness of the statement. The court should have then made findings of fact on this question and incorporated them into the record. *State v. Barnes, supra; State v. Gray, supra.*

Since there must be a new trial, we do not deem it necessary to consider defendant's other assignments of error.

New trial.

STATE OF NORTH CAROLINA v. OTIS LIPSCOMB

No. 413

(Filed 30 October 1968)

1. **Criminal Law § 104— motion for nonsuit — consideration of evidence**

Upon motion for judgment of nonsuit in a criminal prosecution, the evidence introduced by the State must be taken as true and must be interpreted in the light most favorable to the State.

2. **Burglary and Unlawful Breakings § 5— sufficiency of evidence**

The evidence in this case *is held* sufficient to support a finding of every element of the offense of first degree burglary.

APPEAL by defendant from *Thornburg, S.J.*, at the 29 April 1968 Criminal Session of FORSYTH.

Upon an indictment, proper in form, the defendant, having entered a plea of not guilty, was convicted of first degree burglary with a recommendation by the jury that he be sentenced to life imprisonment. From the judgment of the court, entered in accordance with the verdict, the defendant appeals as a matter of right under G.S. 7A-27(a). The sole assignment of error is the denial of his motion for judgment of nonsuit at the conclusion of the State's evidence. No other exception appears in the record.

The defendant offered no evidence in his own behalf. The evidence for the State consisted of the testimony of Robert J. Gaston and C. M. Smith, the latter being a police officer of the city of Winston-Salem.

The testimony of Gaston was to the following effect:

On the night of the alleged offense, 10 December 1967, Gaston returned to his apartment home about midnight. No one else was then in the apartment. He locked the doors and closed all of the windows, each window having a screen over it. He then went to bed and to sleep. About 3 a.m. he was awakened by someone touching his leg. He lay still for a few minutes.

An army jacket, which Gaston had worn, lay on another bed in the room. Gaston heard someone "shifting around, going through the jacket." He could see a silhouette moving about. Before getting out of bed, Gaston reached for and picked up his rifle which was near the bed. He lay in bed a bit longer and then "ejected" the rifle. He then got out of the bed, going over the foot of it, and turned on the light in the room. The defendant was lying on the floor beside the bed. Pointing the rifle at the defendant, Gaston asked him what he was doing but received no reply.

At rifle point, Gaston then conducted the defendant out to the front porch of the apartment. The bedroom door, which Gaston had closed, was open. The front door of the apartment, which Gaston had locked, was also open. The screen had been removed from one of the front windows of the apartment and a muddy footprint was on the couch under that window in the living room, which footprint was not there when Gaston went to bed. While Gaston was trying to get to his telephone to call the police, the defendant ran away. Twelve to 15 minutes elapsed between the time Gaston turned on the light and discovered the defendant in the bedroom and the time the defendant ran away. Gaston then telephoned the police and Officer Smith came to the apartment in response to the call.

Before he turned on the light in the bedroom, Gaston heard his jacket moving, it having a zipper fastener which was making a noise. When Gaston got up and turned on the light, the defendant was the only other person he saw in the apartment.

The next morning, Gaston found in his bedroom a butcher knife which did not belong to him. He found it "at the back of the bed, under the spread." He did not see the knife in the defendant's hand or hear the defendant drop it. He does not know whether it was or was not the defendant's knife. Gaston's trousers and money were upon the same bed as the jacket. There was nothing in the jacket.

The window, which, after the discovery of the defendant in the apartment, was found to be open, had been closed by Gaston but not locked because it had no lock upon it. It did have a screen over it. The window was raised when the police reached the apartment.

The testimony of Officer Smith was to the effect that he reached the apartment of Gaston in response to a telephone call at approximately 4 a.m. on the night in question. He talked with Gaston who gave him the same information related by Gaston in his testimony, together with a description of the intruder. The officer examined the apartment and found that the screen had been taken off the front window, which window was raised approximately three feet.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Ira Julian for defendant appellant.

PER CURIAM.

[1, 2] Upon a motion for judgment of nonsuit in a criminal prosecution, the evidence introduced by the State must be taken to be true and it must be interpreted in the light most favorable to the State. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. When so considered, the testimony of the witness Gaston is ample to support a finding of every element of the offense of first degree burglary. There was, therefore, no error in the denial of the defendant's motion for judgment of nonsuit.

Although this is the only ruling of the court assigned as error by the defendant, we have carefully considered the charge of the court to the jury and find therein no basis for the granting of a new trial. We find no error upon the face of the record. No objection appears upon the record to the admission of any evidence. The verdict of the jury is supported by the evidence and the judgment of the court is in accordance with the verdict.

No error.

STATE OF NORTH CAROLINA v. LEWIS
No. 250

(Filed 20 November 1968)

1. Habeas Corpus § 1— purpose of writ of habeas corpus ad subjiciendum

The office of the writ of *habeas corpus ad subjiciendum* is to give a person restrained of his liberty an immediate hearing so that the legality of his detention may be inquired into and determined.

2. Habeas Corpus § 2— determination of legality of restraint

The sole question for determination upon habeas corpus hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty.

3. Habeas Corpus § 4— appellate review

Except in cases involving the custody of minor children, G.S. 17-40, no appeal lies from a habeas corpus judgment, the remedy, if any, being by petition for a writ of *certiorari* which is addressed to the sound discretion of the appellate court.

4. Habeas Corpus § 2; Criminal Law § 40— finding as to identity in prior habeas corpus proceeding

A finding by the court in a habeas corpus proceeding that petitioner is in fact the person charged in the indictment has legal significance only as a basis for the court's decision that petitioner is not entitled to his immediate release from custody, but it has no significance in determining whether defendant is guilty of the crime charged in the indictment.

5. Criminal Law § 24— plea of not guilty

Defendant's plea of not guilty puts in issue every essential element of the crime charged and places the burden on the State to prove beyond a reasonable doubt all essential elements of the crime charged, including the identity of the person on trial as the person named in the indictment.

6. Judgments § 37; Constitutional Law § 29; Criminal Law §§ 35, 40— identity of defendant as person indicted — finding in prior habeas corpus hearing — right to jury trial on question of identity

A finding by the court in a habeas corpus proceeding at which defendant was awarded a new trial that defendant is in fact the person named in the indictment is not res judicata as to that question upon defendant's retrial, and the court's refusal at the retrial to admit evidence offered by defendant which tended to show that he is not the person named in the indictment constitutes prejudicial error, defendant being entitled as of right to a jury trial as to every essential element of the crime charged, including the question as to his identity.

7. Criminal Law § 75— applicability of Miranda — confession obtained prior to June 13, 1966

Miranda v. Arizona, 384 U.S. 436, does not apply to confessions obtained prior to the date of that decision, June 13, 1966, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made.

8. Criminal Law §§ 48, 73, 79— statements of accomplice made in defendant's presence

Statements of an accomplice made in defendant's presence which incriminated defendant are incompetent as hearsay where defendant verbally assented thereto and stated to officers in detail both before and after the accomplice made the statements all facts included in such statements, there being no implied admission by silence since defendant did not remain silent, and there being no necessity for the admission of the statements to explain the significance of defendant's assent thereto since defendant made the same statements to the officers.

9. Assault and Battery §§ 11, 16— secret assault — felonious assault

An indictment for malicious secret assault and battery based on G.S. 14-31 which contains no allegation that the victim of the assault was seriously injured is insufficient to support a conviction of felonious assault as defined in G.S. 14-32.

LAKE, J., concurring in part and dissenting in part.

HIGGINS, J., joins in concurring and dissenting opinion.

ON writ of *certiorari* to the Court of Appeals.

Defendant was tried at the October 1967 Criminal Session of Nash Superior Court before Morris, Emergency Judge, and a jury, on an indictment returned at August 1955 Term, which charged that

Jessie B. Lewis, on December 28, 1954, "feloniously and wilfully did in a secret manner, maliciously commit assault and battery with a deadly weapon to wit: a piece of iron upon one H. R. Bailey by waylaying or otherwise with intent to kill the said H. R. Bailey. . . ."

The only admitted evidence was that offered by the State. It was sufficient to support the verdict. Evidence offered in behalf of defendant, referred to in the opinion, was excluded.

The jury found defendant "guilty of secret assault with a deadly weapon, as charged in the bill of indictment." Judgment imposing a prison sentence of ten years, with a credit of four months and sixteen days for time served under prior sentence(s), was pronounced. Upon defendant's appeal, the Court of Appeals found no error. 1 N.C. App. 296, 161 S.E. 2d 497. On August 23, 1968, on defendant's petition, *certiorari* was granted.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Fields, Cooper & Henderson for defendant appellant.

BOBBITT, J.

At his trial at October 1967 Criminal Session, defendant contended, as he had contended at a *habeas corpus* hearing before Judge Cowper on February 13, 1967, that he was not Jessie B. Lewis.

At August 1955 Term, Jessie B. Lewis had pleaded *nolo contendere* to the indictment. Judgment imposing a prison sentence of ten years was pronounced. He escaped. Defendant was brought or returned to prison in North Carolina in 1965. On January 12, 1967, under the name, "Harold B. Richardson, M.D.," defendant filed a petition for a writ of *habeas corpus.* At the *habeas corpus* hearing, defendant did not attack the 1955 indictment of Jessie B. Lewis nor the State's right to imprison Jessie B. Lewis. He sought immediate release from custody on the ground he was not Jessie B. Lewis. Evidence as to defendant's identity was offered by the State and by defendant. Judge Cowper resolved the disputed *question of fact* by finding "that Jessie B. Lewis and Dr. Harold B. Richardson are one and the same person." Based on this finding of fact, Judge Cowper denied defendant's petition for immediate discharge from custody.

At the *habeas corpus* hearing, it came to Judge Cowper's attention that Jessie B. Lewis had not been represented by counsel at August 1955 Term. Thereupon, Judge Cowper vacated the plea and

judgment entered at August 1955 Term (and also pleas and judgments in other cases involving Jessie B. Lewis), and ordered that defendant be held for trial on the 1955 indictment of Jessie B. Lewis.

It is noted that an order entered by Judge Morris, which quotes from Judge Cowper's order of February 13, 1967, is our source of information concerning the matters set forth in the preceding paragraph. The record before us does not contain the minutes of the proceedings at August 1955 Term nor the record in the *habeas corpus* proceedings.

At his trial at October 1967 Criminal Session, after the State had rested its case, defendant offered witnesses whose testimony, which was taken in the absence of the jury, tended to show they had known Jessie B. Lewis and that the person on trial was not Jessie B. Lewis. The court excluded this proffered testimony on the ground the finding previously made by Judge Cowper that defendant was Jessie B. Lewis, the person charged in the 1955 indictment, constituted *res judicata* as to the identity of the person on trial. Defendant excepted to and assigned as error the court's said ruling.

[1-3] The writ returnable before Judge Cowper was a writ of *habeas corpus ad subjiciendum,* 25 Am. Jur., Habeas Corpus § 4. Aptly described as "the great and efficacious writ in all manner of illegal confinement," 3 Blackstone Commentaries 131, it is guaranteed by Article I, Section 18, of the Constitution of North Carolina. *State v. Herndon,* 107 N.C. 934, 12 S.E. 268. The office of this "most celebrated writ in the English law," 3 Blackstone Commentaries 129, "is to give a person restrained of his liberty an immediate hearing so that the legality of his detention may be inquired into and determined." 39 C.J.S., Habeas Corpus § 4. "The sole question for determination upon *habeas corpus* hearing *for alleged unlawful imprisonment* is whether petitioner is then being unlawfully deprived of his liberty." *In re Renfrow,* 247 N.C. 55, 59, 100 S.E. 2d 315, 317, and cases cited. Accord: *In re Burton,* 257 N.C. 534, 540, 126 S.E. 2d 581, 586. Except in cases involving the custody of minor children, G.S. 17-40, no appeal lies from a judgment rendered on return to a writ of *habeas corpus. In re Steele,* 220 N.C. 685, 687, 18 S.E. 2d 132, 134, and cases cited; *In re Renfrow, supra.* The remedy, if any, is by petition for writ of *certiorari,* addressed to the sound discretion of the appellate court. *In re Lee Croom,* 175 N.C. 455, 95 S.E. 903.

[4] The finding of fact made by Judge Cowper in the *habeas corpus* proceedings had legal significance only as a basis for his decision that defendant was not then entitled to immediate release from custody. It has no significance in determining whether defend-

ant is guilty of the crime charged in the 1955 indictment. Assuming valid process and sufficient accusation, the prisoner is not entitled to discharge if *probable cause* is shown for his confinement pending trial. *State v. Herndon, supra.*

Whether defendant, if the plea of Jessie B. Lewis and the judgment pronounced thereon had not been vacated, would have been entitled, in the *habeas corpus* proceedings or otherwise, to have the controverted question as to his identity decided by a jury, is not presented. Judge Cowper vacated the plea and judgment.

[5] At October 1967 Session, defendant was tried on the 1955 indictment. His plea of not guilty put in issue *every essential element of the crime charged. State v. Cooper,* 256 N.C. 372, 381, 124 S.E. 2d 91, 97. The burden was on the State to prove beyond a reasonable doubt that defendant, the person on trial, was in fact Jessie B. Lewis, the person indicted, and all other essential elements of the crime charged. *State v. Logner,* 269 N.C. 550, 553, 153 S.E. 2d 63, 66; *State v. Clyburn,* 273 N.C. 284, 292, 159 S.E. 2d 868, 873.

[6] Article I, Section 13, of the Constitution of North Carolina provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal." A statute (Chapter 23, Public Laws of 1933, later codified as § 4636(a) of the N. C. Code of 1935) which permitted a defendant, by pleading *nolo contendere* to a felony charge, to waive a jury trial and be tried by the judge, was held unconstitutional as violative of Article I, Section 13. *State v. Camby,* 209 N.C. 50, 182 S.E. 715. In the cited case, Stacy, C.J., quotes with approval from the opinion of Hoke, J. (later C.J.), in *State v. Wells,* 142 N.C. 590, 55 S.E. 210, as follows: "Two decisions of this Court — *S. v. Stewart,* 89 N.C. 564; *S. v. Holt,* 90 N.C. 749 — have held that in the Superior Court, on indictment originating therein, trials by jury in a criminal action could not be waived by the accused." Defendant was entitled as of right to a jury trial as to *every* essential element of the crime charged, including the question as to his identity.

The ruling of the trial judge excluding the testimony proffered by defendant was approved by the Court of Appeals. In our view, the texts and decisions cited do not warrant this conclusion. The cited decisions are discussed below.

Analysis of *State ex rel. Cacciatore v. Drumbright,* 116 Fla. 496, 156 So. 721, 97 A.L.R. 154, discloses the following: One Joe Cac-

ciatore "was tried in the municipal court of Tampa, upon a docket charge which ineffectually attempted to allege a violation of City Ordinance No. 455-A." The judge overruled his motion to quash, found the defendant guilty and pronounced judgment. However, the Circuit Court, in a *habeas corpus* proceeding, ordered the defendant discharged from custody on the ground the accusation on which the defendant was tried, convicted and sentenced "did not state an offense against either the City of Tampa or the State of Florida." "Subsequently, another docket charge was entered in the municipal court which . . . sufficiently charge(d) the defendant with certain acts which (did) constitute a violation of said Ordinance 455-A." The action under consideration was instituted by Cacciatore in the Circuit Court to obtain a writ of prohibition. Alleging former jeopardy, he prayed that the judge of the Tampa Municipal Court be prohibited from proceeding with the second prosecution. The Circuit Court dismissed the action. When affirming the judgment, the Supreme Court of Florida, in opinion by Brown, J., said: "(I)n *habeas corpus* proceedings, the general rule in most jurisdictions is that an order or judgment *discharging* a person in such proceedings is conclusive in his favor that he is illegally held in custody and is *res judicata* of all issues of law and fact necessarily involved in that result, and he cannot again be arrested for the same cause; that is, *upon the same warrant, indictment, or information which was therein held illegal.*" (Our italics.) The statement from 25 Am. Jur., Habeas Corpus § 157, quoted in the opinion of the Court of Appeals, is in essentially the same words used by Brown, J., in the Florida case. The opinion of Brown, J., continues: "While it usually terminates the pending proceeding against the petitioner, it does not necessarily prevent the institution of a subsequent prosecution against him under proceedings which are legal and sufficient and which remove the illegalities, or supply the defects, on account of which the order or discharge was granted."

Petition of Moebus, 74 N.H. 213, 66 A. 641 (1907), referred to by the Court of Appeals, and the prior decision, *Petition of Moebus*, 73 N.H. 350, 62 A. 170 (1905), relate to the following factual situation: In 1865 one Mark Shinborn was tried and convicted of a felony in New Hampshire and sentenced to imprisonment for ten years. Committed to prison on February 27, 1866, he escaped December 3, 1866, and fled from the State. In 1900, the prisoner, a resident of New York, was arrested in that State. He was brought into New Hampshire upon a requisition issued by its Governor. Although he asserted he was Henry E. Moebus, not Mark Shinborn, he refused to litigate separately an issue as to his identity. He asserted his impris-

onment in New Hampshire was unlawful on the ground "he was lawfully entitled to a hearing before a competent court within (New Hampshire) prior to his commitment to prison," and that, upon denial of such hearing (trial), he was entitled to be liberated. In the 1905 decision, his original petition was denied. Speaking for the Supreme Court of New Hampshire, Parsons, C.J., said: "Being under sentence for felony and unlawfully at large, Shinborn could lawfully be arrested and returned to imprisonment, even by a private person, without warrant. *State v. Holmes,* 48 N.H. 377. The foundation of the petitioner's claim to a trial before his committal to prison rests upon the contention that he is not Shinborn. If he is Shinborn, no wrong has been done him. *If he is not Shinborn, he was illegally committed and is illegally confined. He may be entitled now to a trial of that question, if none has been had. As he declines to ask for such trial, and refuses to contest the issue if raised by the state, no ground of error appears.* As heretofore said, his refusal to litigate the question of his identity is an admission that he is Shinborn, and it follows that he is legally confined in the state prison, unless his term of imprisonment has expired." (Our italics.) In the 1907 decision, a second petition, which contains substantially the same allegations as the first, was denied (1) on the grounds on which the first petition was denied, and (2) on the further ground that it attempted to present again questions already decided adversely to petitioner in the 1905 decision.

[6] Testimony proffered by defendant, which tended to show he was not Jessie B. Lewis, the person charged in the 1955 indictment, was competent and should have been admitted. The ruling of the trial judge excluding this proffered testimony, and the decision of the Court of Appeals approving this ruling, were erroneous. On this account, defendant is entitled to a new trial.

We turn now to questions relating to the competency of portions of the testimony of Sheriff G. O. Womble.

The State's evidence, in which defendant is identified as Jessie B. Lewis, consisted of the testimony of H. Reese Bailey, Fred L. Wood and G. O. Womble. Bailey, then assistant county jailer, and Wood, then deputy sheriff, testified as witnesses to what occurred in the Nash County Jail on January 28, 1955, on the occasion Bailey was assaulted. Sheriff Womble testified to the escape of Lewis and of one Dock Evans, both prisoners, from the Nash County Jail on January 28, 1955; to their arrest on January 31, 1955; to their return to and reconfinement in the Nash County Jail; to statements made to him by Lewis before and after his return and reconfinement;

and to statements made by Evans in the presence of Lewis in jail after their return and reconfinement.

[7] Defendant assigned as error the admission, over his objections, of Sheriff Womble's testimony as to statements made by Lewis and as to statements made by Evans.

Sheriff Womble's testimony tends to show: After the arrest of Lewis and Evans on January 31, 1955, he talked with Lewis, first at the police station at Rocky Mount and later after the reconfinement of Lewis in the Nash County Jail. Lewis told him in substance that, on January 28, 1955, while a prisoner, he had struck Bailey on the head with a piece of iron, knocking him down; that he had dragged Bailey into the bullpen and locked the door; and that, with Bailey's keys, he unlocked an outer door through which he and Evans, a fellow-prisoner, escaped. After Lewis made these statements, he (Sheriff Womble) talked with Evans and Lewis in the Nash County Jail. Evans then told him substantially what Lewis had previously told him with reference to what happened on January 28, 1955. On this occasion, after Evans had made these statements, Lewis told him the statements made by Evans were correct. Thereupon, Lewis repeated the statements he had made prior to the Sheriff's conversation with both Lewis and Evans in the Nash County Jail.

Evans did not testify at the trial at October 1967 Criminal Session. Sheriff Womble testified he did not know where Dock Evans was at that time — that he had not "seen him in years."

The trial judge, in the absence of the jury, conducted a *voir dire* examination and made the findings of fact set out below.

With reference to the portion of Sheriff Womble's testimony relating to statements made to him by Lewis, the trial judge found as a fact "that the statements made to the sheriff by the defendant were freely, voluntarily, knowingly and intelligently made, without any threat, inducement, reward or hope of reward to the defendant, and after he had been advised of his constitutional rights with reference to any statement he might make being used against him."

With reference to the portion of Sheriff Womble's testimony relating to statements made by Evans, the trial judge found as a fact "that the conversation about which the sheriff was asked, which he had with Dock Evans in the presence of the defendant, was made under such circumstances and was of the type conversation, particularly the statement made to the sheriff by Dock Evans in the presence of the defendant, were such as to call for an answer on the part

of the defendant, and the court rules that the conversation between the sheriff and Dock Evans in the presence of the defendant is competent and admissible against the defendant."

It is clear Sheriff Womble's testimony as to statements made by Evans was incompetent unless his testimony as to statements made by Lewis was competent. This is conceded by the Attorney General. Hence, we consider first whether the testimony as to incriminating statements made by Lewis was competent.

The testimony heard on *voir dire* was sufficient to support the findings of the trial judge to the effect Lewis voluntarily made the statements attributed to him after he had been advised of his constitutional rights in the respects set forth. However, this testimony shows the warnings given Lewis with reference to his constitutional rights fell short of certain of the requirements established and set forth in *Miranda v. Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974, decided June 13, 1966.

The Court of Appeals, in accord with its decision in *State v. Branch,* 1 N.C. App. 279, 161 S.E. 2d 492, held *Miranda* did not apply to statements made by Lewis in 1955; and that the trial judge, based upon his findings as to full compliance with the constitutional standards applicable in 1955, properly admitted Sheriff Womble's testimony as to Lewis's statements.

Decisions in other jurisdictions, based largely upon the stress placed upon particular words and phrases in the opinion of Mr. Chief Justice Warren in *Johnson v. New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882, 86 S. Ct. 1772, decided June 20, 1966, are in sharp conflict. Those decided prior to *State v. Branch, supra,* are discussed by Brock, J., in his opinion for the Court of Appeals. Since there is to be a new trial, this Court deems it appropriate to rule definitively as to whether, at that trial, the admissibility of testimony as to statements made by Lewis while in custody is to be determined with reference to the requirements of *Miranda* or with reference to the constitutional standards applicable on or about January 31, 1955, when the statements were made.

Decisions holding testimony that a defendant's in-custody confession is not admissible in the absence of full compliance with *Miranda* when offered in trials or retrials begun after June 13, 1966, include the following: *Guyette v. State,* 438 P. 2d 244 (Nev.); *United States v. Vanterpool,* 394 F. 2d 697 (2d Cir.); *Groshart v. United States,* 392 F. 2d 172 (9th Cir.); *Smith v. State,* 210 So. 2d 826 (Ala.); *Evans v. United States,* 375 F. 2d 355 (8th Cir.); *Creech v. Commonwealth,* 412 S.W. 2d 245 (Ky.); *Amsler v. United States,* 381

F. 2d 37 (9th Cir.); *People v. Doherty,* 59 Cal. Rptr. 857, 429 P. 2d 177; *Dell v. State,* 231 N.E. 2d 522 (Ind.); *State v. McCarther,* 197 Kan. 279, 416 P. 2d 290; *Gibson v. United States,* 363 F. 2d 146 (5th Cir.); *Thomas v. State,* 3 Md. App. 101, 238 A. 2d 558; *Government of Virgin Islands v. Lovell,* 378 F. 2d 799 (3d Cir.); *State v. Shoffner,* 31 Wis. 2d 412, 143 N.W. 2d 458; *State v. Brock,* 101 Ariz. 168, 416 P. 2d 601; *State v. Ruiz,* 49 Haw. 504, 421 P. 2d 305. (Note: The last four cases cited do not refer to Johnson.)

Decisions holding testimony that a defendant's in-custody confession made prior to June 13, 1966, is admissible in retrials begun after June 13, 1966, where there was full compliance with the constitutional standards applicable when the confession was made, include the following: *People v. Sayers,* 22 N.Y. 2d 571, 240 N.E. 2d 540; *Murphy v. State,* 426 S.W. 2d 509 (Tenn.); *Boone v. State,* 3 Md. App. 11, 237 A. 2d 787; *State v. Branch, supra; State v. Vigliano,* 50 N.J. 51, 232 A. 2d 129; *Jenkins v. State,* 230 A. 2d 262 (Del.); *People v. Worley,* 37 Ill. 2d 439, 227 N.E. 2d 746; *Commonwealth v. Brady,* 43 Pa. Dist. & Cnty. Rpts. 2d 325.

Articles and comments published since Johnson, in which the subject under consideration is discussed, include the following: Schaefer, *The Control of "Sunbursts"; Techniques of Prospective Overruling,* 22 Record of N.Y.C.B.A. 394 (1967); 25 Wash. and Lee L. Rev. 108 (1868); 19 S. C. L. Rev. 863 (1967); 116 U. Pa. L. Rev. 316 (1967); 18 Syracuse L. Rev. 117 (1966).

For general principles relating to retroactive or prospective operation of a new rule adopted by a court in overruling precedent, reference is made to Comment Notes (Annotations) in 14 L. ed. 2d 992-1015 and in 10 A.L.R. 3d 1371-1447, and to decisions and legal periodicals cited therein. These general principles are summarized in the Comment Note in 14 L. ed. 2d at 994 as follows:

"In the early decisions, the courts established a policy in favor of treating all overruling decisions as operating retroactively as well as prospectively, but the modern decisions have recognized *the power* of a court to hold that an overruling decision is operative prospectively only and is not even operative upon the rights of the parties to the overruling case, and it has generally been held that as a matter of constitutional law, retroactive operation of an overruling decision is neither required nor prohibited. Thus, the question whether and to what extent a new rule adopted in an overruling case will be applied retroactively is not a matter of constitutional compulsion, but a matter of judicial attitude, depending on the circumstances of

the particular situation and the nature and purpose of the particular overruling decision involved.

"The following factors are among those which have been deemed to warrant a court's complete or partial denial of retroactive operation to an overruling decision: *justifiable reliance on the overruled case;* ability to effectuate the new rule adopted in the overruling case without giving it retroactive effect; *and the likelihood that retroactive operation of the overruling decision will substantially burden the administration of justice.*" (Our italics.)

We pass, without discussion, decisions given *unlimited* retroactive operation, *e.g., Gideon v. Wainwright,* 372 U.S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733. We confine discussion to decisions holding the newly adopted rule overruling precedent, is to operate prospectively and not retroactively.

Linkletter v. Walker, 381 U.S. 618, 14 L. ed. 2d 601, 85 S. Ct. 1731, decided June 7, 1965, bears upon whether *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933 (1961), which overruled *Wolf v. Colorado,* 338 U.S. 25, 93 L. ed. 1782, 69 S. Ct. 1359 (1949), was to be applied retroactively or prospectively. Under the new rule adopted in *Mapp,* exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment. It was held in *Linkletter,* on *certiorari* to review a decision in federal *habeas corpus* proceedings, that a State court conviction which had become final before the decision in *Mapp* was not subject to collateral attack because of the admission of evidence at the trial that did not meet the constitutional standards of *Mapp.* Although *Linkletter* is silent with reference to the application of *Mapp* to cases then on appeal, the new rule was applied to reverse *Mapp's* conviction, and also to reverse convictions in *Fahy v. Connecticut,* 375 U.S. 85, 11 L. ed. 2d 171, 84 S. Ct. 229 (1963), and *Stoner v. Calofirnia,* 376 U.S. 483, 11 L. ed. 2d 865, 84 S. Ct. 889 (1964). In each of these cases, the search and seizure — illegal under *Mapp* — occurred prior to the decision in *Mapp.*

Tehan v. Shott, 382 U.S. 406, 15 L. ed. 2d 453, 86 S. Ct. 459, decided January 19, 1966, bears upon the prospective or retroactive application of *Griffin v. California,* 380 U.S. 609, 14 L. ed. 2d 106, 85 S. Ct. 1229, decided April 28, 1965. In *Malloy v. Hogan,* 378 U.S. 1, 12 L. ed. 2d 653, 84 S. Ct. 1489, decided June 15, 1964, which overruled *Twining v. New Jersey,* 211 U.S. 78, 53 L. ed. 97, 29 S. Ct. 14, and *Adamson v. California,* 332 U.S. 46, 91 L. ed. 1903, 67 S. Ct. 1672, 171 A.L.R. 1223, it was held the Fifth Amendment privilege

against self-incrimination was made applicable to the States by the Fourteenth Amendment. *Griffin* held the Self-Incrimination clause of the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." It was held in *Tehan,* on *certiorari* to review a decision in federal *habeas corpus* proceedings, that the petitioner could not attack collaterally, on account of failure to comply with the rules adopted in *Malloy* and *Griffin,* State court convictions which had become final prior to those decisions. Although *Griffin* is silent as to cases then on direct appeal, it appears that *Griffin* had been so applied in *O'Connor v. Ohio,* 382 U.S. 286, 15 L. ed. 2d 337, 86 S. Ct. 445. It is noted that the constitutional defect involved in the rule adopted in *Griffin* is quite different from the constitutional defect involved in *Mapp* and *Miranda* and *United States v. Wade,* 388 U.S. 218, 18 L. ed. 2d 1149, 87 S. Ct. 1926, and *Gilbert v. California,* 388 U.S. 263, 18 L. ed. 2d 1178, 87 S. Ct. 1951, both decided June 12, 1967, and discussed below. Since the constitutional defect referred to in *Griffin* related to an incident occurring *during* the trial, a new trial could be conducted free from such defect and without prejudice to the prosecution or defense. However, the new rules adopted in the other overruling decisions relate to matters occurring prior to trial where law enforcement officers complied fully with constitutional standards then applicable. In these instances, a subsequent prosecution is defeated or seriously impaired if the evidence is rejected on the ground the officers did not comply with new rules thereafter promulgated in the overruling decisions.

Johnson v. New Jersey, supra, bears upon the prospective or retroactive application of *Escobedo* and of *Miranda,* which superseded earlier decisions holding the admissibility of confession evidence was determinable on the basis of whether the confession was voluntary or coerced. At Johnson's 1959 trial in a New Jersey Court, testimony was admitted as to in-custody incriminating statements Johnson had made in 1958. Johnson's conviction became final in 1960. After *Miranda,* Johnson attacked the judgment collaterally in post-conviction proceedings on the ground his 1958 confessions had been obtained without complying with the constitutional standards first announced in *Miranda.* Johnson's asserted right to a new trial was rejected on the ground *Miranda* was to be applied prospectively and not retroactively. In addition to passing upon the question directly presented, the opinion of Chief Justice Warren states: "(T)o upset all of the convictions still pending on direct appeal which were obtained in trials preceding *Escobedo* and *Miranda* would impose an unjustifiable burden on the administration of justice. At the same

time, we do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal." Thus, in *Johnson,* the Court, *in its overruling decision,* held the rule established therein would not be applied to cases already tried and then on direct appeal.

Stovall v. Denno, 388 U.S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967. decided June 12, 1967, bears upon the prospective or retroactive application of *United States v. Wade, supra,* and *Gilbert v. California, supra,* which, on direct review, had held that lineup identification testimony should be excluded if it was obtained by exhibiting an accused, in the absence of his counsel and before trial, to identifying witnesses. In *Stovall,* on *certiorari* to review a decision in federal *habeas corpus* proceedings, it was held that the petitioner could not attack collaterally a State court judgment which had become final prior to the decisions in *Wade* and in *Gilbert.* In addition, it was stated by Mr. Justice Brennan that "no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial in direct review." Although the opinion does not deal specifically with the subject of trials or retrials begun after *Wade* and *Gilbert* were decided, the basis of decision is epitomized by Mr. Justice Brennan in these words: "We hold that *Wade* and *Gilbert* affect only *those cases* and *all future cases* which involved *confrontations* for identification purposes *conducted* in the absence of counsel *after this date.*" (Our italics.)

Decisions subsequent to *Stovall,* involving trials begun after *Wade* and *Gilbert* were decided and holding that the admissibility of testimony as to identification in a lineup depends upon whether the lineup occurred before or after the decisions in *Wade* and *Gilbert* were announced, include the following: *People v. Haston,* 70 Cal. Rptr. 419, 444 P. 2d 91; *Commonwealth v. Nassar,* 237 N.E. 2d 39 (Mass.); *Barnes v. State,* 245 A. 2d 626 (Md. App.). Also, see *Crume v. Beto,* 383 F. 2d 36 (5th Cir.), and *United States v. Hutto,* 393 F. 2d 783 (4th Cir.).

Consideration of these overruling decisions leaves the impression the Supreme Court of the United States has not spoken definitively on the precise question now under such consideration. Pending such decision, trial courts in this jurisdiction will be guided by our decision herein.

In determining judicial policy, the opinion in *Stovall* states: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) *the extent of the reliance by law enforcement authorities on the old standards,* and (c) *the*

effect on the administration of justice of a retroactive application of the new standards." (Our italics.) Obviously, law enforcement officers relied on the constitutional standards applicable at the time of the search and seizure, and at the time of the confession, and at the time of the lineup. The date the trial or retrial is commenced is unrelated to whether the law enforcement officers obtained the evidence according to constitutional standards upon which they reasonably placed reliance. As stated by Justice Schaefer, of the Supreme Court of Illinois, in *The Control of "Sunbursts": Techniques of Prospective Overruling, op. cit.* at 411: "The earlier constitutional standards were relied upon, not at the moment that the trial commenced, but at the moment that the interrogation took place."

[7] In our view, *Miranda* should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made. We perceive a trend towards this conclusion in decisions of the Supreme Court of the United States discussed herein.

On this phase of the case, we are in accord with the decision of the Court of Appeals. The statement in *State v. Jackson,* 270 N.C. 773, 774, 155 S.E. 2d 236, 237, inconsistent with the present decision, is withdrawn. The present decision is in accord with the statement in *State v. Fox,* 274 N.C. 277, 291, 163 S.E. 2d 492, 502.

Admissibility of testimony as to statements made by Evans which incriminated Lewis is to be considered in the light of legal principles hereafter set forth.

[8] "If a statement is made in a party's presence under such circumstances that a denial would naturally and properly be expected if the statement were untrue, his silence or failure to deny is admissible against him as an implied admission." Stansbury, North Carolina Evidence, Second Edition, § 179. As to circumstances calling for such denial, see *State v. Guffey,* 261 N.C. 322, 134 S.E. 2d 619, and cases cited; *State v. Moore,* 262 N.C. 431, 137 S.E. 2d 812; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. Although the quoted finding of fact relating to statements attributed to Evans incorporates certain language ordinarily used in the statement of this rule, the rule does not apply to the factual situation under consideration for the reason Lewis, according to Sheriff Womble, did not remain silent.

Assuming the incriminating statements attributed to Evans were made in Lewis's presence and that Lewis verbally assented thereto

but made no further statement, the testimony as to the statements made by Evans would be competent solely to explain the significance of Lewis's assent. The factual situation under consideration is different. According to Sheriff Womble, Lewis, both before and after the statements attributed to Evans were made, stated in detail to Sheriff Womble all facts included in the statements attributed to Evans which tended to incriminate Lewis. This being true, no necessity existed for the admission of the statements attributed to Evans in order to explain the significance of Lewis's assent thereto. Absent a sound reason for creating an exception thereto, the rule against hearsay evidence renders incompetent the testimony as to the unsworn declarations of Evans.

Since a new trial is awarded on other grounds, we need not decide whether the erroneous admission of the testimony as to statements made by Evans would constitute error of such prejudicial import as to require the award of a new trial. Whether an error is to be considered prejudicial or harmless must be determined in the context of the entire record. Suffice to say, at the next trial, if circumstances are substantially the same as those disclosed by the present record, error will be avoided by the exclusion of the testimony as to statements made by Evans.

Although not properly assigned as error on defendant's appeal to the Court of Appeals nor brought forward in defendant's brief, we deem it appropriate to call attention to the subject discussed below.

[9] The 1955 indictment on which defendant was tried is based on G.S. 14-31, which provides: "If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be guilty of a felony. . . ." The felony described in G.S. 14-31 is often referred to as malicious secret assault and battery with a deadly weapon. The maximum punishment therefor is imprisonment for twenty years.

G.S. 14-32 provides: "Any person who assaults another with a deadly weapon with intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony. . . ." The felony described in G.S. 14-32 is often referred to as felonious assault. The maximum punishment therefor is imprisonment for ten years.

The jurors were instructed they might return one of four possible verdicts: (1) Guilty as charged; or (2) guilty of an assault with a deadly weapon with intent to kill, inflicting serious bodily injury

not resulting in death; or (3) guilty of an assault with a deadly weapon; or (4) not guilty. Although there was ample evidence to the effect Bailey, the victim of the assault, was seriously injured, the 1955 indictment contains no allegation to this effect. Consequently, since the indictment does not charge all essentials of the crime of felonious assault as defined in G.S. 14-32, a verdict that defendant was guilty of such felonious assault could not be sustained. In this connection, see *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233, and *State v. Overman,* 269 N.C. 453, 464, 153 S.E. 2d 44, 54, and cases cited therein. The indictment in *State v. High,* 215 N.C. 244, 1 S.E. 2d 563, contained an allegation that the victim of the assault sustained "serious damage and injury, to wit, on or about the head."

For the error indicated, the decision of the Court of Appeals is reversed and the cause is remanded to that Court with direction to award a new trial to be conducted in accordance with the legal principles stated herein.

Error and remanded.

LAKE, J., concurring in part and dissenting in part:

I concur in the decision that the defendant is entitled to a new trial. I also concur in all of the majority opinion except the portion of it dealing with the applicability to this case of the decision of the Supreme Court of the United States in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, and with the admissibility of the testimony of Sheriff Womble as to the statements made to him by the defendant and by Evans.

It is my view that the *Miranda* rule does apply to this case and, consequently, the testimony of Sheriff Womble as to the statements made to him by the defendant was incompetent. As the majority opinion points out, this compels the conclusion that the testimony of the sheriff as to statements made to him by Evans in the presence of the defendant was also incompetent. If the defendant's express admission was incompetent by reason of the *Miranda* rule, the contemporaneous statement by Evans could not be competent as an implied admission by the defendant. The defendant having the constitutional right to remain silent throughout the interrogation by the sheriff, his failure to deny the statement by Evans could not be deemed an implied admission that the Evans statement was true. *State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286.

The majority opinion is to the effect that, though a trial be commenced after the *Miranda* decision, the admissibility in evidence at such trial of a statement made by the defendant in the course of

custodial interrogation is not affected by the *Miranda* rule, if the statement was made before the date of that decision. With this I am unable to agree. I believe that for trial courts to follow this course will result in reversals of convictions otherwise proper.

Like Justices Harlan, Stewart, White and Clark, who dissented from the *Miranda* decision, I believe the rule established by that case is unsound and the result of a misinterpretation of the Fourteenth Amendment to the Constitution of the United States. Consequently, I have no desire to see the effect of that decision enlarged, either as to the content of the rule or as to the time of its effectiveness. The merits of the *Miranda* decision are, however, not before us.

As stated in my dissenting opinion in *Rabon v. Hospital,* 269 N.C. 1, 152 S.E. 2d 485, it is my view that the judicial power does not extend to the making of a new rule of law applicable only to the future. For that reason I am unable to concur in those portions of the majority opinion which seem to imply that this Court may lawfully exercise this power, which is the very essence of the legislative power. That power is, in my opinion, denied us by Art. I, § 8, and Art. II, § 1, of the Constitution of North Carolina, but that question is not before us in this case and any such implications in the majority opinion are, at the most, dicta.

While, for like reason, it is my view that the Supreme Court of the United States has no lawful authority under the Constitution of the United States to give to an interpretation of that document by it prospective operation only, that question is not before us. The Supreme Court of the United States has ruled that it does have that authority, and its determination of that question is binding upon us, being, itself, an interpretation of the Constitution of the United States.

Assuming the Supreme Court of the United States has that authority, as we must for the purposes of this case, it is not for this Court to determine whether a decision by the Supreme Court of the United States should or should not be retroactive, or, if it be not fully retroactive, to determine when its effectiveness commences. That is a question to be determined by the Supreme Court of the United States and by no other tribunal. Unless the Supreme Court of the United States otherwise declares, its interpretations of the Constitution of the United States are retroactive and are applicable, where otherwise so, to all trials occurring thereafter, without regard to when the facts giving rise to the question arose. When the Supreme Court of the United States has otherwise declared, its declaration is conclusive of the question as to when its interpretation of

the Constitution of the United States takes effect and conclusive of the question as to which trials are to be conducted under the new rule announced by it and which are to be conducted under the former rule.

The Supreme Court of the United States has so spoken in *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, with reference to the effective date of its *Miranda* decision. Consequently, the discussion in the majority opinion, in the present case, as to principles governing determination of when a decision, which changes the law, should be declared retroactive and just how retroactive it should be, is not pertinent to the case now before us. Whether we agree with *Johnson v. New Jersey* or not, it is the authoritative answer to the question of when the *Miranda* rule took effect and determines which confessions (time-wise) are admissible and which are not. The only question for us is, What did the *Johnson* case say about this and what did the Court mean by what it said?

This is what the Court said in *Johnson v. New Jersey:*

"In this case we are called upon to determine whether *Escobedo v. Illinois* * * * and *Miranda v. Arizona* * * * should be applied retroactively. We *hold* * * * that *Miranda* applies only to cases in which the *trial began* after the date of our decision one week ago. * * *

"[R]etroactive application of * * * *Miranda* would seriously disrupt the administration of our criminal laws. It would require retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. * * *

"In the light of these various considerations, we conclude that *Escobedo* and *Miranda* * * * should not be applied retroactively. The question remains whether *Escobedo* and *Miranda* shall affect cases still on direct appeal when they were decided or whether their application shall *commence with trials begun* after the decisions were announced. * * *

"All of the reasons set forth above for making *Escobedo* and Miranda nonretroactive suggest that these decisions should apply only to *trials begun* after the decisions were announced. Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. * * * Prospective application only to *trials begun* after the standards were

announced is particularly applicable here. * * * In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained *in trials* preceding * * * *Miranda* would impose an unjustifiable burden on the administration of justice. * * *

"In the light of these additional considerations, *we conclude* that * * * *Miranda* should apply only to cases *commenced* after those decisions were announced. * * *

"The disagreements among the other courts concerning the implications of *Escobedo,* however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in *Miranda,* and these guidelines are therefore available only to persons whose *trials had not begun as of June 13, 1966.*" (Emphasis added throughout.)

When a court says in its opinion that it "holds" a certain thing, this statement, and not the reasons given therefor, determines what that case decides. I am unable to escape the conclusion that the *Johnson* case decides that the *Miranda* rule applies to the introduction of a confession at any trial, which trial begins after the *Miranda* case was decided, 13 June 1966, irrespective of when the confession was obtained. Consequently, I cannot concur in this statement in the majority opinion in the present case:

"In our view, *Miranda* should not and does not apply to confessions obtained prior to that decision, when offered at trials or retrials beginning thereafter, where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made."

Let us suppose an arrest and interrogation just prior to the *Miranda* decision. The interrogating officer did not inform the prisoner of his right to have counsel appointed, he being an indigent. The prisoner confessed in response to interrogation otherwise proper. The prisoner thereafter escaped before trial and has just been recaptured. He is now brought to trial and the confession is offered in evidence and admitted over his objection. Can there be any doubt as to what the Supreme Court of the United States would hold, assuming it adheres to its decisions in the *Miranda* and *Johnson* cases? In the language of the *Johnson* case, I can find no support for the view that the admissibility of the confession depends on when it was obtained, rather than on when the trial at which it was used commenced.

There remains for consideration the question of whether a new trial, ordered because of errors in a former trial, is indeed a new trial

or a mere continuation of the old one. Is the new trial, which gets under way long after the announcement of the *Miranda* decision, a trial "begun" before that decision was handed down merely because the case was started by an indictment returned prior to that decision and an abortive trial was then had? In my opinion the answer is obviously, "No." The old, erroneous trial is a nullity, in this respect at least.

Though the decisions of other courts could not alter the rule of the *Johnson* case as to the effective date of the *Miranda* decision, I am strengthened in my view by the fact that, according to the majority opinion in this case, a substantial majority of the decisions from other jurisdictions reach the same conclusion.

HIGGINS, J., joins in this opinion.

STATE OF NORTH CAROLINA v. LEROY THORPE

No. 247

(Filed 20 November 1968)

1. Constitutional Law § 32— right to counsel — in-custody interrogation

Indigent defendant's failure to request counsel during in-custody questioning following his arrest cannot be regarded as a waiver of right to legal representation where (1) the defendant was a retarded and uneducated 20-year-old youth who had left school before completing the third grade, and (2) the officers, although advising defendant of his rights, including a statement that they would hire a lawyer if he could not afford one, failed to explain to defendant that he was entitled to counsel during the interrogation.

2. Criminal Law § 76— admissibility of confessions — presumptions

In determining the admissibility of a confession the courts are no longer permitted to rely on the presumption that a confession is deemed to be voluntary until and unless the contrary is shown.

3. Constitutional Law § 32— right to counsel — indigent defendant

Not only is accused entitled to representation at the trial, but under certain circumstances he is entitled to counsel at his in-custody interrogation; if accused is without counsel, and is indigent, counsel must be provided by the authorities or be intelligently waived.

4. Criminal Law § 75— competency of confession — in-custody interrogation — waiver of counsel

Where officers did not advise uneducated and retarded indigent defend-

ant of his right to counsel during in-custody interrogation following his arrest, the confession obtained during the interrogation is rendered incompetent, since defendant's failure to request counsel cannot be regarded as a waiver of right to counsel.

5. Burglary and Unlawful Breakings § 6— instructions — felonious intent

In prosecution for first degree burglary upon indictment charging that defendant did break and enter with the felonious intent to ravish and carnally know a named female by force and against her will, the trial court erred in merely instructing the jury that they must find that the breaking and entering was done "with the intent to commit a felony," it being necessary that the court charge an intent to commit the felony designated in the indictment.

6. Burglary and Unlawful Breakings § 7— instructions on possible verdicts

In first degree burglary prosecution upon indictment charging that defendant did break and enter with the felonious intent to ravish and carnally know a named female by force and against her will, trial court erred in failing to submit the question of defendant's guilt of non-felonious breaking as authorized by G.S. 14-54 where there was evidence that the defendant, a dull youth of previous good character, had made advances to other females on three occasions prior to the offense charged and, when his advances were rejected, had abandoned them without the slightest show of force.

7. Burglary and Unlawful Breakings § 1— intent

In burglary prosecution, the jury must find the intent in the mind of the intruder at the time he forced entrance into the house.

HUSKINS, J., concurs in result.

BOBBITT, J., concurring in result.

SHARP, J., joins in concurring opinion.

APPEAL by defendant from *Parker, J.*, January 29, 1968 Criminal Session, NASH Superior Court.

In this criminal prosecution the defendant was tried for the capital felony of burglary in the first degree. The indictment charged: ". . . Leroy Thorpe . . . on the 9th day of July [1967], with force and arms . . . unlawfully, willfully, burglariously and feloniously did break and enter the dwelling house of one Andrew Mullen at or about the hour of 12:20 o'clock a.m. midnight in the night of said date, said dwelling house being then and there actually occupied by Mrs. Andrew Mullen, with the felonious intent to unlawfully, willfully and feloniously ravish and carnally know one Mrs. Andrew Mullen, a female in said dwelling, by force and against her will. . . ."

The evidence disclosed the following: On the date involved, Mrs. Andrew Mullen, white, lived with other members of her family in her husband's house in Nash County. The defendant, a 20 year old colored male, lived in the community. He is described in the record as being uneducated, having quit school before he completed the third grade. He was classified as mentally retarded, with an I.Q. of 67. Witnesses described him as being of good character, never having been in any trouble.

Mrs. Mullen testified that about midnight she was awakened by her grandchild crying out. The room was dimly lighted by kerosene lamp. She saw the defendant standing at the foot of the bed. "I jumped up and tried to turn the light on but the lights would not come on. I said, 'What are you doing in here?' He whirled around and went right back out. The last thing I saw was his feet going out the front room window. . . . I had no conversation with him other than to holler out 'What are you doing in here?' He did not do anything to me while he was in there. . . . It was my shoe I threw at him. He never said anything."

The screen over the window through which the intruder escaped was cut. The electric light switch on the outside was disengaged. The witness identified the defendant, Leroy Thorpe, as the intruder in her bedroom. She reported the occurrence to officers, who took Thorpe in custody. Shortly after the arrest, the officers advised him that he need not answer any questions, that if he did the answers might be used against him. They advised him that he had the right to refuse answers at any time. Sheriff Womble testified: "I told him we would hire him a lawyer if he could not afford one. . . . He didn't request any lawyer." The defendant was indigent.

At the trial, the State undertook to introduce the in-custody admissions made by the defendant. His court-appointed trial counsel objected. The presiding judge conducted a voir dire examination in the absence of the jury. At the conclusion of the examination the Court entered the following:

> "The Court holds and finds as a fact that any statement made to Sheriff Womble and to Deputy Sheriff Doughtie was made freely and voluntarily without duress, coercion or threat, and without reward or promise of reward, and after the defendant had been fully warned of all rights that he had under the Constitution of the State of North Carolina and the Constitution of the United States, and that said statement was freely, voluntarily and knowingly made to the Sheriff and Deputy Sheriff by the defendant during the course of the investigation."

In the presence of the jury, the officers related the incriminating statements made by the defendant immediately after his arrest. These include an admission that on the afternoon of July 9, after drinking some wine and liquor, he went to a nearby cafe about 6:00 and while there he made some improper proposals to a white waitress. This incident took place just outside the building. She "cussed him out" and he left. Later, he went to the home of Henry Williams, colored, who was not at home. While the defendant was there, he made advances to Anne Williams, age 16. When she declined his proposition, he left. Later that night, he went to a house where he had seen a white girl who was wearing shorts and with whom he had talked shortly before night. He said he liked her looks. He went to the house, entered by the back door, which was closed but not locked, and went into the girl's bedroom. She made outcry and he immediately left. Later on, he went to the Mullen home and entered through a window after cutting the screen. He said his purpose was to find someone who would engage in intercourse. These statements were related to the jury over the defendant's objection.

The defendant testified as a witness in his own behalf. He admitted being at the Mullen house looking for a mule which had strayed from the pasture. He denied, however, entering the Mullen home and denied making the incriminating statements the officers attributed to him. He introduced numerous witnesses who testified to his good character. Members of his family gave evidence tending to establish an alibi.

The jury returned a verdict of guilty of burglary in the first degree and recommended the punishment be imprisonment for life in the State's prison. From the Court's judgment in accordance with the jury's verdict, the defendant appealed.

T. W. Bruton, Attorney General; Andrew A. Vanore, Jr., Staff Attorney, for the State.

W. O. Rosser for the defendant.

HIGGINS, J.

[1] The first assignment of error involves the admissibility of the defendant's confession. Before permitting the investigating officers to relate to the jury the defendant's incriminating admissions, the Court conducted a voir dire examination in the jury's absence. The evidence disclosed the officers first talked with Mrs. Mullen, who had observed and recognized the defendant as the intruder in her home at about midnight. On the basis of her identifying statements,

they arrested Leroy Thorpe. The in-custody interrogation, therefore, was not for the purpose of making an arrest, but for the purpose of buttressing the proof of the burglary charge against the defendant. The officers testified that before the interrogation, they gave the defendant warnings as to his rights, including the statement that they "would hire a lawyer for him if he could not afford one". The officers testified: "He did not request any lawyer".

At this stage of the proceeding the officers had in custody a dull, retarded, uneducated, indigent boy 20 years old who had left school before he completed the third grade. In giving the advice with respect to counsel, the officers did not explain to him that he was entitled to counsel during the interrogation. To his inexperienced mind, in all probability, he understood the officers to mean that counsel would be made available at his trial. Counsel at in-custody questioning upon arrest was something relatively new at that time. His failure to request counsel at the interrogation is understandable. The failure to make the request under these circumstances was not a waiver of the right to legal representation during the questioning.

[1, 2] The Court, at the conclusion of the voir dire examination, did not make any findings with respect to counsel. The evidence before the Court was not sufficient to justify a finding that counsel at the interrogation was offered, or the defendant's right thereto was understandably waived. In concluding the defendant was entitled to have counsel at his interrogation, and the right was not waived, we are no longer permitted to rely on the presumption that a confession is deemed to be voluntary until and unless the contrary is shown. Our rules to that effect have been discussed and applied in many decisions. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365; *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797; *State v. Goff,* 263 N.C. 515, 139 S.E. 2d 695; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363.

[3] Recent decisions of the United States Supreme Court, however, have forced us to re-examine our trial court practice with respect to counsel in cases in which constitutional rights against self-incrimination are involved. Not only is the accused entitled to representation at the trial, but under certain circumstances, he is entitled to counsel at his in-custody interrogation. If the accused is without counsel, and is indigent, counsel must be provided by the authorities, or intelligently waived. The prohibition is not against interrogation without counsel. It is against the use of the admissions as evidence against the accused at his trial. In *Miranda v. Arizona,* 384 U.S. 436, decided June 13, 1966, the Court said:

> ". . . We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.
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> * * *
>
> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . ."

In *Carnley v. Cochran,* 369 U.S. 506, the Court held:

> ". . . The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. . . ."

The *Carnley* quotation is approved in *Miranda,* which adds the following:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . This Court has always set high standards of proof for the waiver of constitutional rights. . . ."

[4] The high court in Washington calls the shots with respect to Fifth Amendment rights. We mark the targets according to the calls. The recent pronouncements force us to conclude the record before us in this case does not show that this dull, uneducated, retarded boy waived his right to counsel at the interrogation. That interrogation produced enough admissions to make out one, perhaps two, capital charges against him. At the same time, we recognize that the evidence of the State, independently of the defendant's admissions, was sufficient to go to the jury, and to sustain a verdict of burglary in the first degree. We conclude, however, under the rules which we must enforce, a proper foundation was not laid for admitting the confession. The defendant, by proper exception and assignment of

error, directly challenged the admissibility of the confession. In our opinion the challenge should have been sustained.

[5] Moreover, there are two other objections which, though debated in the brief, are not so clearly delineated by exceptive assignments. Since this is a capital case and must go back for another trial, we discuss them. After the evidence was completed, the Court charged among other matters, the following:

> "The Court instructs you that you may return one of the following verdicts. You may return a verdict of guilty as charged in the bill of indictment, or you may return a verdict of guilty as charged in the bill of indictment and recommend that his punishment be life imprisonment, or you may return a verdict of not guilty.
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> * * *
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> . . . If you find that the breaking and entering was done in the nighttime, that it was the dwelling house of another, that the dwelling house was occupied by some person at that time other than the accused, and that it was done with the intent to commit a felony while in said dwelling house, whether or not the intent was carried out, and you are further satisfied from the evidence and beyond a reasonable doubt that the defendant was the person who committed this offense, it would be your duty to return a verdict of guilty."

The charge of the Court as given was incomplete. At no time did the Court instruct the jury that in order to convict the defendant of a capital offense the jury should find, beyond a reasonable doubt, that the breaking and entering was with the intent to "unlawfully, willfully and feloniously ravish and carnally know one Mrs. Andrew Mullen". "Felonious intent is an essential of the crime . . . it must be alleged and proved and the felonious intent proven must be the felonious intent alleged. . . ." *State v. Jones,* 264 N.C. 134, 141 S.E. 2d 27. "But it is not enough in an indictment for burglary to charge generally an intent to commit 'a felony' in the dwelling house of another. The particular felony which it is alleged the accused intended to commit must be specified. . . . Indeed, burglary in the first degree, under our statute, consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling-house or sleeping apartment of another, in the night-time, with the further concurrent intent, which may be executed or not, then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony, as aforesaid, must be proved, in addition to the more gen-

eral one, in order to make out the offense. . . ." The foregoing is taken from the opinion of Stacy, J. [later C.J.] in *State v. Allen*, 186 N.C. 302, 119 S.E. 504. That case, except the admission of the confession, fits the one now before us. The indictment having identified the intent necessary, the State was held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury.

[6 ,7] As disclosed by the evidence before the jury, a dull, intoxicated youth of previous good character was on the prowl looking for a female. On each of the three prior instances disclosed by the evidence, when his advances were rejected, he abandoned them without the slightest show of force. What about the defendant's intent, assuming he entered the Mullen home? When different inferences may reasonably be drawn from the evidence, the jury must draw them. In this case the jury must find the intent in the mind of the intruder at the time he forced entrance into the house. The defendant's intent may have been as charged in the bill, or his intent may have been to stop short of the use of force. The jury, under proper instructions, should make the determination. We think the question is whether the breaking was with the felonious intent of committing rape, or with the non-felonious intent of stopping short of the use of force. The Court cannot say as a matter of law that the defendant forcibly entered the Mullen home for the purpose of ravishing Mrs. Mullen by force and against her will. The evidence will permit that finding, but does not compel it.

The record of the trial shows errors in these particulars: (1) The State was permitted to introduce in evidence the defendant's confession without showing his clear cut waiver of counsel during the in-custody interrogation which brought it forth; (2) The Court failed to instruct the jury that proof of the intent to ravish Mrs. Mullen specified in the indictment was required before a verdict of burglary in the first degree could be rendered; and (3) The Court failed to submit a charge of non-felonious breaking as authorized by G.S. 14-54 (Chapter 1015, Session Laws of 1955).

For the reasons assigned, we conclude the defendant is entitled to a

New trial.

HUSKINS, J., concurs in result.

BOBBITT, J., concurring in result:

I concur in the decision and all portions of the opinion except two sentences, *viz.*: "The prohibition is not against interrogation without counsel. It is against the use of the admissions as evidence against the accused at his trial." I dissent from the view expressed in the quoted sentences.

The basic holding in *Miranda* is that, unless the officer has complied with the requirements set forth in *Miranda,* the in-custody interrogation of an accused violates his constitutional privilege against self-incrimination and therefore *is unlawful.* An admission or confession is inadmissible when and because it *is unlawfully* obtained. It is inadmissible then *as a means* of protecting an accused from *unlawful* violation of his constitutional privilege against self-incrimination. The excerpts from *Miranda* quoted in the Court's opinion support this view.

SHARP, J., joins in this opinion.

MARY SUE RIGBY, EXECUTRIX UNDER THE WILL OF DAN WILLIAMS RIGBY, AND MARY SUE RIGBY, INDIVIDUALLY v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF NORTH CAROLINA

No. 444

(Filed 20 November 1968)

1. Constitutional Law § 23; Taxation § 2— due process of law — inheritance taxation

The "due process" provisions of the Federal or State Constitution are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under G.S. 105-21 to the transfer of property within the State.

2. Taxation § 2— uniformity of taxation — inheritance taxation

The equality and uniformity required by the State Constitution in property taxation do not apply to inheritance or succession taxation.

3. Taxation § 2— construction of tax statute — discrimination

Although the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same, when the validity of a tax statute is challenged on ground of discrimination by arbitrary classification, it becomes the duty of the court to ascertain if, in fact, there is a difference in the classes taxed.

4. Taxation § 2— construction of tax statute — discriminatory classification

The Legislature is given the widest latitude in making the distinctions

which are bases for classification, and they will not be disturbed unless they are capricious, arbitrary and unjustified by reason; nor will occasional inequalities and hardships resulting from the application of the statute defeat the law unless it be shown that they result from hostile discrimination.

5. Taxation § 17— inheritance taxation — transfer of property

The transfer of property, as that term is used in G.S. 105-2, contemplates both the legal power to transmit property at death and the privilege of receiving property.

6. Taxation §§ 2, 17— inheritance taxation — basis for classification

A state may consider the composition and character of the entire estate as well as the amount passing to the individual legatees or heirs under its intestate or testamentary laws as a basis for classification, without imposing an arbitrary classification or without violating the "equal protection" or "uniformity" provisions of the State or U. S. Constitution.

7. Taxation § 2— construction of tax statute — duty of court

In determining whether there is some difference which bears a reasonable and proper relationship to the attempted classification in a statute, the reviewing court must be able to see that the enacting legislature could regard it as reasonable and proper without doing violence to common sense; in other words, there must be enough reason for it to support an argument.

8. Taxation § 17— validity of inheritance tax — inclusion of decedent's property outside the State for purposes of computation

G.S. 105-21, which levies an inheritance tax upon the transfer of property within the State at a rate which considers decedent's entire estate wherever situated, even outside the State, is a valid exercise of legislative powers, the statute neither denying equal protection of laws in violation of the U. S. Constitution, XIV Amendment, nor imposing an arbitrary and capricious classification in violation of N. C. Constitution, Art. V, § 3.

APPEAL by plaintiff from decision of the Court of Appeals (2 N.C. App. 57) which affirmed judgment of *Ervin, J.*, entered at October 1967 Session of IREDELL Superior Court.

Dan Williams Rigby, a resident of Iredell County, died testate on 17 March 1964, owning property within North Carolina having an appraised value of $110,021.49 and real property in South Carolina having an appraised value of $61,000.00. Plaintiff, executrix and sole beneficiary of the will of Dan Williams Rigby, filed an inheritance tax return as executrix with defendant Commissioner of Revenue. In the return she took all state deductions and exemptions and paid inheritance tax on the North Carolina property, without any reference to the South Carolina property. Defendant assessed an additional tax on the North Carolina property by establishing a rate pursuant to G.S. 105-21. Plaintiff paid the additional tax under pro-

test and duly filed claim for refund. Defendant denied plaintiff's claim for refund and plaintiff instituted this action for recovery of the additional assessment paid under protest, contending that G.S. 105-21 is unconstitutional. From judgment denying relief to plaintiff and holding G.S. 105-21 constitutional, plaintiff appealed to the North Carolina Court of Appeals. That Court affirmed the judgment of the Superior Court and plaintiff appealed to this Court under provisions of G.S. 7A-30(1).

Adams and Dearman and Raymer, Lewis & Eisele for plaintiff, appellant.

Attorney General Bruton and Assistant Attorney General Banks for defendant, appellee.

BRANCH, J.

G.S. 105-21 provides:

> "Computation of tax on resident and nonresident decedents. — A tax shall be assessed on the transfer of property, including property specifically devised or bequeathed, made subject to tax as aforesaid in this State of a resident or nonresident decedent, if all or any part of the estate of such decedent, wherever situated, shall pass to persons or corporations taxable under this article, which tax shall bear the same ratio to the entire tax which the said estate would have been subject to under this article if such decedent had been a resident of this State, and all his property, real and personal, had been located within this State, as such taxable property within this State bears to the entire estate, wherever situated. It shall be the duty of the personal representative to furnish to the Commissioner of Revenue such information as may be necessary or required to enable the Commissioner to ascertain a proper computation of his tax. Where the personal representative fails or refuses to furnish information from which this assessment can be made, the property in this State liable to tax under this article shall be taxed at the highest rate applicable to those who are strangers in blood."

As originally passed in 1921, G.S. 105-21 applied only to non-specific bequests or devises of North Carolina property from the estates of nonresident decedents. In 1925 the statute was amended so as to include both specific and non-specific bequests and devises, and in 1937 was amended so as to include all decedents, resident and nonresident, whose estates consisted of property both in and out of the State.

Appellant, in attacking the constitutionality of G.S. 105-21, strongly contended before the Court of Appeals that the statute was unconstitutional, in that it violated the "due process" clauses of the Fifth and Fourteenth Amendments of the U. S. Constitution and Article I, Section 17 of the Constitution of North Carolina, and that it denied equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution, and that it violated Article 5, Section 3 of the North Carolina Constitution by an arbitrary and capricious classification for the purpose of taxation.

The decision of the North Carolina Court of Appeals is founded principally upon the case of *Maxwell v. Bugbee,* 250 U.S. 525, 63 L. Ed. 1124, 40 S. Ct. 2, in which the Supreme Court of the United States considered the constitutionality of a New Jersey statute that was in substance the same as G.S. 105-21 before its 1925 and 1937 amendments. In *Maxwell v. Bugbee,* Justice Day, speaking for majority of the Court, stated:

> "It is not to be disputed that, consistently with the Federal Constitution, a state may not tax property beyond its territorial jurisdiction, but the subject-matter here regulated is a privilege to succeed to property which is within the jurisdiction of the state. When the state levies taxes within its authority, property not in itself taxable by the state, may be used as a measure of the tax imposed. . . . In the present case the state imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the state is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the state exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority that such exercise of power by the state is held void."

Appellant, on the other hand, relied heavily on the cases of *Frick v. Pennsylvania,* 268 U.S. 473, 69 L. Ed. 1058, 45 S. Ct. 603, and *Treichler v. Wisconsin,* 338 U.S. 251, 94 L. Ed. 37, 70 S. Ct. 1.

[1] Further review and discussion of the history of G.S. 105-21 and the cases cited in reference to the controlling force of *Maxwell*

v. Bugbee would be merely an affectation of learning, since we conclude that the Court of Appeals correctly distinguished the cases cited by appellant in reaching its conclusion that *Maxwell v. Bugbee* is still the prevailing law. We agree with the Court of Appeals that the 1925 Amendment did not affect the applicability of *Maxwell v. Bugbee* and that the 1937 Amendment, from the point of view of removing any distinction contained in the statute as between residents and non-residents, strengthened the constitutionality of G.S. 105-21. It is further observed that long before the decision in *Maxwell v. Bugbee* it was well settled in North Carolina that the type of tax here challenged was not a tax on property but on transmission of property from the dead to the living. *In re Morris Estate,* 138 N.C. 259, 50 S.E. 682. The "Due process" provisions of the Federal or State Constitution are not violated by the use of value of the entire estate, wherever located, to determine the *rate* of the tax to be applied to the transfer of property within the state; nor is it contended or shown that the procedural rights of notice and hearing are denied by the statute. *Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902.

The main force of appellant's brief and argument to this Court is directed to the contentions that the statute violated the Fourteenth Amendment "equal protection" clause and Article V, Section 3 of the North Carolina Constitution by establishing an arbitrary and capricious classification for methods of determining a tax rate which was based on whether a beneficiary received property from an estate comprised of property solely within the state or property within and outside of the state.

[2] The equality and uniformity required by our State Constitution in property taxation does not apply to inheritance or succession taxation. *In re Morris Estate, supra; Pullen v. Comm'rs,* 66 N.C. 361. The reason for this rule is clearly set forth in the case of *In re Morris, supra,* as follows:

> "The theory on which taxation of this kind on the devolution of estates is based and its legality upheld is clearly established and is founded upon two principles: (1) A succession tax is a tax on the right of succession to property and not on the property itself. (2) The right to take property by devise or descent is not one of the natural rights of man but is the creature of the law. Should the supreme law abolish such rights the property would escheat to the government or fall to the first occupant. The authority which confers such rights may impose conditions upon them, or take them away entirely. Accordingly it is held

that the States may tax the privilege, grant exemptions, discriminate between relatives and between these and strangers, and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation."

See also *Magoun v. Illinois Trust and Savings Bank,* 170 U.S. 283, 42 L. Ed. 1037, 18 S. Ct. 594, and *U. S. v. Perkins,* 163 U.S. 625, 41 L. Ed. 287, 16 S. Ct. 1073.

[3, 4] Although the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same, when the validity of a tax statute is challenged on the ground of discrimination by arbitrary classification, it becomes the duty of the court to ascertain if, in fact, there is a difference in the classes taxed. *Finance Co. v. Currie,* 254 N.C. 129, 118 S.E. 2d 543. The Legislature is given the widest latitude in making the distinctions which are bases for classification, and they will not be disturbed unless they are capricious, arbitrary and unjustified by reason. *Snyder v. Maxwell,* 217 N.C. 617, 9 S.E. 2d 19. Nor will occasional inequalities and hardships resulting from the application of the statute defeat the law unless it be shown that they result from hostile discrimination. *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E. 2d 316.

Considering the constitutional requirements that the equal protection clause of the Fourteenth Amendment places on state authorities to tax, the U. S. Supreme Court, in the case of *Magoun v. Illinois Trust and Savings Bank, supra,* stated:

"What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases,* 115 U.S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privilege conferred and the liabilities imposed. . . ."

In *Stebbins v. Riley,* 268 U.S. 137, 69 L. Ed. 884, 45 S. Ct. 424, the U. S. Supreme Court considered a California statute which imposed a tax on the transfer of property and forbade the deduction of the Federal estate tax in levying the amount of the State inher-

itance tax. In *Stebbins,* appellants contended that the statute violated the "equal protection" and "uniformity" provisions of the Federal Constitution because it imposed a much larger proportionate tax on the succession to a residuum of a large estate than of a smaller estate, although the residuary legacies were equal in each instance. Appellant contended that there was an arbitrary discrimination and a denial of equal protection, in that inequality resulted depending upon the size of the estate from which a legacy was received. The United States Supreme Court, holding the statute to be constitutional, stated:

> "It is not necessary that the basis of classification should be deducible from the nature of the thing classified. It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.' *Watson v. State Comptroller,* 254 U.S. 122, 65 L. ed. 170, 41 Sup. Ct. Rep. 43. It is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion. . . .
>
> "There are two elements in every transfer of a decedent's estate: the one is the exercise of the legal power to transmit at death; the other is the privilege of succession. Each, as we have seen, is the subject of taxation. The incidents which attach to each, as we have observed, may be made the basis of classification. We can perceive no reason why both may not be made the basis of classification in a single taxing statute, so that the amount of tax which the legatee shall pay may be made to depend both on the total net amount of decedent's estate subject to the jurisdiction of the state, and passing under its inheritance and testamentary laws, and the amount of the legacy to which the legatee succeeds under those laws. Such a classification is not, on its face, unreasonable. The discrimination is one which bears a substantial relationship to the exercise of the power of disposition by the testator. It is one of the elements in the transfer which is made the subject of taxation. The adoption of the discrimination does not preclude the assumption that the legislature, in enacting the taxing statute, did not act arbitrarily or without the exercise of judgment or discretion which rightfully belongs to it, and we can find in it no basis for holding the statute unconstitutional."

The classification which appellant attacks as arbitrary and capricious lies in the difference in the method of arriving at the rate of tax applied to heirs or legatees receiving property from estates con-

sisting of property lying both within North Carolina and outside of North Carolina, as distinguished from the method of arriving at the rate of tax applied to heirs or legatees receiving property from estates consisting of property lying wholly within North Carolina.

[5] G.S. 105-2 expressly imposes a tax "upon the *transfer* of any property, real or personal. . . ." (Emphasis ours)

[5, 6] The transfer of property contemplates both the legal power to transmit property at death and the privilege of receiving property. A state may consider the composition and character of the entire estate as well as the amount passing to the individual legatees or heirs under its intestate or testamentary laws as a basis for classification, without imposing an arbitrary classification or without violating the "equal protection" or "uniformity" provisions of the State or U. S. Constitution. Such a classification bears a reasonable and substantial relation to the succession of property, and we recognize the imposition of a tax on the succession of property as a proper subject of taxation by the State. *In re Morris, supra.*

[7] In determining whether there is some difference which bears a reasonable and proper relationship to the attempted classification in a statute, the reviewing court must be able to see that the enacting legislature could regard it as reasonable and proper without doing violence to common sense. In other words, there must be enough reason for it to support an argument. *People ex rel Farrington v. Mensching,* 187 N.Y. 8, 79 N.E. 884. Thus, in addition to the exercise of their legislative prerogative of considering both the entire estate as well as the amount passing to individual legatees as a basis for classification, it may be argued that the classification is a reasonable and valid exercise of legislative judgment in avoiding inequality in taxation by preventing the disposition of property in other states in order to obtain rates of taxation lower than those enjoyed by legatees or heirs taking from an estate where all the property is located in North Carolina. Such a classification is founded in fact upon a difference in classes taxed and is clearly uniform and equal as to members of the same class.

[8] We conclude that the classification is not "so wholly arbitrary and unreasonable as to be beyond the legislative authority of the state." *Maxwell v. Bugbee, supra.* Thus, recognizing the prevailing law that a state may levy inheritance or succession taxes on property within its authority at a rate which considers the entire estate (a part of which is located outside the state) in arriving at the amount of the tax, *Maxwell v. Bugbee, supra,* we hold that the

North Carolina Legislature did not exceed its powers in enacting G.S. 105-21. The decision of the Court of Appeals is

Affirmed.

JAMES C. UNDERWOOD v. RALPH L. HOWLAND, COMMISSIONER OF MOTOR VEHICLES OF THE STATE OF NORTH CAROLINA

No. 357

(Filed 20 November 1968)

1. Automobiles § 2— revocation of driver's license — review in Superior Court

Discretionary suspensions and revocations of licenses by the Department of Motor Vehicles are reviewable *de novo* in the Superior Court under G.S. 20-25, but mandatory revocations are not so reviewable.

2. Automobiles § 2— driving after revocation — mandatory additional revocation

A moving violation committed while the operator's license is in a state of suspension makes revocation for an additional period mandatory under G.S. 20-28.1.

3. Automobiles § 2— moving violation — driving while license suspended

Driving a motor vehicle on a public highway without a valid operator's license is a moving violation within the meaning of G.S. 20-28.1.

4. Automobiles § 2— driving while license suspended — mandatory revocation

The Department of Motor Vehicles is required by G.S. 20-28.1 to revoke the license of any person convicted of operating a motor vehicle upon the public highways of the State while such person's license to operate a motor vehicle is in a state of suspension, the period of revocation being one year for the first offense.

5. Statutes § 5— legislative intent

The legislative will is the controlling factor in the interpretation of statutes.

6. Statutes § 5— rules of construction

Where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded.

7. Statutes § 5— rules of construction

If the language of a statute is clear and unambiguous, its plain and definite meaning controls and judicial construction is not necessary; if

the language is ambiguous and the meaning doubtful, judicial construction is required to ascertain the legislative intent.

8. Statutes § 5— rules of construction

Words and phrases of a statute must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.

9. Automobiles § 2— driving while license suspended — effective date of additional suspension

The provision of G.S. 20-28.1 requiring the Department of Motor Vehicles, upon receipt of notice of a licensee's conviction of a moving violation committed while his license was in a state of suspension, to revoke that person's license for an additional period of one year "effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense" means only that the initial period of suspension and the additional one year period of revocation shall run consecutively and that no part thereof shall run concurrently, the additional revocation being mandatory even though it may occur after the initial suspension has expired and it becomes effective after the termination date of the initial suspension.

10. Automobiles § 2— suspension of driver's license — review in Superior Court — mandatory suspension

In a proceeding under G.S. 20-25 for review of an order of the Commissioner of Motor Vehicles revoking plaintiff's license, demurrer is properly sustained to a petition alleging that notice of plaintiff's conviction of a moving violation committed during a period of suspension was received by the Department of Motor Vehicles after the termination date of the initial suspension, and that plaintiff's license was thereafter revoked for an additional year by the Department, it appearing on the face of the petition that the revocation was mandatory under G.S. 20-28.1.

ON Certiorari to the Court of Appeals to review its decision reported in 1 N.C. App. 560, 162 S.E. 2d 124.

Proceeding under G.S. 20-25 for review of an order of the Commissioner of Motor Vehicles revoking plaintiff's license to operate a motor vehicle on the highways of the State. Pertinent allegations of the petition are summarized as follows:

1. On February 27, 1968, plaintiff held a valid license to operate a motor vehicle on the highways of North Carolina.

2. On February 27, 1968, defendant mailed plaintiff a notice reading in pertinent part as follows:

"Effective Mar. 04, 1968 your North Carolina Motor Vehicle driving privilege is revoked one year for conviction of a moving violation while license suspended or revoked — G.S. 20-28.1.

"You may apply for a license Mar. 04, 1969.

"Section 20 of the Motor Vehicles Laws of North Carolina requires that you surrender your driver license to the Department of Motor Vehicles upon receipt of this notice. You are directed to mail all driver licenses in your possession to the department on the effective date of this order if you have not previously turned them in to the court or surrendered them to the department."

3. In compliance with said notice, plaintiff mailed his operator's license to the Department of Motor Vehicles.

4. Plaintiff was thereafter advised by legal counsel that the grounds upon which defendant purported to revoke his operator's license were unlawful and that plaintiff was entitled to a return of his license and was lawfully entitled to continue to operate a motor vehicle upon the highways of the State. On March 8, 1968, plaintiff made formal demand for a return of his license but the defendant has willfully retained it without legal authority.

5. The records maintained by the Department of Motor Vehicles show: (a) that plaintiff's license to operate a motor vehicle was in a state of suspension from July 13, 1966, to October 13, 1966; (b) that on August 28, 1966, during said period of suspension, plaintiff was charged with operating a motor vehicle without a license; and (c) that plaintiff was convicted of said offense in the County Court of Wayne County on January 31, 1968.

6. Defendant has revoked plaintiff's license from March 4, 1968, to March 4, 1969, relying for his authority on G.S. 20-28.1 and contending that such revocation is mandatory by reason of the matters above set out in Paragraph 5.

7. Under the express language of G.S. 20-28.1, plaintiff's license could not be suspended for any period other than the period beginning October 13, 1966, and ending October 13, 1967. Defendant's attempt to revoke it for one year beginning March 4, 1968, and ending March 4, 1969, is arbitrary, unauthorized, and an abuse of his authority.

8. Plaintiff has not operated a motor vehicle upon the highways of North Carolina since mailing his operator's license to the Department of Motor Vehicles, but he is entitled to the immediate return of his license and all the rights and privileges which go with it.

Defendant demurred to the petition, saying:

"That the complaint does not state facts sufficient to constitute a cause of action against the respondent in that the allegations of the petition purport to bring on for review in the Su-

perior Court action which has been taken by the respondent pertaining to the privilege of the petitioner to operate a motor vehicle in a case where upon the facts alleged in the petition the action of the respondent is required by statute and no review by the Superior Court of this action is provided.

"WHEREFORE, the defendant prays that this action be dismissed."

The trial court sustained the demurrer and dismissed the proceeding. Plaintiff appealed to the Court of Appeals where the judgment of the superior court was reversed. Defendant's petition for certiorari was allowed.

Thomas Wade Bruton, Attorney General, William W. Melvin, Assistant Attorney General, T. Buie Costen, Staff Attorney, Attorneys for defendant appellant.

Herbert B. Hulse, Attorney for plaintiff appellee.

HUSKINS, J.

[1] Plaintiff instituted this proceeding under G.S. 20-25 seeking judicial review of the facts surrounding the revocation of his operator's license and a determination that he is entitled to its return. Under that statute, any person who has been denied a driver's license or whose license has been cancelled, suspended, or revoked, *except mandatory cancellations, suspensions and revocations,* has a right to file a petition in the superior court of the county wherein he resides; and said court is vested with jurisdiction and charged with the duty "to take testimony and examine into the facts of the case, and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation or revocation of license under the provisions of this article." G.S. 20-25. Discretionary revocations and suspensions may be reviewed by the court under this statute, while mandatory revocations and suspensions may not. "A license to operate a motor vehicle is a privilege in the nature of a right of which the licensee may not be deprived save in the manner and upon the conditions prescribed by statute. These, under express provisions of the Act, include full *de novo* review by a Superior Court judge, at the election of the licensee, in all cases except where the suspension or revocation is mandatory." *In Re Revocation of License of Wright,* 228 N.C. 584, 589, 46 S.E. 2d 696, 699.

Plaintiff alleges, and the demurrer admits, these facts: (1) Plaintiff's license to operate a motor vehicle was in a state of suspension from July 13, 1966, to October 13, 1966; (2) on August 28, 1966, dur-

ing said period of suspension, plaintiff was charged with operating a motor vehicle upon the highways of North Carolina without a license; and (3) plaintiff was convicted of said offense in the County Court of Wayne County on January 31, 1968. Upon these admitted facts, is revocation of plaintiff's license for a period of one year mandatory under the provisions of G.S. 20-28.1? If so, is a period of suspension beginning March 4, 1968, and ending March 4, 1969, authorized by G.S. 20-28.1?

Prior to 1965, operating a motor vehicle upon the public highways of the State without a valid operator's license was not an offense for which, upon conviction, the suspension or revocation of an operator's license was authorized, even though such offense was committed while the offender's license to operate a motor vehicle was suspended. Such was the law when *Gibson v. Scheidt, Comr. of Motor Vehicles,* 259 N.C. 339, 130 S.E. 2d 679 (1963) was decided. There, Gibson had been convicted of speeding in one case and of operating a motor vehicle without a valid operator's license in a second case, both offenses having been committed during a period when his operator's license was suspended. It was held that neither conviction authorized the Department of Motor Vehicles to suspend or revoke Gibson's license under G.S. 20-16, G.S. 20-16.1, G.S. 20-16(a)(1), or G.S. 20-17. Furthermore, since Gibson was not charged with and convicted of the offense of driving while his license was suspended or revoked, as he might have been, the Department of Motor Vehicles was without authority to revoke his license under G.S. 20-28(a).

The decision in *Gibson* spawned the enactment of Chapter 286 of the Session Laws of 1965, codified as G.S. 20-28.1 which reads in part as follows: "Upon receipt of notice of conviction of any motor vehicle moving violation committed while driving a motor vehicle, such offense having been committed while such person's operator's . . . license was in a state of suspension or revocation, the Department shall revoke the person's license effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense." This statute further provides that the period of revocation for the first offense shall be one year.

[2] A moving violation committed while the operator's license is in a state of suspension makes revocation for an additional period mandatory under G.S. 20-28.1. *Carson v. Godwin,* 269 N.C. 744, 153 S.E. 2d 473.

[3] Driving a motor vehicle on a public highway without a valid operator's license is a moving violation within the meaning of G.S.

20-28.1. It is an offense which cannot be committed without driving a motor vehicle upon a public highway. "Driving" or "operating" a motor vehicle imports motion. *State v. Hatcher,* 210 N.C. 55, 185 S.E. 435. That the General Assembly intended such offense to be a moving violation is implied by a reading of G.S. 20-16(c) where many specific offenses are enumerated in a schedule of point values. This schedule includes not only the offense of "no operator's license" but also such obvious moving violations as "passing stopped school bus", "reckless driving", "driving on wrong side of road", "failure to stop for siren", etc. The schedule then concludes with the words "all other moving violations." The clear implication is that the legislature considered the enumerated offenses, including "no operator's license", to be moving violations.

[4-6] Hence, we hold that the Department of Motor Vehicles is required by G.S. 20-28.1 to revoke the license of any person convicted of operating a motor vehicle upon the public highways of the State without a valid operator's license when such offense is committed while such person's license to operate a motor vehicle is in a state of suspension. The period of revocation is one year for the first offense. When does this period begin? In the case before us, plaintiff contends the words "effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense" requires the period of revocation to begin October 13, 1966. Since the Commissioner of Motor Vehicles took no action until February 27, 1968, plaintiff contends he was then legally powerless to take any action at all. This requires us to construe and interpret the language of the statute. In this task we are guided by the primary rule of construction that the intent of the legislature controls. "In the interpretation of statutes, the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof." 50 Am. Jur., Statutes, Sec. 223. As stated by Bobbitt, J., in *Lockwood v. McCaskill,* 261 N.C. 754, 757, 136 S.E. 2d 67, 69: "In performing our judicial task, 'we must avoid a construction which will operate to defeat or impair the object of the statute, if we can reasonably do so without violence to the legislative language.' *Ballard v. Charlotte,* 235 N.C. 484, 487, 70 S.E. 2d 575 [577]." Furthermore, ". . . where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded. *S. v. Barksdale,* 181 N.C. 621, 107 S.E. 505." *Duncan*

v. Carpenter, 233 N.C. 422, 426, 64 S.E. 2d 410, 413. And, where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *State v. Scales,* 172 N.C. 915, 90 S.E. 439. A statute is never to be construed so as to require an impossibility if that result can be avoided by another fair and reasonable construction of its terms." *Hobbs v. Moore County,* 267 N.C. 665, 671, 149 S.E. 2d 1, 5.

[7] If the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. *Davis v. Granite Corporation,* 259 N.C. 672, 131 S.E. 2d 335. But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473; *Young v. Whitehall Co., supra* (229 N.C. 360, 49 S.E. 2d 797).

[8] Words and phrases of a statute "must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." 7 Strong's N. C. Index 2d, Statutes, Sec. 5.

[9] G.S. 20-28.1 required the Department of Motor Vehicles (1) upon receipt of notice of plaintiff's conviction (2) of a moving violation (3) committed while his operator's license was in a state of suspension (4) to revoke his license for an additional period of one year (5) "effective on the date set for termination of the suspension or revocation which was in effect at the time of such offense." The words in quotations must be interpreted in context so as to render them harmonious with the intent and tenor of the entire statute and must be accorded the meaning which harmonizes with the other modifying provisions so as to give effect to the reason and purpose of the law. *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505. So, when this statute is subjected to these rules of construction the quoted language means that the one year period of revocation shall not overlap the initial period of suspension. It means that the initial period of suspension and the additional one year period of revocation shall run consecutively and no part thereof shall run concurrently. Obviously, the Department had no authority to take action prior to receipt of notice of plaintiff's conviction. The interpretation urged by plaintiff would require the impossible and would defeat the reason and purpose of the law. Thus, the strict letter must be disregarded and the effective date of the additional period of suspension must be construed in light of the whole statute and accorded that meaning which harmonizes with the clear legislative intent.

[10] It appearing on the face of the petition that the action taken by defendant was mandatory under G.S. 20-28.1, the trial court properly sustained the demurrer and dismissed the proceeding.

The decision of the Court of Appeals was erroneous and is

Reversed.

STATE OF NORTH CAROLINA v. VINCENT KENNETH CAVALLARO

No. 165

(Filed 20 November 1968)

1. Criminal Law § 91— motion for continuance

The ruling on a motion for continuance is a matter resting in the sound discretion of the trial judge.

2. Criminal Law § 91; Constitutional Law § 30— continuance due to illness of State's witness — speedy trial

Defendant was not denied the right to a speedy trial where the State was granted a continuance to the next term of court due to the illness of a witness although there was an available State's witness who would have testified to the same matters as the absent witness, the record failing to show any arbitrary and oppressive delays caused by the fault of the prosecution which constituted a prolonged imprisonment or substantially impaired defendant's means of proving his innocence.

3. Criminal Law § 146; Appeal and Error §§ 1, 3— appeal from Court of Appeals to Supreme Court — substantial constitutional question

An appellant seeking to appeal to the Supreme Court from a decision of the Court of Appeals as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal.

4. Criminal Law § 146— failure to show substantial constitutional question

Purported appeal to the Supreme Court under G.S. 7A-30(1) based upon the failure of the trial court to allow defendant's motion "to dismiss for lack of a speedy trial under the North Carolina Constitution and the Constitution of the United States," while probably not presenting a substantial constitutional question within the meaning of G.S. 7A-30, is not dismissed by the Supreme Court where the appeal was certified to the Court prior to the interpretation of G.S. 7A-30 in *State v. Colson*, 274 N.C. 295.

5. Criminal Law §§ 146, 161— appeal from Court of Appeals to Supreme Court — abandonment of assignments of error

Assignments of error alleged in the Court of Appeals which are not brought forward and argued before the Supreme Court are deemed abandoned.

BOBBITT, SHARP and HUSKINS, JJ., vote to dismiss appeal.

STATE *v.* CAVALLARO

APPEAL by defendant from *Bowman, S.J.*, 2 October 1967 Mixed Session, Superior Court of ONSLOW.

Defendant was charged by indictment with the first degree murder of Archie Lynwood Taylor. Upon call of the case, the solicitor announced the State would seek a verdict of guilty of murder in the second degree or manslaughter, as the jury might find. Defendant thereupon entered a plea of not guilty. The jury returned a verdict of guilty of murder in the second degree, and the court imposed a prison sentence of not less than sixteen nor more than twenty years. Defendant announced in open court that he did not desire to appeal from the judgment entered; however, after he had begun service of the sentence he wrote a letter to the Clerk of Superior Court of Onslow County giving notice of his desire to appeal. The letter was dated within the time allowed for giving notice of appeal, but was not mailed or received until after the time for giving notice of appeal had expired. Upon motion, the court allowed defendant to appeal, appointed counsel to represent him in his appeal, set an appearance bond, and ordered Onslow County to furnish court-appointed counsel with a transcript of the trial at the expense of the County. In opinion reported in 1 N.C. App. 412, the North Carolina Court of Appeals found no error in the trial below. Defendant gave notice of appeal to the Supreme Court of North Carolina.

Attorney General Bruton and Deputy Attorney General McGalliard for the State.

Ellis, Hooper, Warlick & Waters for defendant.

BRANCH, J.

Defendant seeks to appeal to this Court from the decision of the Court of Appeals pursuant to G.S. 7A-30, which, in pertinent part, provides that an appeal may be taken to the Supreme Court from a decision of the Court of Appeals as a matter of right when the decision is one "which directly involves a substantial question arising under the constitution of the United States or of this state."

He assigns as error the failure of the trial court to allow his motion "to dismiss for lack of a speedy trial under the North Carolina Constitution and the Constitution of the United States." Defendant also relies upon the question presented by this assignment of error to bring him within the provisions of G.S. 7A-30(1).

In *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891, this Court, speaking through Parker, J., now C.J., declared:

"The right of a person formally accused of crime to a speedy and impartial trial has been guaranteed to Englishmen since Magna Carta, and the principle is embodied in the Sixth Amendment to the Federal Constitution, and in some form is contained in our State Constitution and in that of most, if not all, of our sister states, or, if not, in statutory provisions. *S. v. Webb,* 155 N.C. 426, 70 S.E. 1064 . . .

"G.S. 15-10 entitled 'Speedy trial or discharge on commitment for felony,' requires simply that under certain circumstances 'the prisoner be discharged from custody and not that he go quit of further prosecution.' *S. v. Webb, supra.*

"The Court said in *Beavers v. Haubert,* 198 U.S. 77, 49 L. Ed. 950, 954: 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.'

"The constitutional right to a speedy trial is designed to prohibit arbitrary and oppressive delays which might be caused by the fault of the prosecution. *Pollard v. United States,* Mo., 249 S.W. 2d 857. The right to a speedy trial on the merits is not designed as a sword for defendant's escape, but a shield for his protection."

Accord: *State v. Lowry and State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 876; *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *United States v. Ewell,* 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1965).

[2] Here, defendant was arrested in the state of Florida on 27 February 1967, upon a charge of first degree murder, and was returned to this jurisdiction on 10 or 11 March 1967. Counsel for defendant was appointed on 21 March 1967, and at the next session of criminal court, commencing on 2 April 1967, a true bill of indictment was returned by the Grand Jury charging defendant with murder in the first degree. During this term of court defendant's counsel petitioned the court that defendant be admitted to a hospital for psychiatric and neurological examination and evaluation prior to his trial. On 7 April 1967, the court allowed defendant's petition. On 8 April, 1967, pursuant to the order of court, defendant was admitted to Cherry Hospital, a state-supported mental institution. Upon completion of the examination and evaluation, defendant was returned to Onslow County jail during the first part of June 1967. His case was calendared for trial at the 17 July 1967 Session of Onslow Superior Court, which was the first session following defendant's re-

turn to Onslow County. At this session of court, upon motion of the State and over defendant's objection, the case was continued to the 2 October session of Superior Court because of illness of S. B. I. Agent John B. Edwards, a State's witness. The only delay in the trial of defendant caused by the prosecution was the continuance of the case from the 17 July Session to the 2 October Session of the Superior Court because of illness of witness Edwards. There had been no session of the Superior Court of Onslow County for the trial of criminal cases between the session which began on 17 July 1967 and the session which began on 25 September 1967, one week prior to the call of the instant case for trial.

[1] It is well established in this jurisdiction that the ruling on a motion for continuance is a matter resting in the sound discretion of the trial judge. *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520; *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233.

[2] Defendant contends that the continuance by the trial judge was not justified and deprived him of his right to a speedy trial as guaranteed by the United States Constitution and the North Carolina Constitution, since there was an available State's witness who would have testified to the same matters as the absent witness. Admitting the availability of this witness, this argument is not tenable under these circumstances. The case against this defendant was based on circumstantial evidence and neither the prosecution nor the defense could know what tests of credibility the jury might apply to the witnesses offered by the State.

[4] The record fails to show any arbitrary and oppressive delays caused by the fault of the prosecution which constituted a prolonged imprisonment or substantially impaired defendant's means of proving his innocence. To the contrary, the record shows that the court proceeded with efficient dispatch and the entire record negatives any suggestion of want of due process in the trial of defendant or any abuse of discretion on the part of the trial judge. Further, it is very doubtful that appellant has shown that this case involves a substantial question arising under the Constitution of the United States or of this State, so as to bring him within the provisions of G.S. 7A-30.

[3-5] *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, holds that an appellant seeking a review by the Supreme Court as a matter of right of a decision of the Court of Appeals on the ground that a substantial constitutional question is involved, must allege and show the involvement of such question or suffer dismissal. The question must be real and substantial rather than superficial and frivolous.

Appeal in instant case was certified to this Court prior to the interpretation of G.S. 7A-30 in *State v. Colson, supra.* Under these circumstances we are not disposed to dismiss the appeal; however, the question of dismissal becomes academic since we find no merit in the remaining assignment of error brought forward and argued in appellant's brief relating to the denial of his motion for judgment of nonsuit. Assignments of error alleged in the Court of Appeals, not brought forward and argued before the Supreme Court, are deemed abandoned. *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353. The opinion of the Court of Appeals painstakingly and accurately reviewed the evidence and correctly applied it to the controlling principles of law relative to nonsuit in criminal cases. *State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801; *State v. Johnson,* 261 N.C. 727, 136 S.E. 2d 84; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. Morris, J., in her discussion of this assignment of error in the Court of Appeals fully sets out all the pertinent facts and we do not deem it necessary to repeat them here.

There was substantial evidence of all the material elements of the offense and defendant's exculpatory statements offered by the State were clearly contradicted by other State's evidence.

In the decision of the Court of Appeals we find

No error.

BOBBITT, SHARP and HUSKINS, JJ., vote to dismiss defendant's appeal on the ground it does not present a *substantial* question "arising under the Constitution of the United States or of this State" within the meaning of G.S. 7A-30.

DWIGHT MOODY CARTER, TRADING AS RIDGEWAY TAVERN, PETITIONER, v. STATE BOARD OF ALCOHOLIC CONTROL, MALT BEVERAGE DIVISION, RESPONDENT

No. 519

(Filed 20 November 1968)

Appeal and Error § 39— dismissal of appeal not aptly docketed

Where the appeal is not docketed in the Supreme Court within the time allowed by the rules so that the appeal is carried beyond the term at which it should have been heard, the Supreme Court will dismiss the appeal *ex mero motu.*

CARTER *v.* BOARD OF ALCOHOLIC CONTROL

APPEAL by Petitioner from *Olive, S.J.,* February Assigned Civil Session 1967, of WAKE.

Petitioner instituted this proceeding pursuant to Article 33, Chapter 143 of General Statutes of North Carolina for judicial review of an administrative decision and action of respondent which resulted in the revocation of petitioner's malt beverage permit. Revocation was based on findings by respondent that petitioner sold taxpaid whiskey on his licensed premises in violation of G.S. 18-2, G.S. 18-50, and G.S. 18-78.1(5), and that because of these violations petitioner was no longer considered a suitable person to hold a state retail beer permit.

On 21 February 1967 Judge Olive heard the case on the pleadings and a certified record of the administrative proceedings. On the same date he entered judgment in which he found that the findings by respondent and the decision based thereon were supported by competent, material and substantial evidence, and affirmed respondent's decision. Petitioner gave notice of appeal in open court on 21 February 1967. The court allowed petitioner 60 days in which to serve its case on appeal and allowed respondent or Attorney General 30 days thereafter in which to serve counter case. The appeal was docketed in this Court on 13 May 1968.

Attorney General Bruton and Staff Attorney Denson for the State, Respondent.

Bencini & Wyatt and Fisher & Fisher for Petitioner.

PER CURIAM.

Under the rules of this Court this appeal must have been docketed by 10 o'clock A.M. on 3 October 1967. Rule 5, Rules of Practice in the Supreme Court, 254 N.C. 785.

In the case of *Owens v. Boling,* 274 N.C. 374, 163 S.E. 2d 396, this Court stated:

> "Counsel may not waive the rules of this Court. *In re Suggs,* 238 N.C. 413, 78 S.E. 2d 157; *Jones v. Jones,* 232 N.C. 518, 61 S.E. 2d 335; *State v. Butner,* 185 N.C. 731, 117 S.E. 163. Consequently, it was beyond the authority of the attorneys to bypass a term. *Mimms v. R. R.,* 183 N.C. 436, 111 S.E. 778. 'The rules of practice in the Supreme Court are mandatory, not directory, and must be uniformly enforced. . . . Neither the judges, nor the solicitors, nor the attorneys, nor the parties have any right to ignore or dispense with the rules requiring such

docketing within the time prescribed. . . . If the rules are not observed the Court may *ex mero motu* dismiss the appeal.' *Stone v. Ledbetter,* 191 N.C. 777, 779, 133 S.E. 162, 163. In *Kernodle v. Boney,* 260 N.C. 774, 133 S.E. 2d 697, the defendant-appellant's delay in docketing carried the case beyond the Spring Term at which it should have been heard. This Court, *ex mero motu,* dismissed that appeal. . . ."

Here, delay in docketing was such that the case was carried not only beyond the Fall Term 1967, at which it should have been heard, but was carried beyond the Spring Term 1968.

The appeal is dismissed, *ex mero motu,* for failure to docket within the time fixed by the Rules.

Appeal dismissed.

STATE OF NORTH CAROLINA, EX REL. EDWIN S. LANIER, COMMISSIONER OF INSURANCE v. JAMES ABNER VINES

No. 521

(Filed 27 November 1968)

1. Insurance § 1— suit by Commissioner to recover civil penalty

Failure to pay a civil penalty imposed by the Commissioner of Insurance under G.S. 58-44.6, assuming the penalty to be lawfully imposed, is a violation of a provision of G.S. Ch. 58 for which G.S. 58-9(5) authorizes the Commissioner to institute a civil action.

2. Parties § 2— action created by statute designating who may sue

Where a cause of action is created by a statute which also provides who is to bring the action, only the persons so designated may sue.

3. Insurance § 1; Parties § 2— action in name of State on relation of party entitled to maintain the action

Institution of an action to collect a civil penalty imposed by the Commissioner of Insurance under G.S. 58-44.6 in the name of the State on the relation of the Commissioner of Insurance does not vitiate the proceeding.

4. Constitutional Law § 5— separation of powers in State government — federal constitution

Assuming that G.S. 58-44.6 is an attempt to confer upon the Commissioner of Insurance legislative or judicial powers, the statute violates no prohibition of the United States Constitution, it being for the State to determine whether and to what extent its powers shall be kept separate between the executive, legislative and judicial departments of its government.

5. Constitutional Law § 6— definition of legislative authority

The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities.

6. Constitutional Law § 10— judicial power defined

The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty within the limits previously fixed by law so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

7. Constitutional Law §§ 7, 10— civil penalty by Commissioner of Insurance — judicial power

The power purportedly granted to the Commissioner of Insurance by G.S. 58-44.6 to impose a civil penalty upon an insurance agent for violation of the State insurance laws found by the Commissioner to have been committed by the agent is judicial in nature; therefore, the statute delegates no legislative power to the Commissioner.

8. Constitutional Law § 10— judicial powers — administrative officer

The Legislature cannot confer upon an administrative officer judicial power except within the limits specified in N. C. Constitution, Art. IV, § 3.

9. Constitutional Law §§ 6, 10— civil penalty for insurance law violation — legislative and judicial powers

Provision of G.S. 58-44.6 allowing a civil penalty which may vary in amount from a nominal sum to $25,000 to be imposed upon an insurance agent for a violation of the insurance laws is an exercise of the legislative power; determination by the Commissioner of Insurance of the amount of the penalty to be inflicted in each case is an exercise of judicial power.

10. Constitutional Law § 10; Insurance § 1; Administrative Law § 3— Commissioner of Insurance — judicial powers

The Legislature may confer on the Commissioner of Insurance only such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the Department of Insurance was created. N. C. Constitution Art. IV, §§ 1, 3.

11. Constitutional Law § 10; Insurance § 2— revocation of insurance agent's license — judicial power

The grant of judicial power to the Commissioner of Insurance to revoke the license of an insurance agent is reasonably necessary to the effective policing of the activities of such agents so as to protect the public from fraud and imposition, one of the purposes for which the Department of Insurance was established; the power to hold hearings and determine facts relating to the conduct of such agent is reasonably necessary to the effective and just exercise of the power to grant and revoke such license.

12. Constitutional Law § 10; Administrative Law § 3— administrative agency — judicial powers

Whether a judicial power is reasonably necessary as an incident to the

accomplishment of a purpose for which an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred.

13. Constitutional Law § 10; Insurance § 2— G.S. 58-44.6 unconstitutional

The attempted grant to the Commissioner of Insurance of judicial power to impose upon an insurance agent for a violation of the insurance laws a penalty, varying in the Commissioner's discretion from a nominal sum to $25,000, violates N. C. Constitution Art. IV, § 3, there being no reasonable necessity for conferring such judicial power upon the Commissioner.

ON certiorari to the Court of Appeals.

The State on the relation of the Commissioner of Insurance brought this civil action in the Superior Court of Wake County to recover $3,000, the amount of a civil penalty imposed by the Commissioner of Insurance upon the defendant for violations of the insurance laws of the State, found by the Commissioner to have been committed by the defendant. From a judgment in favor of the plaintiff the defendant appealed to the Court of Appeals, which affirmed the judgment of the superior court. 1 N.C. App. 208. The defendant petitioned the Supreme Court for certiorari to review the decision of the Court of Appeals, asserting in the petition that G.S. 58-44.6, under which the Commissioner imposed the penalty, violates the Constitution of North Carolina in that:

(1) It violates the constitutional requirement of a separation of the executive, judicial and legislative powers of the government of the State;

(2) It confers upon the Commissioner of Insurance a discretion, subject to no guiding rules or standards, to impose a civil penalty not in excess of $25,000.

The material allegations of the complaint filed in the superior court are, in substance:

Prior to 16 January 1967, the defendant was duly licensed by the State as an insurance agent and broker. On that date the Commissioner caused to be served upon the defendant notice of certain charges of violations by him of the insurance laws of the State and of a hearing to be held on 26 January by the Commissioner to determine whether the defendant's licenses should be revoked permanently and a civil penalty imposed on account of such alleged violations.

In accordance with such notice, a hearing was held by the Commissioner at which the defendant was represented by counsel, and at which evidence was introduced both by the Department of Insurance and by the defendant. On 6 April 1967, the Commissioner rendered his decision and issued his order, which is attached to and made part of the complaint.

The order contained detailed findings of fact setting forth numerous violations by the defendant of the insurance laws of the State. The order also contained conclusions by the Commissioner, upon such findings of fact, that the defendant had wilfully violated G.S. 58-47, had dealt unjustly with and wilfully deceived persons in regard to insurance policies, had wilfully procured insurance in "an unauthorized foreign or alien company," had neglected to make and file documents required by G.S. 58-53.1, and had failed to comply with certain requirements of chapter 58 of the General Statutes, "by virtue of which the licenses of James Abner Vines are subject to suspension or revocation."

Upon such findings of fact and conclusions, the Commissioner ordered that all licenses theretofore issued to the defendant to act as an insurance agent and broker be permanently revoked, and that the defendant "pay to the State of North Carolina a civil penalty in the amount of $3,000."

The Commissioner is entitled, after notice and hearing, to impose a civil penalty not to exceed $25,000, from which imposition the aggrieved party may appeal to the Superior Court of Wake County. The defendant has not so appealed from the order of the Commissioner and the time for taking the appeal has expired, so that the order has become final. The Commissioner has made demand upon the defendant for payment of the penalty so imposed upon him but the defendant has failed and refused to pay it.

The defendant filed answer admitting the foregoing allegations of the complaint, except that the authority of the Commissioner to levy a civil penalty was denied for the reason that G.S. 58-44.6 is in violation of the Constitution of the United States and of the Constitution of North Carolina. The answer does not specify by article and section the provision of either constitution relied upon by the defendant, but alleges that this statute purports to confer upon the Commissioner "the unbridled discretionary right to inflict civil penalties up to the sum of $25,000," is discriminatory and is an unlawful delegation of legislative and judicial powers, in violation of both

the Constitution of the United States and of the Constitution of North Carolina. The answer further alleges that the State, upon the relation of the Commissioner of Insurance, is not the real party in interest and so cannot maintain this action.

Upon the call of the case for trial in the superior court, the defendant demurred ore tenus upon the ground that the complaint does not state facts sufficient to constitute a cause of action for that G.S. 58-44.6 "contravenes both the Constitution of the State of North Carolina and the Constitution of the United States." In the demurrer, as in the answer, the defendant did not cite, by article and section, the provision of either constitution relied upon by him. The demurrer was overruled.

The evidence for the plaintiff consisted of the notice of hearing, the statement of charges and the order of the Commissioner, including his findings of fact and conclusions thereon. It was stipulated that the notice and statement of charges were duly and properly served upon the defendant.

No finding of fact or conclusion by the Commissioner is controverted in this action and the validity of so much of the order as revokes permanently the licenses theretofore issued to the defendant is not challenged, the only contentions being that the Commissioner had no authority to impose the civil penalty and that the plaintiff is not the real party in interest, for which reasons the defendant contends this action to collect the penalty so imposed cannot be maintained.

At the conclusion of the evidence for the plaintiff, the defendant moved for a judgment of nonsuit on the ground that the action was not instituted by the real party in interest as required by G.S. 1-57. This motion was denied.

The superior Court made its own findings of fact, in summary as follows:

(1) The penalty was imposed by the Commissioner pursuant to G.S. 58-44.6 after notice and hearing.

(2) The Commissioner issued an order and decision finding, among other things, that the defendant, a licensed insurance agent, had violated various sections of chapter 58 of the General Statutes, had unlawfully negotiated for and collected premiums for insurance policies issued by companies not licensed to do business in North Carolina, and had dealt unlawfully with and had deceived persons in regard to insurance policies; the Commissioner permanently revoked the licenses of the defendant and

imposed a civil penalty in the amount of $3,000, to be "finally discharged and satisfied upon payment to the Treasurer of the State of North Carolina";

(3) The defendant did not appeal from the order and decision of the Commissioner and it became final;

(4) After demand upon the defendant for payment, the Commissioner filed this action in the superior court to compel the defendant to pay the penalty; the defendant answered the complaint, alleging that G.S. 58-44.6 is unconstitutional in that it is an unlawful delegation of legislative and judicial powers to the Insurance Commissioner, and the defendant also contended in oral argument that the Commissioner is not the real party in interest to bring this action.

Upon these findings of fact, the superior court concluded that the statute is not unconstitutional, does not violate Art. I, § 8, of the Constitution of North Carolina and does not constitute an unlawful delegation of legislative authority or of judicial powers; the statute contains adequate safeguards for due process of law and for the imposition of a civil penalty; this action is properly brought by and in the name of the Commissioner of Insurance by the State.

The superior court accordingly ordered and adjudged that the defendant pay to the Treasurer of the State $3,000 and pay the costs of the action.

In his appeal to the Court of Appeals, the defendant assigned as error the overruling of his demurrer ore tenus, the denial of his motion for judgment of nonsuit and the signing of the judgment. The Court of Appeals found no error in any of these respects.

Attorney General Bruton and Assistant Attorney General Harrell for the State.

Nance, Collier, Singleton, Kirkman & Herndon for defendant.

LAKE, J.

The questions before us are:

(1) Assuming the penalty to have been lawfully imposed, may an action to collect it be brought in the name of the State on the relation of the Commissioner of Insurance?

(2) Did the Commissioner of Insurance have authority to impose a civil penalty of $3,000 upon the defendant?

After revoking permanently the licenses which had been issued to the defendant, the order of the Commissioner of Insurance states:

> "It is further ordered that * * * James Abner Vines shall pay to the State of North Carolina a civil penalty in the amount of $3,000. Upon the payment of the amount of such civil penalty to the Treasurer of the State of North Carolina, the civil penalty imposed hereunder shall be forever satisfied and discharged."

The prayer of the complaint is for "a judgment ordering defendant to pay the civil penalty as imposed, with interest."

The caption of the complaint designates the plaintiff as "State of North Carolina, Ex Rel. Edwin S. Lanier, Commissioner of Insurance." The body of the complaint states, "The plaintiff is the duly appointed, qualified and acting Commissioner of Insurance of the State of North Carolina." It is verified by the Commissioner.

[1] G.S. 58-9(5) provides that the Commissioner of Insurance "shall have power to institute civil actions * * * for any violation of the provisions of this chapter." G.S. 58-44.6, under which the penalty was imposed and which is set forth in full below, provides that if a penalty imposed thereunder is not paid within ten days from the date of the order imposing it, the Commissioner of Insurance may revoke the license of the person so penalized. Clearly, the failure to pay the penalty, assuming the penalty to be lawfully imposed, is a violation of a provision of chapter 58 of the General Statutes for which G.S. 58-9(5) authorizes the Commissioner to institute a civil action.

[2, 3] 67 C.J.S., Parties, § 12, states, "Where a cause of action is created by statute and the statute also provides who is to bring the action, the person or persons so designated, and, ordinarily, only such persons, may sue." See also, *Hunt v. State,* 201 N.C. 37, 158 S.E. 703; McIntosh, North Carolina Practice and Procedure, 2d Ed, § 607. The institution of an action in the name of the State upon the relation of the party entitled to maintain the action does not vitiate the proceeding. *Warrenton v. Arrington,* 101 N.C. 109, 7 S.E. 652. We hold, therefore, that if the penalty sued for was lawfully imposed, this action to collect it was lawfully instituted.

We are, therefore, brought to the question of the authority of the Commissioner of Insurance to impose the penalty upon the defendant.

G.S. 58-44.6, which is the source, if any, of the authority of the

Commissioner of Insurance to impose the penalty in question, provides:

> "Whenever any person, agent, adjuster, firm, corporation or company, subject to the provisions of chapter 57 of the General Statutes, as amended, and the provisions of chapter 58 of the General Statutes, as amended, shall do or commit any act or shall fail to comply with any requirements prohibited or required by said chapters, by virtue of which any license is subject to suspension or revocation, the Commissioner of Insurance, in addition to or in lieu of any other official action that may be taken by him, may, in his discretion, inflict a civil penalty in an amount to be fixed by said Commissioner of Insurance not in excess of twenty-five thousand dollars ($25,000.00), and if said penalty is not paid within ten (10) days from the date of the finding and order inflicting said penalty, then said Commissioner of Insurance may revoke any license of such person, agent, adjuster, firm, corporation or company subject to the provisions of said chapters. The Commissioner of Insurance before imposing any penalty or revoking any license shall conduct a hearing and shall make all necessary findings of fact in regard to the matter under inquiry. In giving notices, conducting hearings and producing evidence, as well as examining records, the Commissioner of Insurance shall have all the power and authority and shall follow the procedures conferred and given in G.S. 58-54.6. Any person, agent, adjuster, firm, corporation or company subject to said chapters, whose rights are affected by the findings and order of the Commissioner of Insurance, shall have the right to appeal to the Superior Court of Wake County, and upon such appeal the record shall be certified to the Superior Court of Wake County, and the procedure and authority contained in § 58-9.3 shall be followed and shall govern. The commencement of proceedings, as herein authorized, shall not operate as a stay of the Commissioner's order or decision, unless so ordered by the court."

For the purposes of this review, the findings of fact by the Commissioner of Insurance are not attacked by the defendant. Therefore, it must be deemed that the defendant wilfully violated, in each of the respects detailed in the Commissioner's findings of fact, the provisions of G.S. 58-47, 58-53.1 and 58-53.2, and has dealt unjustly with and wilfully deceived persons in regard to insurance policies.

G.S. 58-42 provides: "When the Commissioner is satisfied that any insurance agent * * * [or] broker * * * licensed by this State has willfully violated any of the insurance laws of this State

* * * or has dealt unjustly with or willfully deceived any person in regard to any insurance policies * * * the Commissioner may immediately suspend his license or licenses and shall forthwith give to such licensee ten days' notice of the charge or charges and of a hearing thereon, and if the Commissioner finds there has been any of the violations hereinbefore set forth, he shall * * * revoke the license of such agent * * * [or] broker * * *." Therefore, the Commissioner had the authority to impose the penalty here in question unless G.S. 58-44.6 is in excess of the authority of the General Assembly under the Constitution of this State, or is a violation of the Constitution of the United States, as the defendant contends.

[4] We find no merit in the defendant's contention, asserted both in the answer and in the demurrer ore tenus, that some undesignated provision of the United States Constitution is violated by G.S. 58-44.6 in that the statute is an attempt to confer upon the Commissioner legislative or judicial powers. Assuming that the statute does either of these things, it violates no prohibition of the United States Constitution. It is for the State to determine whether and to what extent its powers shall be kept separate between the executive, legislative and judicial departments of its government. *Neblett v. Carpenter,* 305 U.S. 297, 59 S. Ct. 170, 83 L. Ed. 182; *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835; *Dreyer v. Ill.,* 187 U.S. 71, 23 S. Ct. 28, 47 L. Ed. 79.

We turn, therefore, to the Constitution of North Carolina. Art. I, § 8, provides, "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." Art. II, § 1, provides, "The legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: a Senate and a House of Representatives." Art. IV, § 1, provides, "The judicial power of the State shall, except as provided in § 3 of this article, be vested in a court for the trial of impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of government, nor shall it establish or authorize any courts other than as permitted by this article." Art. IV, § 3, provides, "The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice." Art. III, § 1, provides that the Commissioner of Insurance is a member of the executive department.

[5-7] The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative. This is the power which G.S. 58-44.6 purports to confer upon the Commissioner of Insurance, a member of the executive department of the State government. There is, therefore, in this statute no delegation of the legislative power to the Commissioner.

Strictly speaking, there is no delegation of the judicial power to the Commissioner by this statute. One delegates his own authorities or powers, not those of another. A branch of the government, like an individual, may not delegate powers it does not have. The Legislature has, however, by this statute, undertaken to confer upon the Commissioner of Insurance a part of the judicial power of the State. We must, therefore, determine its authority to do so in the light of the foregoing provisions of the Constitution of North Carolina.

In *Cox v. Kinston,* 217 N.C. 391, 8 S.E. 2d 252, Seawell, J., speaking for the Court, said:

> "As to the judicial function, the Legislature itself has none, and, therefore, the use of the word 'delegation' is not apt as regarding the power of the Legislature to confer judicial powers. The Legislature has always, without serious question, given *quasi*-judicial powers to administrative bodies in aid of the duties assigned to them, without necessarily making them courts. Such powers are given to the Utilities Commission, the Industrial Commission, the Commissioner of Revenue, the State Board of Assessment, and, in lesser degree, to many other State agencies which we might add to the list. The performance of *quasi*-judicial and administrational duties by the same board violates no implication of the cited section of the Constitution [Art. I, § 8], requiring that the supreme judicial power be kept separate from the legislative and executive. Certainly the limited discretion given to these bodies is no part of the 'supreme judicial power' of the State."

Since *Cox v. Kinston, supra,* was decided, Article IV of the Constitution has been rewritten. This Article, unlike Article I, Section 8, refers not to the "*supreme* judicial power" but to the "judicial

power" and provides that all of that power shall be vested in a court for the trial of impeachments and in the General Court of Justice, *"except as provided in Section 3 of this article."* (Emphasis added.) *State v. Matthews,* 270 N.C. 35, 153 S.E. 2d 791.

[8] Decisions of this and other courts to the effect that the Legislature may delegate to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations, so long as the Legislature, itself, prescribes the broad principles and standards within which such administrative authority is to be confined (See *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854, 128 A.L.R. 658), are not applicable to the present case. There, the question is whether the Legislature has sufficiently limited its own delegatee and thus has, itself, exercised the law-making power. Here, we are concerned with the extent to which the Legislature has undertaken to confer upon an administrative officer a power which the Legislature, itself, never had. Thus, we are not here concerned with whether the Legislature has or has not prescribed standards to guide and confine the administrative officer in his exercise of the power conferred. With or without standards to guide the administrative discretion, the Legislature cannot confer upon an administrative officer judicial power, except within the limits specified in Art. IV, § 3, of the Constitution.

[9] In G.S. 58-44.6 the Legislature has provided that when an insurance agent commits certain acts, or fails to do certain acts, such agent may, after a hearing, have inflicted upon him a civil penalty in an amount which may vary from a nominal sum to $25,000 for each such act or omission. Thus far, the statute is an exercise of the legislative power. As such, we need not concern ourselves here with whether the maximum authorized penalty is excessive with reference to some of the offenses to which it is applicable. Obviously, however, someone must determine the amount of the penalty to be inflicted in each case. This application of the law, which has been enacted by the Legislature, to the facts found in a specific case, so as to make the penalty commensurate with the conduct of the agent in question, is of the essence of judicial power. 1 Am. Jur., 2d, Administrative Law, § 173.

[10] The Legislature in G.S. 58-44.6 has undertaken to vest this judicial power in an administrative officer. Under Art. IV, §§ 1 and 3, of the North Carolina Constitution, as amended by the vote of the people at the general election in November 1962, the Legislature may do this, if, but only if, conferring this segment of the judicial power of the State upon the Commissioner of Insurance is "rea-

sonably necessary as an incident to the accomplishment of the purposes for which" the Department of Insurance was created.

[11] The power to revoke a license granted to an insurance agent by the Commissioner, pursuant to chapter 58 of the General Statutes, is "reasonably necessary" to the effective policing of the activities of such agents so as to protect the public from fraud and imposition, one of the purposes for which the Department of Insurance was established. The power to hold hearings and determine facts relating to the conduct of such agent is "reasonably necessary" to the effective and just exercise of the power to grant and revoke such license. The grant of such judicial power to the Commissioner for that purpose is clearly within the authority conferred upon the Legislature by Art. IV, § 3, of the Constitution.

We find, however, no reasonable necessity for conferring upon the Commissioner the judicial power to impose upon an agent a monetary penalty, varying, in the Commissioner's discretion, from a nominal sum to $25,000 for each violation.

[12, 13] Whether a judicial power is "reasonably necessary as an incident to the accomplishment of a purpose for which" an administrative office or agency was created must be determined in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred. We have before us only the attempted grant to the Commissioner of Insurance of the judicial power to impose upon an insurance agent, for one or more of the violations of law specified in G.S. 58-44.6, a penalty, varying in the Commissioner's discretion from a nominal sum to $25,000. We hold such power cannot be granted to him under Art. IV, § 3, of the Constitution of North Carolina.

It follows that the penalty for which the plaintiff here sues was not lawfully asserted and is not due from and owing by the defendant.

The judgment of the Court of Appeals is, therefore, reversed and this cause is remanded to the Court of Appeals for the entry of a judgment by it in accordance with this opinion.

Reversed and remanded.

STATE v. TERRY SNEEDEN

No. 496

(Filed 27 November 1968)

1. Rape § 1— elements of the offense

Carnal knowledge of a female forcibly and against her will is rape, the slightest penetration of the sexual organ of the female by the sexual organ of the male amounting to carnal knowledge in the legal sense.

2. Criminal Law § 71; Rape § 4— testimony that defendant "raped" prosecutrix

Where the prosecutrix had testified positively and unequivocably as to each element of the crime of rape, testimony by the prosecutrix that when she regained consciousness defendant was "in the act of raping" her *is held* competent as a shorthand statement of the events to which she had already testified.

3. Criminal Law § 33— evidence admissible

In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible.

4. Criminal Law § 42; Rape § 4— weapon used in connection with the crime

In a prosecution for rape, the court properly admitted into evidence a rifle found in defendant's possession the night of the crime where there was evidence tending to show the gun was used in connection with the crime charged.

5. Criminal Law § 130— conversation between bailiff and jury foreman

While it is not improper for the jury foreman to indicate to the bailiff that the jury desires further information from the court, it is improper for the bailiff to assume the role of judge and attempt to furnish the information.

6. Criminal Law § 130— mistrial for jury misconduct

Motion for a mistrial or a new trial based on misconduct affecting the jury is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed unless it is clearly erroneous or amounts to a manifest abuse of discretion.

7. Criminal Law § 130— new trial for misconduct of jury

A criminal verdict will not be disturbed because of a conversation between a juror and a third person when it does not appear that any injustice was done to defendant and he is not shown to have been prejudiced thereby.

8. Criminal Law § 130— denial of motion for mistrial for misconduct of jury

Denial of motions for a mistrial and for a new trial based on asserted misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown.

9. Criminal Law § 130— conversation between bailiff and jury foreman as to parole possibility — new trial denied

In a prosecution for rape, no abuse of discretion is shown in the court's denial of defendant's motions for a mistrial and for a new trial where the bailiff, in reply to a question by the jury foreman during the jury's deliberations as to how quick parole was possible, informed the jury foreman that such "has nothing to do with the evidence," there being nothing in the conversation between the bailiff and the jury foreman to show injury to the defendant or to afford any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict.

APPEAL by defendant from *Bickett, J.*, March 1968 Regular Criminal Session of WAKE County Superior Court.

Defendant was tried upon a bill of indictment charging him with the capital crime of rape. The jury returned a verdict of guilty and recommended life imprisonment. Sentence was pronounced accordingly, and defendant appealed to the Supreme Court.

The State's evidence — defendant offered none — tends to show that on September 17, 1967, Mary Jo Welch was returning by bus from her home in Burlington to East Carolina University at Greenville where she was a sophomore. She arrived in Raleigh at 6 p.m. and, having a one hour layover, entered the bus station restaurant for food and drink. She then spent some time in the waiting room and gift shop where she noticed defendant watching her. He finally approached her and introduced himself as a graduate student at East Carolina University working on a Master's degree and doing a thesis on penal institutions. He told her he worked for the North Carolina Prison Department and also a rent-a-car business on weekends. Defendant invited Miss Welch to ride with him and his brother as they were also returning to East Carolina. She at first declined but later, upon his insistance and assurances, accepted. Defendant reclaimed Miss Welch's baggage and placed it in his car parked nearby. He then drove to the Econo-Car Rental Office a block away and, after making a telephone call, informed Miss Welch that he had a problem with a rented car and had to take the client another vehicle. At his request she followed defendant in a second car. Defendant finally turned off the main road, stopped his vehicle, and told her he was to meet the client farther down the road and that he would go down to appraise the situation. He instructed her to follow in ten minutes if he had not returned. It was then 7 p.m. and still light. When he did not return, she drove down the dirt road as instructed. At the end of the road, defendant told her the client had not arrived but was coming to take him to the disabled car. From time to time she asked when the client was coming. Defendant went

into an old cottage nearby, used for fishing and hunting parties, and made some telephone calls. The bugs and mosquitos were getting bad, and defendant suggested they go inside the cottage to wait. She at first declined but finally went inside to avoid the mosquitos. It was not yet dark. They conversed about defendant's job at the Prison Department and its connection with his Master's degree. Defendant produced a rifle from an adjoining room, put it to her shoulder and demonstrated how to hold it. He asked if she had ever been taught ways to defend herself. He pointed the gun at her and said, "What would you do if I were to point this gun at you and tell you to take your clothes off?" She replied, "Well, if it were you I would probably laugh." Defendant told her he would not do that, took the gun away, and put it in the adjoining room. He returned and pulled her down on some kind of bunk bed and held her so she could not move. She asked him to let her up and he did. She started walking to the door when he again pulled her down and placed his body on hers so she could not move. He refused to let her up. She screamed and yelled and asked to be released. Defendant smothered her with his hand and said, "Shut up or I'll kill you." She calmed herself and he removed his hand from her mouth and nose. Defendant then told her to remove her pants, and she began screaming, became hysterical, and then felt a blow on the head. Thereafter, according to her testimony, "she didn't remember what happened after that until I guess I came to and he was in the act of raping me." She went into hysterics and evidently passed out. Upon regaining consciousness, defendant entered from the adjoining room, helped her up, and assisted her into the kitchen. He wanted to take her to the police, but she asked him to take her back to school. Then he said he would take her to the hospital because her head was bleeding. He said, "I hit you hard and you are bleeding very bad and you have got to go to the hospital and have it fixed." He helped her to the car and placed the rifle in the back seat. She was afraid he was taking her out to shoot her. He refused to take her back to school because she had so much blood on her and finally took her to a motel where she could bathe and remove the blood. He registered for a room at the motel, took her in, brought her suitcase from the car, and told her to take a shower, which she did. At that point defendant telephoned his wife and said, "Jane, I've got something to tell you, Jane, I have raped a girl and hurt her very bad." Miss Welch then spoke to defendant's wife on the phone. They drove to defendant's home where his wife looked at the wound on Miss Welch's head and told defendant to stay there while she took Miss Welch back to school. After they got in the car, Miss Welch related what had happened and defendant's wife took her to

the police station. It was then 12:30 a.m. Miss Welch was taken to the hospital and, after treatment, returned to the police station where she gave a written statement of what had taken place.

Deputy Sheriff C. L. Beddingfield was bailiff on duty in Wake Superior Court during the trial of this case. After the case had been submitted to the jury and during its deliberations, there was a knock on the door to the jury room and the bailiff, who was standing duty outside the door, opened it. The foreman asked if he could ask the bailiff a question. The bailiff told him he could not answer a question. The foreman then said, "We want to know how quick a parole was possible." The bailiff replied, "It has nothing to do with the evidence." Nothing else was said. The bailiff then reported the episode to the judge.

The jury returned a verdict of guilty and recommended life imprisonment. Judgment was pronounced accordingly, and defendant appealed to the Supreme Court assigning errors as noted in the opinion.

George M. Anderson and E. Ray Briggs, Attorneys for defendant appellant.

T. Wade Bruton, Attorney General, and George A. Goodwyn, Assistant Attorney General, for the State.

HUSKINS, J.

Defendant assigns as error the refusal of the court to strike the statement by the prosecuting witness Mary Jo Welch that after she felt something hit her on the head she didn't remember what happened until "I guess I came to and he was in the act of raping me." Defendant argues that the statement is a conclusion of the witness which invaded the province of the jury and should have been excluded.

[1, 2] Carnal knowledge of a female forcibly and against her will is rape. *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232. The slightest penetration of the sexual organ of the female by the sexual organ of the male amounts to carnal knowledge in a legal sense. *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513. Here, the evidence of the prosecuting witness is positive and unequivocal as to each and every element of the crime — force, penetration, and lack of consent. Viewed in context, the statement of the prosecuting witness that when she regained consciousness defendant was in the act of raping her was merely her way of saying that he was having intercourse with her. She was not expressing her opinion that she had been raped. Rather,

she was stating in shorthand fashion her version of the events to which she had already testified. Stansbury, N. C. Evidence 2d ed., § 125. Compare *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469. It is inconceivable that the jury could have construed it otherwise, and its admission was not error.

Defendant's next assignment of error relates to the introduction, over objection, of the rifle found in defendant's possession on the night of September 17, 1967. Defendant contends the rifle was not used in connection with the crime charged against him and therefore has no bearing on the question of his guilt.

[3] In criminal cases, ". . . every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton,* 264 N.C. 277, 286, 141 S.E. 2d 506, 513. Articles shown by the evidence to have been used in connection with the commission of the crime charged are competent and properly admitted in evidence. *State v. Stroud,* 254 N.C. 765, 119 S.E. 2d 907; accord, *State v. Payne,* 213 N.C. 719, 197 S.E. 573.

"So far as the North Carolina decisions go, any object which has a relevant connection with the case is admissible in evidence in both civil and criminal trials. Thus, weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime or in defense against an assault." Stansbury, N. C. Evidence 2d ed., § 118.

In *State v. Harris,* 222 N.C. 157, 22 S.E. 2d 229, the rape victim had been struck on the head. A brick with hairs clinging to it, found near the scene, was held properly admitted. A knife with which a rape victim was threatened and cut was held properly admitted in *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645.

[4] In the case before us, there is evidence tending to show that after defendant had lured his victim into the front room of a secluded cabin he went into an adjoining room and came back with a rifle. During the conversation about the gun, defendant pointed it at Miss Welch and said, "What would you do if I were to point this gun at you and tell you to take your clothes off?" She answered in jest although feeling apprehensive, and he said, "Don't worry I won't" and lowered the gun and took it back to the other room. Shortly thereafter he forced her down on a bunk bed and, after rendering her unconscious by a blow on the head, sexually assaulted her. Then he took the rifle along on the trip to the motel. On that trip she testified that all she could think about was the gun in the back seat and expressed her fear that he would shoot her. Thus, there is

evidence tending to show that the gun was used in connection with the commission of the crime charged, and it was admissible in evidence. It had a subtle intimidating significance to the victim and apparently served as a silent persuader. In any event, it had a relevant connection with the case, and its admission was not error.

[9] Finally, defendant assigns as error the denial of his motions for a mistrial and for a new trial based upon a conversation between the bailiff and the jury foreman. After the case had been submitted to the jury and during its deliberations, the bailiff opened the door to the jury room in response to a knock on the door. The bailiff testified under oath as follows: "The foreman asked me if he could ask me a question. I told him I could not answer a question. He says 'We wanted to know how quick a parole was possible.' I says 'It has nothing to do with the evidence.' And I reported it to the judge." Nothing else was said.

[5] The bailiff should have declined to answer the foreman's question and should have taken the jury to the courtroom where the presiding judge, if he deemed proper, could further instruct it. "Contacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced since no justification should be given for arousing suspicions as to the sanctity of jury verdicts." 89 C.J.S., Trial § 457(f). While it is not improper for the jury foreman to indicate to the bailiff that the jury desires further information from the court, it is improper for the bailiff to assume the role of judge and attempt to furnish the information. The legal significance of such improper conduct and the question of prejudicial effect largely depends upon the nature of the communication. See Annot., Communication with Jurors—Prejudice, 41 A.L.R. 2d 288.

In *Gaither v. Generator Co.*, 121 N.C. 384, 28 S.E. 546, the sheriff declined to provide the jury with refreshments except water and told the jurors they must wait until they agreed on a verdict or until the judge told him to take them to dinner. Such conduct was held not prejudicial.

In *State v. Burton*, 172 N.C. 939, 90 S.E. 561, the officer having the jurors in charge told them on Friday that the judge would keep them together until Sunday if they did not agree earlier. Such conduct was held insufficient for a new trial, even if the judge had authorized the officer to so inform the jury.

In *State v. Adkins*, 194 N.C. 749, 140 S.E. 806, the officer in charge of the jury during its deliberations informed the jurors that

defendant with his wife and daughter had endeavored to obtain lodging in the same boardinghouse with them. The finding of the trial judge that the verdict had not been influenced or tainted by the misconduct of the officer was upheld.

[6] Motions for a mistrial or a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court. *In Re Will of Hall,* 252 N.C. 70, 113 S.E. 2d 1. Unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be disturbed. *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363; *O'Berry v. Perry,* 266 N.C. 77, 145 S.E. 2d 321; *Keener v. Beal,* 246 N.C. 247, 98 S.E. 2d 19. "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *Lewis v. Fountain,* 168 N.C. 277, 279, 84 S.E. 278, 279.

[7] The great weight of authority sustains the rule that ". . . a verdict will not be disturbed because of a conversation between a juror and a stranger when it does not appear that such conversation was prompted by a party, or that any injustice was done to the person complaining, and he is not shown to have been prejudiced thereby, and this is true of applications for new trial by the accused in a criminal case as well as of applications made in civil actions. . . . [A]nd if a trial is really fair and proper, it should not be set aside because of mere suspicion or appearance of irregularity which is shown to have done no actual injury. Generally speaking, neither the common law nor statutes contemplate as ground for a new trial a conversation between a juror and a third person unless it is of such a character as is calculated to impress the case upon the mind of the juror in a different aspect than was presented by the evidence in the courtroom, or is of such a nature as is calculated to result in harm to a party on trial. The matter is one resting largely within the discretion of the trial judge." 39 Am. Jur., New Trial, § 101. This statement of the rule is quoted with approval by Parker, J., now C.J., in *Stone v. Baking Co., supra* (257 N.C. 103, 107, 125 S.E. 2d 363, 366). See Annot., Juror-Communication with Outsider, 64 A.L.R. 2d 158.

[8] Denial of such motions is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown. *Farmer v. Lands,* 257 N.C. 768, 127 S.E. 2d 553; *Stone v. Baking Co., supra.*

[9] The burden is on the appellant to show prejudicial error amounting to a denial of some substantial right. 1 Strong's N. C. In-

dex 2d, Appeal and Error, § 46; *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477. Here, there is nothing in the conversation between the bailiff and the jury foreman to show injury to the defendant or to afford any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict. Upon the facts shown, the trial judge was not required as a matter of law to order a mistrial. Furthermore, no abuse of discretion has been made to appear.

The verdict and judgment will be upheld.

No error.

DUKE POWER COMPANY, A CORPORATION v. I. L. CLAYTON, NORTH CAROLINA COMMISSIONER OF REVENUE

No. 274

(Filed 27 November 1968)

1. Taxation § 31— sales and use taxes — mill machinery and accessories thereto

Prior to 1 July 1961 sales of mill machinery or mill-machinery parts and accessories to manufacturing industries and plants were totally exempt from retail sales and use taxes. G.S. 105-164.13(12).

2. Statutes § 5— statutory construction

Words of a statute must be given their common and ordinary meaning unless another is apparent from the context, or unless they have acquired a technical significance.

3. Taxation § 31— sales and use taxes — exemption — accessory to manufacturing machinery

A fly-ash precipitator purchased by plaintiff power company and installed prior to 1 July 1961 for the purpose of preventing fly ash produced in the furnaces of the generating plant from polluting the air is exempt from retail sales and use taxes under G.S. 105-164.13(12) as an accessory to machinery used by plaintiff in the manufacture or generation of electricity, notwithstanding the precipitator is not used in the direct production of electricity, it being essential to the operation of the generating plant.

4. Statutes § 5— administrative interpretations

The Supreme Court will not follow an administrative interpretation of a statute which, in its opinion, is in conflict with the clear intent and purpose of the statute.

5. Taxation § 31— sales and use taxes — sale of fuel to manufacturers

After 1 July 1961 sales of fuel to manufacturers are subject to a sales or use tax of 1%. G.S. 105-164.4(1)(d); G.S. 105-164.6(1).

6. Taxation § 31— sales and use taxes — unmanufactured products of farm and mine

G.S. 105-164.13(3) exempts from sales and use tax products of farms, forests, and mines when sold by the producers in their original or unmanufactured state.

7. Statutes § 5— statutory construction — reconciling two statutes

Where two enactments are not irreconcilable, it is the duty of the Court to give effect to both.

8. Taxation § 31— sales and use taxes — unmanufactured coal

When fuel is the product of a mine and is sold by the producer in its original or unmanufactured state, it is exempt from sales and use taxes.

9. Taxation § 31— definition of manufacturing

The term manufacture as used in the sales and use tax statutes means the making of a new product from raw or partly wrought materials.

10. Taxation § 31— sales and use taxes — unmanufactured mine products

Coal purchased by plaintiff power company from corporations which mine the coal and then clean and crush it is exempt from sales and use taxes as a product of the mine in its original or unmanufactured state within the meaning of G.S. 105-164.13(3), neither the cleaning nor the crushing of the coal after it is mined constituting manufacturing within the meaning of the statute.

11. Taxation § 31— sales and use taxes — unmanufactured mine products — sales by agents of the producers

Sales of coal to plaintiff power company were made by the producers of the coal within the meaning of G.S. 105-164.13(3), notwithstanding the producers utilized sales agents in making such sales, the acts of the agents being the acts of the principals.

APPEAL by defendant from *Hasty, J.*, 27 November 1967, Schedule A, Civil Session of MECKLENBURG, certified under G.S. 7A-31(b)(1) for review by the Supreme Court without determination by the Court of Appeals.

On 31 January, 1964, Duke Power Company, Inc., (plaintiff), instituted this action under G.S. 105-267 against I. L. Clayton, Commissioner of Revenue for the State of North Carolina (defendant), to recover sales and use taxes paid under protest. These taxes were assessed upon plaintiff's purchases of coal and a fly-ash precipitator. By consent, the judge heard the case without a jury. The essential facts, which are not in dispute, are summarized as follows:

Plaintiff, a North Carolina corporation, is a public utility primarily engaged in the business of manufacturing and selling electricity. Its Allen Steam Electric Generating Plant (Allen) is located

on the Catawba River in Gaston County in a heavily populated area near the town of Belmont and about 3½ miles from the Charlotte Municipal Airport. Allen is a coal-burning plant with a generating capacity of approximately 1,200,000 kilowatts.

Fly ash, a very fine powder, is produced when coal is burned in the boilers of a steam electric generating plant. Allen burns enormous amounts of coal and, unless the resulting fly ash is trapped, a million pounds of fly ash would be discharged daily upon the surrounding countryside. This discharge would prohibit the operation of the plant in that area and would deprive plaintiff of the best available steam-plant site in the entire Duke Power Company system. A fly-ash precipitator is a large piece of equipment which traps the fly ash and prevents its discharge into the atmosphere. It is positioned between the steam-generator boiler and the stack. Ducts from the furnace discharge combustion gases bearing the fly ash into the precipitator. Electricity can be generated without the precipitator, but, as a practical matter, the consequences of doing so could not be disregarded. No plant as large as Allen operates in the United States without similar equipment. Plaintiff ordered the precipitator in suit in 1959. It was delivered in the fall of 1960, and installation was completed in March 1961.

Fly ash is commercially marketable as a lightweight additive to concrete and asphalt mixes, cement blocks, and concrete pipe. Plaintiff first sold fly ash in 1956. By 1959 the increasing demand for it had caused plaintiff to make provision for marketing the ash. From then through August 1967, in addition to the ash used in its own construction projects, plaintiff sold 84,950.67 tons for the total price of $150,697.37. In 1960 its revenue from fly ash was $563.73; in 1966, $29,988.50. In August 1966 plaintiff contracted to sell to Nello L. Teer Construction Company Allen's total output of fly ash and gave it the first right to purchase ash from all of plaintiff's other stations. Plaintiff expects to derive approximately $90,000.00 annually from this contract.

Prior to 1 July 1961, G.S. 105-164.13(12) exempted from the retail sales and use tax "sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants." On 13 September 1963, defendant, contending that the fly-ash precipitator was not mill machinery or an accessory to mill machinery because it was not used in the "direct production" of electricity, assessed plaintiff with use tax in the amount of $4,247.85 (plus interest) on account of its purchase. Plaintiff, contending that the precipitator

came within the foregoing exemption, paid the assessment under protest on 16 September 1963.

From 1 July 1961 through 30 November 1962, at a cost of $13,544,099.58, plaintiff purchased 3,864,879.8 tons of coal from the mines of sixty-five coal-mining companies. All but three of these companies made the sales directly to plaintiff. Each of these three sold its coal through a sales agent. Two sold through wholly owned subsidiary corporations formed for that purpose; one sold through a company which acted as sales agent for several coal-mining corporations. Two of the sales agents were reimbursed for actual expenses; one received a fixed commission, which was based on tonnage sold and bore no relation to the price of the coal. The sales companies, which never owned the coal, submitted orders to the mining corporations, collected for those which were filled, and remitted the purchase price to the producers. The coal was delivered to plaintiff on board freight cars at the mines. During the period 1 July 1961 through 30 November 1962, plaintiff paid railroad freight charges in the amount of $13,129,572.04 on the coal here involved.

On 13 September 1963 defendant assessed plaintiff with $266,736.71 (plus interest) in sales and use taxes with reference to these coal purchases and the freight charges thereon. On 16 September 1963 plaintiff paid this sum with interest to defendant under protest. Plaintiff's contention is that the coal sales are tax free under G.S. 105-164.13(3), which exempts from the retail sales and use tax "products of farms, forests, and mines when such sales are made by the producers in their original or unmanufactured state." Defendant contends (1) that the coal is not exempt because plaintiff did not purchase it in its "original or unmanufactured state" and, in at least three instances, plaintiff did not purchase from the producer; and (2) that it is taxable both under G.S. 105-164.4(1)(d) and G.S. 105-164.6(1), which impose a sales or use tax of 1% upon the "sales of fuel to manufacturing industries and manufacturing plants for use in connection with the operation of such industries and plants other than sales of fuels to be used for residential heating purposes."

In the ground, coal is generally found in relatively horizontal layers which are interspersed with strata of sandstone, slate, limestone, or shale. These layers of impurities — called partings, slate, rash, or bone — may be as thin as a pencil point or several inches in thickness. No impurities, however, are mixed in with the coal itself. In the mining process, tunnels are systematically blasted into the seams of coal. "Everything shot down during the blasting process" (coal and impurities) is taken to the surface by the loader. There is no other way to remove coal from the ground.

Coal comes to the surface in lumps, or chunks, of varying sizes and is taken to the "tipple," a building located between the mine and the railroad cars into which the coal is loaded. There the impurities are separated from the coal either by hand-picking, washing, air cleaning, or by a mechanical vibrator. It is then called "clean coal." Thereafter it is dried (if wet) and screened or otherwise divided into lumps of various sizes (sized). The coal is usually sized in a crushing machine, which can be adjusted so that the coal may be reduced to the desired size. All the coal in suit was crushed to a size of less than two inches.

Judge Hasty found facts substantially as set out above.

With reference to the fly-ash precipitator, he concluded:

(1) The precipitator is essential to the manufacture of electricity at Allen and was "mill machinery or an accessory to mill machinery" within the meaning of G.S. 105-164.13(12). It was also mill machinery essential to plaintiff's manufacture and sale of fly ash.

(2) The precipitator, having been purchased and installed prior to 1 July 1961, was exempt from the retail sales and use tax, and plaintiff is entitled to a refund of the use tax assessed in the amount of $4,247.85 with interest from 16 September 1963.

With respect to plaintiff's purchases of coal, Judge Hasty concluded:

(1) Each of the sixty-five coal-mining companies sold plaintiff the coal in suit as a producer within the meaning of G.S. 105-164.13(3), notwithstanding that three of them utilized sales agents in making the sales.

(2) The term *manufacturing,* as used in the statute and as generally understood, does not include cleaning and crushing coal after it is mined.

(3) The coal which was purchased from 1 July 1961 through 30 November 1962 was exempt from sales and use taxes, and plaintiff is entitled to a refund of the use tax paid in the amount of $266,736.71 with interest on that sum from 16 September 1963.

From the judgment that plaintiff recover of defendant the sum of $270,984.56, with interest at the applicable statutory rate from 16 September 1963, until paid, defendant appealed.

John D. Hicks and William I. Ward, Jr., for plaintiff appellee.

Thomas Wade Bruton, Attorney General; Robert L. Gunn, Assistant Attorney General, for defendant appellant.

SHARP, J.

This appeal presents two primary questions: (1) Is the fly-ash precipitator, which plaintiff installed in 1961, mill machinery or an accessory thereto within the meaning of G.S. 105-164.13(12), and (2) Was the cleaned and crushed coal plaintiff purchased from the corporations which mined it a product of the mine in its "original or unmanufactured state" within the meaning of G.S. 105-164.13(3)? The purchases of coal from the three mining corporations which used the services of sales agents raise a third question: Were those sales made by the producers of the coal as that term is used in G.S. 105-164.13(3)? (The designated statutes are those which were applicable at the time of the installation of the fly-ash precipitator and the purchase and delivery of the coal. S. L. 1957, Ch. 1340, § 5(a), p. 1380 and p. 1379, codified in N. C. Gen. Stat., Replacement Vol. 2C (1958).)

[1] Prior to 1 July 1961 sales of mill machinery or mill-machinery parts and accessories "to manufacturing industries and plants" were totally exempt from retail sales and use taxes. (G.S. 105-164.13(12), *supra.*) Since then they have been subject to the retail sales or use tax at the rate of 1%, with a maximum tax of $80.00 per article. G.S. 105-164.4(h). The fly-ash precipitator in suit, having been purchased, installed, and put to use prior to 1 July 1961, is exempt from sales and use tax if it is mill machinery *or* an accessory to mill machinery used by plaintiff in manufacturing. *Hosiery Mills v. Clayton, Com'r of Revenue,* 268 N.C. 673, 151 S.E. 2d 574.

Plaintiff's primary activity is the generation of electricity — a manufacturing enterprise. *City of Louisville v. Howard,* 306 Ky. 687, 208 S.W. 2d 522 (1948). It also produces and sells fly ash. Plaintiff concedes, however, that the precipitator was installed for the purpose of preventing the fly ash produced in the furnaces of its generating plant from polluting the air and surrounding area. In 1960 its sales of fly ash were minimal and incidental. However, our view of the case makes it unnecessary to decide whether the precipitator is exempt as machinery used in the manufacture of an incidental by-product.

[2, 3] It is an elementary rule of statutory construction that words must be given their common and ordinary meaning unless another is apparent from the context, or unless they have acquired a technical significance. *Bleacheries Co. v. Johnson, Comm'r of Revenue,* 266 N.C. 692, 147 S.E. 2d 177; 7 N.C. Index 2d, Statutes § 5 (1958). Despite the fact that electricity can be generated without the precipitator, that piece of machinery is obviously essential to

the operation of a generating plant, which would have to be abandoned without it. More we need not say, for G.S. 105-164.13(12) exempted not only manufacturing machinery but also *accessories thereto. Accessory,* as defined by Webster's Third New International Dictionary (1964) is "a thing of secondary or subordinate importance; an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else." (For a discussion of the problem posed by question (1), see generally Annot., 30 A.L.R. 2d 1439 (1953) and 3 A.L.R. 2d, Later Case Service 1266 (1965).) Indubitably, the fly-ash precipitator is an accessory to machinery which plaintiff used in the manufacture or generation of electricity.

[3] Defendant's tax assessment upon plaintiff's use of the precipitator was based upon his ruling that equipment must be "used in direct production or extractive processes" to be exempt under G.S. 105-164.13(12). For this position he attempts to apply Revenue Department's Sales and Use Tax Regulation No. 30, Section III-D.1.(a) (from which the quoted words are taken) to the sale and use of all mill machinery and to rely upon *Campbell v. Currie, Comm'r of Revenue,* 251 N.C. 329, 111 S.E. 2d 219. Regulation 30, issued 14 May 1962, was introduced in evidence by defendant without objection from plaintiff. Defendant asserts in his brief that the direct production test has been in force since 1944, when it was denominated Regulation No. 4. Citing *Campbell v. Currie, supra,* he argues that since Regulation No. 4, now Regulation No. 30, Section III-D.1.(a), has been unchanged by legislative action this Court should uphold it. No evidence in the transcript supports defendant's assertion of continuity, but — assuming the premise — Section III-D.1.(a) relates expressly to "mining"; it has no application to the fly-ash precipitator. The section provides: "(a) Sales of articles of tangible, personal property used in direct production of extractive processes inside the mine, including dynamite and other explosives, are deemed to be sales of mill machinery or mill machinery parts and accessories. . . ." The section of Regulation 30 which relates specifically to "electric power companies" is Section III-C.1.(a). It declares "all production machinery and accessories thereto" to be within the purview of G.S. 105-164.4(h).

[4] Clearly, the fly-ash precipitator is embraced by the definition contained in Section III-C.1.(a), and Section III-D.1.(a) is totally irrelevant. In any event, the Commissioner's regulation construing the Revenue Act cannot change the meaning of a statute or control the Court's interpretation of it. "[T]his Court will not follow an ad-

ministrative interpretation which, in its opinion, is in conflict with the clear intent and purpose of the statute under consideration." *In re Vanderbilt University,* 252 N.C. 743, 747, 114 S.E. 2d 655, 658.

Campbell v. Currie, supra, does not support defendant's premise that the fly-ash precipitator installed in a power plant must be used in the "direct production" of electricity to come within the exemption which G.S. 104-164.13(12) afforded mill machinery, etc. In *Campbell,* the plaintiff sold lumber in 1957 to Tungsten Mining Company, which used it underground in the stoping process of its mining operations. At that time, mill machinery, etc., were exempt from the retail sales tax but were subject to a wholesale tax of 1/20th of 1%. The Commissioner, contending that lumber was not mill machinery or accessories thereto assessed the plaintiff's sales to the mine at 3%. Plaintiff paid the tax under protest and sued for its recovery. The trial judge found that the lumber "was used in the direct production and extractive process inside the mine" and its sale was "embraced within the term sales of mill machinery, mill machinery parts and accessories" as defined by the Revenue Department's Sales and use Tax Regulation No. 4. From the opinion it appears that Regulation No. 4, specifically applicable to *mining,* was practically identical with Section III-D.1.(a) of Regulation 30. Judgment was entered that plaintiff recover the amount of the tax paid. Upon appeal, defendant Commissioner contended that his Department's Regulation No. 4 went "beyond the authority granted by the legislature to the Commissioner in classifying mill machinery, mill machinery parts and accessories." In affirming the judgment of the trial judge, this Court noted that Regulation No. 4, after having been duly promulgated, had been in effect for more than fifteen years. It held that *the taxpayer* was entitled to claim the protection of Regulation 4, which, under G.S. 105-264, was "prima facie correct and a protection to the officers and taxpayers affected thereby." Obviously, under the facts of this case, defendant is in no need of "protection."

The two cases which defendant cites from other jurisdictions, *Union Carbide & Carbon Corp. v. Bowers,* 166 Ohio St. 419, 143 N.E. 2d 710 (1957) and *Tulsa Mach. Co. v. Oklahoma Tax Comm'n,* 208 Okla. 138, 253 P. 2d 1067 (1953), are likewise not pertinent to a consideration of G.S. 104-164.13(12). Respectively, they involved the construction of Ohio and Oklahoma statutes which exempted machinery only if used *directly* in the manufacturing process. Therefore, the answer to question (1) is YES. Defendant's assignments of error relating to the fly-ash precipitator are, therefore, overruled.

[5-8] Between 1 July 1955 and 1 July 1961 all sales of fuel to

manufacturers were exempt from sales and use tax. S. L. 1955, Ch. 1313, § 3(e), p. 1356; S. L. 1957, Ch. 1340, § 5(a), p. 1380. Thereafter the legislature subjected sales of fuel for the operation of manufacturing plants to a sales or use tax at the rate of 1% of the sales price. G.S. 105-164.4(1)(d), G.S. 105-164.6(1). The presumption is that the General Assembly enacted these statutes with care and deliberation and with full knowledge that G.S. 105-164.13(3) — which it left in full force and effect — exempted "products of farms, forests, and mines" when sold by the producers in their original or unmanufactured state. *State v. Lance,* 244 N.C. 455, 94 S.E. 2d 335. The two enactments are not irreconcilable, and it is the duty of the Court to give effect to both. *State v. Humphries,* 210 N.C. 406, 186 S.E. 473. Therefore, when fuel is the product of a mine and sold by the producer in its original or unmanufactured state, it is exempt from sales and use taxes. Had the legislature intended otherwise, obviously it would have eliminated fuel from the exemption.

[10] The second question, therefore, is whether coal, after having been separated from the rock and slate mined with it and then crushed, remains in its "original or unmanufactured state" within the meaning of G.S. 105-164.13(3). The phrase, "original or unmanufactured state," must be construed in relation to the particular product involved and in accordance with general understanding of the words used. *See Byrd v. Aviation, Inc.,* 256 N.C. 684, 124 S.E. 2d 880; *Seminary v. Wake County,* 251 N.C. 775, 112 S.E. 2d 528. Patently, the legislature intended the term *manufacture* to explain and delimit the word *original.* A farmer who sells unshucked sweetcorn from his patch surely sells it in its original state. If the farmer shucks the roasting ears first, a technicalist might argue that they were no longer in their original state, but he would scarcely contend that the corn had been manufactured.

[9] The word *manufacture* "is not susceptible of an accurate definition that is all-embracing or all-exclusive, but is susceptible of many applications and many meanings. . . . In its generic sense, 'manufacturing' has been defined as the producing of a new article or use or ornament by the application of skill and labor to the raw materials of which it is composed." 55 C.J.S. *Manufactures,* § 1 at 667 and 670 (1948). *Accord, Bleacheries Co. v. Johnson, Comm'r of Revenue, supra* at 695-96, 147 S.E. 2d at 179; *City of Louisville v. Ewing Vol-Allmen Dairy Co.,* 268 Ky. 652, 105 S.W. 2d 801 (1937). "To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character, or use." *Inhabitants of Leeds v. Maine Crushed Rock & Gravel*

Co., 127 Me. 51, 56, 141 A. 73, 75 (1928). Thus, the usual connotation of *manufacturing* is the making of a new product from raw or partly wrought materials. Carbonize coal in a coke oven and a new and different product, coke, has been manufactured. Crush coal, however, and it is still merely coal.

In *Anheuser-Busch Brewers Ass'n v. United States*, 207 U.S. 556, 28 S. Ct. 204, 52 L. Ed. 336 (1908), plaintiff sued for a drawback on corks which it had imported from Spain and used in bottling beer for exportation. Before using the corks plaintiff put them in an air fan which removed all dust, meal, bugs, and worms. The corks were then washed, steamed, and dried. After this they were put in a glycerin-alcohol bath and dried by a special system. Plaintiff contended that this process — which took from one to three days — made them articles manufactured in the United States from imported materials and, upon exportation, entitled the manufacturer to a partial drawback of the import duties paid on the corks. In rejecting this contention, the Supreme Court, speaking through Mr. Justice McKenna, said: "Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary. . . . There must be a transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." *Id.* at 562, 28 S. Ct. at 206-07, 52 L. Ed. at 338. The foregoing words are equally applicable to the crushed coal.

Removing coal from underground and bringing it to the surface is mining; it does not constitute manufacturing. Annot., 17 A.L.R. 3d 7, 68-69 (1968). The first step in processing coal for sale is to separate it from the impurities which, of necessity, have been mined with it. This mechanical process, called cleaning, changes the coal no more than shucking does an ear of corn; the coal itself remains in its original or unmanufactured state — exactly as it came from the ground in chunks, or lumps, of varying sizes. Manufacturing is not involved in the first step. *Anheuser-Busch Brewers Ass'n v. United States, supra.* The second step is to reduce the size of the coal by crushing it. Is crushed coal manufactured coal?

Neither our research nor that of counsel has produced a decision whether the crushing of coal constitutes manufacturing within the meaning of taxing statutes. Cases involving the crushing and screening of quarried rock, however, are analogous. The majority of jurisdictions which have decided the question hold that quarrying and

crushing stone is not manufacturing. *Schumacher Stone Co. v. Tax Comm'n,* 134 Ohio St. 529, 18 N.E. 2d 405 (1938). The cases are collected in Annot., 17 A.L.R. 3d 7, 68-75 (1968). The following cases well state the rationale:

In *People v. Saxe,* 176 App. Div. 1, 162 N.Y.S. 408 (1916), *affirmed,* 221 N.Y. 601, 117 N.E. 1081 (1917), a case in which it was held that a corporation engaged in blasting and crushing limestone was not engaged in manufacturing, it was said: "The process through which coal passes from the time it is separated from the mass in the mine to the time it is placed upon the market is closely analogous to the process employed by the relator in its business. It could hardly be claimed that breaking or mining coal is being engaged in manufacturing." *Id.* at 410-11. A similar statement appears in *Wellington v. Inhabitants of Town of Belmont,* 164 Mass. 142, 41 N.E. 62 (1895), where Morton, J., said: "We do not see that the business of quarrying stone and breaking it up for use on roads and other similar purposes is any more a manufacturing business than mining coal and breaking it up into merchantable sizes, or farming and cutting ice." *Id.* at 143, 41 N.E. at 62.

In *Commonwealth v. John T. Dyer Quarry Co.,* 250 Pa. 589, 95 A. 797, the court said: "Quarrying is not manufacturing; neither is crushing in and of itself a manufacturing process, unless it results in the production of a new and different article." *Id.* at 591, 95 A. at 797. It reasoned: if the stone had been broken into smaller sizes by men wielding hammers it would not have been argued that this was manufacturing; the use of machinery did not change the nature of the process; the rock, "broken into sizes to meet the demands of the market," was sold just as it fell from the crusher without the application thereto of any art, skill or process which changed its appearance or form.

The Iowa Supreme Court reached the same conclusion in *Iowa Limestone Co. v. Cook,* 211 Iowa 534, 233 N.W. 682 (1930). Crushing stone, it said, "does not change the product into a new or different article, having any new or distinctive name or character. This is altogether different from the business of felling timber in its natural state, and sawing, planing, dressing, and sizing the same into an entirely new product, namely, merchantable lumber of many varieties." *Id.* at 541, 233 N.W. at 686. *Accord, Inhabitants of Leeds v. Maine Crushed Rock & Gravel Co., supra; Commonwealth v. Welsh Mountain Mining & Kaolin Mfg Co.,* 265 Pa. 380, 108 A. 722 (1919); *People v. Saxe, supra; Wellington v. Inhabitants of Town of Bel-*

mont, supra. See also Cleveland-Cliffs Iron Co. v. Glander, 145 Ohio St. 423, 62 N.E. 2d 94 (1945).

[10] Defendant relies upon the following cases, which hold that corporations engaged in crushing rock for commercial use are engaged in manufacturing: *High Splint Coal Co. v. Campbell,* 222 Ky. 591, 1 S.W. 2d 1051 (1928); *Tulsa Mach. Co. v. Okla. Tax Comm'n, supra; Dolese & Shepard Co. v. O'Connell,* 257 Ill. 43, 100 N.E. 235 (1912). We have considered these cases, and they do not persuade us that crushing coal is a manufacturing process as that term is generally understood. We hold with Judge Hasty that plaintiff purchased the coal in an unmanufactured state.

Because three of the mining corporations producing the coal in suit made sales to plaintiff through sales agents, defendant contends that those sales were not made by the producer. For this position he cites *Henderson v. Gill,* 229 N.C. 313, 49 S.E. 2d 754. In that case the taxpayers were partners operating a retail florist shop, selling flowers and floral arrangements which they made. They purchased some of the flowers wholesale and grew the rest. The Commissioner assessed sales tax upon their total sales. They paid the assessment under protest and sued to recover that portion of the tax which (they asserted) had been paid upon the sale of cut flowers grown upon their own land. In denying recovery the Court said:

"In the case at bar we must keep in mind that the tax is imposed with respect to sales made by a retail merchant . . . and this should properly be the beginning of our reasoning, rather than with the exception. The sale was a transaction carried on by the plaintiffs as retail merchants through a regular place of business devoted to that purpose. . . . and not that of a farmer and cultivator of the soil in producing the product. . . ." *Id.* at 319, 49 S.E. 2d at 758.

Henderson v. Gill is not applicable to the facts of this case. The mining companies sold *only* the coal which they mined. It was not comingled with coal purchased from other producers; nor did they sell furnaces, stoves, grates, coal scuttles, fireside or other heating accessories. In short, they were not operating a retail coal yard and conducting mining operations as a subordinate enterprise which incidentally furnished a portion of their stock in trade. The corporate brokers which negotiated their sales to plaintiff were their agents within the most elementary definition of that term. *"Qui facit per alium facit per se.* He who acts through another acts himself — *i. e.,* the acts of an agent are the acts of the principal." *Livingston v. Investment Co.,* 219 N.C. 416, 425, 14 S.E. 2d 489, 494. The orders which plaintiff placed with the three agents were subject to accept-

ance or rejection by the mining companies, their principals. Just as the broker, who sells a tract of land for a client upon the client's terms, never owns the land he sells, these sales agents never had title to the coal which plaintiff bought. Title passed directly from the mining corporations to plaintiff when it accepted the coal F. O. B. at the mine. Obviously, the producers sold their own coal.

[11] Judge Hasty correctly held that all the sales of coal to plaintiff were made by the producers of the coal within the meaning of G.S. 105-164.13(3), notwithstanding that three of the producers utilized sales agents in making such sales.

For the reasons stated, each of defendant's assignments of error is overruled, and the judgment of the court below is

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

MEIR v. WALTON

No. 530.

Case below: 2 N.C. App. 578.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 November 1968.

NEWMAN MACHINE COMPANY v. NEWMAN

No. 691

Case below: 2 N.C. App. 491.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 26 November 1968.

PARKER v. ALLEN

No. 689.

Case below: 2 N.C. App. 436.

Petition for writ of certiorari to North Carolina Court of Appeals denied 20 November 1968.

STATE v. LOVEDAHL

No. 497.

Case below: 2 N.C. App. 513.

Petition for writ of certiorari to North Carolina Court of Appeals denied 20 November 1968.

STATE v. PARRISH

No. 823.

Case below: 2 N.C. App. 587.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 20 November 1968.

STATE v. WHITT

No. 743.

Case below: 2 N.C. App. 601.

Purported appeal from decision of North Carolina Court of Appeals dismissed 26 November 1968.

YORK v. NEWMAN

No. 692.

Case below: 2 N.C. App. 484.

Petition for writ of certiorari to North Carolina Court of Appeals denied 26 November 1968.

STATE OF NORTH CAROLINA v. JAMES ALLEN STAFFORD

No. 495

(Filed 9 December 1968)

1. Criminal Law § 138— severity of sentence on retrial — credit for prior sentence

When a sentence is set aside and a new trial ordered upon defendant's application on appeal or in post-conviction proceedings, the whole case is tried de novo and the former judgment does not fix the maximum punishment which may be imposed after a second conviction; the total of the time served under the two sentences, however, may not exceed the maximum sentence authorized by the applicable statute, and on any subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence.

2. Criminal Law § 150— right of defendant to appeal

No person should ever be penalized for exercising a constitutional right or his right of appeal, but not every auxiliary consequence unfavorable to a prisoner who has succeeded in vacating a sentence can be classified as a penalty.

3. Criminal Law § 150— right of unfettered appeal

In this State an aggrieved party has the absolute and unfettered right to appeal, and the Supreme Court has been alert to protect this right.

4. Criminal Law § 138— procedure in imposition of sentence — evidence

In determining sentence to be imposed, any evidence bearing upon a defendant's conduct, character, and propensities should be considered whether the court hears it during the trial or reads it in a presentence report.

5. Criminal Law § 158— presumption of judge's impartiality

There is a presumption that a judge will act fairly, reasonably and impartially in the performance of the duties of his office.

6. Criminal Law § 138— increased punishment upon retrial — validity

Upon the retrial and conviction of an accused whose earlier conviction for the same offense was set aside upon appeal or in post-conviction proceedings because of a constitutional defect in the first trial, the trial court may impose a sentence severer than the one vacated, unless it affirmatively appears that the second sentence has been increased to penalize a defendant for exercising rights accorded him by the constitution, a statute, or judicial decision.

7. Criminal Law § 158— presumption that judge acted fairly — burden of proof

A defendant has the burden to overcome the presumption that trial judge acted with the proper motive and did not violate his oath of office.

8. Criminal Law § 138— increased punishment upon retrial — necessity for explanation

Where the trial judge imposes severer sentence on retrial than the one

vacated, it is unnecessary for him to articulate the reason for any differentiation in the term of the sentence, although there is no objection to his placing in the record the basis for his action.

9. Criminal Law § 26; Constitutional Law § 37— waiver of protection against retrial

When a defendant seeks a new trial by appealing his conviction, he waives his protection against reprosecution.

10. Criminal Law §§ 26, 138— double jeopardy — increased punishment on retrial

The Fifth Amendment protection against double jeopardy has no application to increased punishment in a second trial resulting from defendant's successful attack upon his first conviction. U. S. Constitution, Amendment V.

11. Criminal Law §§ 4, 26— element of offense — punishment

Punishment is not an ingredient of the offense.

12. Criminal Law §§ 26, 138— validity of retrial and resentencing

Under the Fifth Amendment the only persons who can ever be retried or resentenced are those whose first sentences have been imposed under valid statutes and have been vacated at their request. U. S. Constitution, Amendment V.

13. Criminal Law §§ 150, 181— post-conviction alternatives

A convicted defendant has the right to appeal and to assert alleged violations of his constitutional rights in post-conviction proceedings, or he has the right to accept the sentence pronounced and rely upon the constitutional provision which protects him from double jeopardy.

14. Criminal Law § 138; Constitutional Law § 20— equal protection — risk of increased punishment on retrial

A prisoner who has accepted his sentence is not in the same classification as one who has sought and obtained a second trial and, the two classes being dissimilar, it is not reasonable to claim a violation of the equal protection clause because all those who are tried de novo assume the risk of an increased sentence at the second trial while those who never attack their sentences do not.

15. Constitutional Law § 20— equal protection

It is fundamental that once a right or privilege is granted it must be applied equally and indiscriminately, but when a law applies uniformly to all members of the class affected — and the classification is based on a reasonable distinction — equal protection of the laws has not been denied.

16. Constitutional Law § 20— equal protection

The Constitution does not require that the same rules apply to incompatible classes.

17. Criminal Law § 138— consolidation for judgment of two or more counts — excessive sentence

Trial court may consolidate for judgment two or more counts charging

distinct offenses and pronounce one sentence, but the court is not authorized to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts.

REVIEW upon certiorari of order, entered 21 November 1966 by *Mallard, J.*, dismissing petitioner's application for a writ of habeas corpus and post-conviction review under G.S. 15-217 *et seq.*

At the July 1953 Session of the Superior Court of Wake, defendant pled guilty to charges of feloniously breaking and entering the building occupied by Brawley Jewelry Company of Raleigh and of stealing and carrying away therefrom watches valued at $5,400.50. The two counts were consolidated for judgment, and defendant received a sentence of "not less than ten years nor more than eighteen years" in the State's prison. He escaped from prison on 7 December 1953, but was apprehended in Ohio and returned on 25 November 1964.

Thereafter, under G.S. 15-217 *et seq.*, defendant petitioned the Superior Court to vacate his sentence because he was not represented by counsel at the time he entered his plea of guilty. Judge C. W. Hall allowed his petition, set aside his plea and sentence, and ordered a trial de novo. Upon retrial at the November 1965 Session, defendant entered a plea of not guilty. The State offered evidence before the jury; defendant did not. The verdict was "guilty of breaking and entering as charged and guilty of larceny as charged." Upon the count of breaking and entering, the judgment was that defendant be imprisoned for not less than seven nor more than ten years; upon the count of larceny, for not less than six nor more than eight years, this sentence to begin at the expiration of the one imposed on the first count. The court ordered that defendant be credited with all time served prior to 11 October 1965 in execution of the sentence imposed at the July 1953 term.

Defendant appealed to this Court, assigning as error the admission in evidence of his confession and the failure of the court to allow his motion of nonsuit. We found no error in the trial. *State v. Stafford,* 267 N.C. 201, 147 S.E. 2d 925 (filed 4 May 1966).

On 21 November 1966, defendant addressed to Honorable Raymond B. Mallard, the judge then presiding over the Superior Court of Wake County, the last of several petitions for his release or post-conviction review of his trial. He averred (1) that he had been awarded and subjected to a new trial over his vigorous protest, and (2) that the sentence which he received at the second trial was illegal because it exceeded by three years the sentence at the first

trial. Judge Mallard found — as the record conclusively establishes — that the new trial had been awarded at defendant's insistence and after Judge Hall had fully explained to him "the risk incident thereto." Judge Mallard found defendant's petition to be without merit and denied his application.

On 22 June 1967 defendant filed with this Court a petition for certiorari in which he asserted that a sentence in excess of the one received at his first trial could not constitutionally be imposed at the second trial. Certiorari was allowed.

T. W. Bruton, Attorney General, and Dale Shepherd, Staff Attorney, for the State.

Hatch, Little, Bunn & Jones by Frank R. Liggett, III, for petitioner-appellant.

SHARP, J.

Defendant's appeal presents for our reconsideration this question: Upon the retrial and conviction of an accused whose earlier conviction for the same offense was set aside upon appeal or in post-conviction proceedings because of a constitutional defect in the first trial, may the court impose a sentence severer than the one vacated?

[1] The decisions of this Court have established the following rules for this jurisdiction: When, upon defendant's application, a sentence is set aside and a new trial ordered, the whole case is tried de novo. The former judgment, therefore, does not fix the maximum punishment which may be imposed after a second conviction. *State v. Pearce,* 268 N.C. 707, 151 S.E. 2d 571; *State v. Slade,* 264 N.C. 70, 140 S.E. 2d 723; *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687; *State v. White,* 262 N.C. 52, 136 S.E. 2d 205, *cert. denied,* 379 U.S. 1005 (1965). The total of the time served under the two sentences, however, may not exceed the maximum sentence authorized by the applicable statute. *State v. Foster,* 271 N.C. 727, 157 S.E. 2d 542; *Williams v. State,* 269 N.C. 301, 152 S.E. 2d 111; *State v. Weaver,* 264 N.C. 681, 142 S.E. 2d 633; *State v. Slade, supra.* Furthermore, on *any* subsequent sentence imposed for the same conduct, a defendant must be given full credit for all time served under the previous sentence. *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522; *State v. Weaver, supra. Accord, Lewis v. Commonwealth,* 329 Mass. 445, 108 N.E. 2d 922, 35 A.L.R. 2d 1277 (1952). See *King v. United States,* 69 App. D. C. 10, 98 F. 2d 291 (D. C. Cir. 1938); Annot., 35 A.L.R. 2d 1283, 1288 (1954).

The North Carolina rule that upon retrial the court hears the case as if it were being tried for the first time and may impose an increased sentence is in accord with the weight of authority. In Annot., 12 A.L.R. 3d 978, 979-80 (1967) (wherein the cases on this point are collected), it is said: "The majority of courts which have been faced with the issue have held or indicated that it is permissible, both in cases involving capital offenses and in those involving lesser offenses, to impose upon a defendant convicted at a new trial of the same crime of which he was previously convicted a more severe punishment than was imposed upon his earlier conviction." *Accord,* 24 C.J.S. *Criminal Law* § 1426 (1961); 66 C.J.S. *New Trial* § 226 (1950); 39 Am. Jur. *New Trial* § 217 (1942).

To the question whether, upon a retrial, the defendant may be given an increased sentence, other courts have given five different answers:

1. Severer sentences are permissible and will be upheld unless they clearly flout constitutional standards of due process, and the judge need not articulate the reason for the differentiation in the sentence. *United States ex rel. Starner v. Russell,* 378 F. 2d 808 (3d Cir. 1967), *reh. denied* 389 U.S. 889 (1967); *United States v. Fairhurst,* 388 F. 2d 825 (3d Cir. 1968), *cert. denied,* 392 U.S. 912; *United States v. Saunders,* 272 F. Supp. 245 (E.D. Cal. 1967); *Hobbs v. State,* 231 Md. 533, 191 A. 2d 238 (1962), *cert. denied* 375 U.S. 914 (1963); *King v. United States, supra; Sanders v. State,* 239 Miss. 874, 125 So. 2d 923, 85 A.L.R. 2d 481 (1961); *State v. Young,* 200 Kan. 20, 434 P. 2d 820 (1967). (In *Newman v. Rodriquez,* 375 F. 2d 712 (10th Cir. 1967), it was held that upon reconviction after a new trial the state of New Mexico was not required to give credit for time served on a void sentence for the same offense.)

2. Increased sentences are absolutely prohibited. *Patton v. North Carolina,* 381 F. 2d 636 (4th Cir. 1967), *cert. denied* 390 U.S. 905 (1968); *State v. Turner,* 429 P. 2d 565 (Ore. 1967). See also *Walsh v. United States,* 374 F. 2d 421 (9th Cir. 1967) (Sentence imposed in absence of defendant, although erroneous and vacated, fixed maximum penalty.) *People v. Ali,* 66 Cal. 2d 277, 57 Cal. Rptr. 348, 424 P. 2d 932 (1957).

3. Increased sentences are prohibited *unless* events warranting an increased penalty occur and come to the court's attention subsequent to the first sentence, and are made affirmatively to appear. *Marano v. United States,* 374 F. 2d 583 (1st Cir. 1967).

4. Increased sentences are permitted when the record affirmatively shows that the judge is not penalizing the defendant for

having exercised his right to have his first sentence vacated. *United States v. White,* 382 F. 2d 445 (7th Cir. 1967), *cert. denied* 389 U.S. 1052 (1968); *Rice v. Simpson,* 274 F. Supp. 116 (M. D. Ala. 1967); *Coke v. United States,* 280 F. Supp. 97 (S. D. N. Y. 1968); *State v. Leonard,* 39 Wis. 2d 461, 159 N.W. 2d 577 (1968); *State v. Jacques,* 99 N. J. Super. 230, 239 A. 2d 252 (1968).

5. After a defendant has been tried and *convicted* of murder in the first degree (or other capital crime), with a recommendation of life imprisonment, upon a retrial the prosecution may not seek the death penalty. The rationale is that the "price of an appeal from an erroneous conviction" may not be "set at risk of a man's life." *State v. Wolf,* 46 N.J. 301, 216 A. 2d 586, 12 A.L.R. 3d 970 (1966). The rule enunciated in *Wolf* was not made applicable to a sentence imposed upon a plea of *non vult,* since upon such a plea the defendant could not have been sentenced to death, nor was it applied to a resentence for robbery in *State v. Jacques, supra.* See *Beardslee v. United States,* 387 F. 2d 280, 297 (8th Cir. 1967), in which the court recognized the potential problem when it granted a new trial to a defendant convicted of murder in the first degree "without capital punishment."

The foregoing classification reveals the recent conflict between the federal circuits which have considered the question here involved. See *Jack v. United States,* 387 F. 2d 471, 474 (9th Cir. 1967); *United States v. White, supra* at 448; *Moon v. State,* 1 Md. App. 569, 571, 232 Atl. 2d 272, 278 (1967). The divergence between our views and those of the Court of Appeals for the Fourth Circuit, by whose decisions all federal district courts in North Carolina are bound, has put the utmost stress upon the "delicate balance of federal-state relations." We have, therefore, decided to re-examine the reasoning which has shaped our conflicting views.

The grounds upon which it is asserted that at any subsequent trial for the same offense a defendant cannot be sentenced to a longer term of imprisonment than he received upon his first conviction are these: (1) The risk of a greater sentence "chills" meritorious appeals as well as frivolous ones. It imposes an unreasonable and a fundamentally unfair condition upon a defendant's right to attack his conviction, which deprives him of due process of law. (2) An increased sentence deprives the successful movant or appellant of the equal protection of the laws. (3) An increased sentence is inconsistent with the constitutional prohibition against double jeopardy. The gist of the arguments supporting these hypotheses are set out in *Marano v. United States, supra; Patton v. North Carolina,*

supra; and *State v. Turner, supra.* See also Van Alstyne, In Gideon's Wake, 74 Yale L. J. 606 (1965).

DUE PROCESS

The rationale of the due process claim is stated in *Coke v. United States, supra,* as follows: In essence it "rests upon the suggested rejection of the theory that in appealing a criminal conviction a defendant consents to proceedings de novo, including resentence if the original judgment is vacated and a new trial ordered. This legal fiction is said to impose an unconstitutional condition upon the right of appeal, putting defendants to a 'grisly choice' . . . either appealing a conviction rendered upon proceedings constitutionally unfair and risking harsher punishment, or abandoning that right and serving a prison term under a sentence invalid in all but name."

In considering whether an increased sentence deprived a defendant of due process of law two fundamental principles must be weighed: (1) the right of every person convicted of crime to exercise his constitutional rights and to appeal his conviction and sentence without fear of reprisals, and (2) the right of every trial judge to remain in control of the case he is trying and to exercise his own judicial discretion freely. The first protects individual rights; the second, the freedom, integrity, and favorable repute of the judicial branch of the government. In our view, these rights are mutually dependent.

[2, 3] It goes without saying that no person should ever be penalized for exercising a constitutional right or his right of appeal. Not every auxiliary consequence unfavorable to a prisoner who has succeeded in vacating a sentence, however, can be classified as a penalty. In North Carolina, an aggrieved party has the absolute and unfettered right to appeal, and this Court has been alert to protect this right. In *State v. Arthur Patton, Jr.,* 221 N.C. 117, 19 S.E. 2d 142, the record disclosed that when the defendant gave notice of appeal from a fine of $25.00, the trial judge struck that judgment and imposed a prison sentence of ninety days. In remanding the case for resentence, Devin, J. (later C.J.), said: "[I]t seems here, under the circumstances described in the record, the action of the judge was induced by the defendant's expression of his intention to appeal. This tended to impose a penalty upon the defendant's right of appeal and to affect the exercise of his right to do so. . . . This right ought not to be denied or abridged, nor should the attempt to exercise this right impose upon the defendant an additional penalty or the enlargement of his sentence." *Id.* at 119, 19 S.E. 2d at 143-44.

In *Marano v. United States, supra,* the defendant was convicted in the Federal District Court of receiving stolen goods and given a three-year sentence. The Court of Appeals ordered a new trial, and Marano was again convicted. As a result of the additional testimony produced at the second trial *and* his evaluation of the new presentence report, the same judge — *expressly* disclaiming that he was penalizing defendant for having appealed — imposed a sentence of five years. In remanding for resentence the Court of Appeals said: A defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing," and, on the question of punishment, the trial judge had no right to consider the additional evidence at the second trial. "The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider, unfavorably to the defendant, the factors which led to his original disposition. We think there must be repose not merely as to the severity of the court's view, but as to the severity of the crime." *Id.* at 585. However, the court recognized a *new* presentence report as an exception to the rule and said that it would not be "inappropriate for the court to take subsequent events into consideration both good and bad." Notwithstanding, since the judge considered both the report *and* the additional evidence, the five-year sentence was vacated.

[4] It seems to us that any evidence bearing upon a defendant's conduct, character, and propensities should be considered whether the court hears it during the trial or reads it in a presentence report. The idea that a defendant should be "protected" from the hazard that, between a first and second trial, the prosecution might obtain additional evidence which would augment his crime and disclose criminal tendencies revealing him to be a greater threat to society than the judge had reason to suspect at the first trial is one which we cannot assimilate. It may be that in *Marano* the court thought the district judge had protested too much and that he had, in fact, punished the defendant for insisting upon a second trial which produced the same verdict. Even so, its sweeping prohibition far exceeded the requirements of the case. For its statement that "there must be repose not merely as to the severity of the court's view, but as to the severity of the crime," it cited no authority but suggested by way of a *"Cf."* that *Green v. United States,* 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199, 61 A.L.R. 2d 119 (1957), was sufficiently analogous to lend some support to its statement.

The 5-4 decision in *Green* was that, upon the defendant's trial for first-degree murder, the jury's verdict finding him guilty of sec-

ond-degree murder was an implied acquittal of the charge of first-degree murder and that to retry him for that offense would be to place him twice in jeopardy. Thus, *Green* dealt with the right of the government again to prosecute the defendant for a crime of which he had been acquitted. It was directed at the offense itself; it does not bear upon the matter of punishment. It did not decide whether, had the defendant again been convicted of second-degree murder, the court could have imposed a longer sentence than the one from which he appealed.

Implicit in the decisions of the courts which deny the second trial judge his traditional authority to pass judgment in the light of the most complete and current information available is the belief that courts, with retributive motive, will likely impose an increased sentence after a second trial.

In *Patton v. North Carolina,* 256 F. Supp. 225 (W.D.N.C. 1966), Craven, Circuit Judge, said that "the heart of the question" is "the motivation of the second judge." He held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record and that the burden was upon the state to introduce such evidence. When the State of North Carolina appealed, a three-judge panel of the Fourth Circuit Court of Appeals (Sobeloff, Bell, and Winter, JJ.) held that "a sentence may not be increased following a successful appeal, even where additional testimony has been introduced." Sobeloff, Circuit Judge, stated the reason bluntly: "In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old." *Patton v. North Carolina* (4th Cir.), *supra* at 641.

The opinion of Ganey, Circuit Judge, in *United States ex rel. Starner v. Russell, supra,* evidenced an entirely different philosophy:

"[W]e cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive — penalizing him for his appeal, conduct unworthy of the name of judge — rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area encompassed by the trial which, in most instances, is far more revealing than those

factual elements taken into consideration in the imposition of sentence upon a plea of guilty.

* * *

"It is submitted it would be a flagrant trespass of an independent state judiciary, to question its discretionary judgment, in the imposition of a sentence, where the trial judge, in the possession of all the facts relative thereto, in a proceeding in a Federal court on a writ of habeas corpus — already ruled on by the highest tribunal of the state — would vacate the same, unless it clearly flouted constitutional standards of due process." Id. at 811-12.

[5] Historically, the presumption has been that a judge will act fairly, reasonably, and impartially in the performance of the duties of his office, *State v. Young, supra.* Our entire judicial system is based upon the faith that a judge will keep his oath. "Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed." 1 N. C. Index 2d, Appeal and Error § 46 (1967). Since, however, *all* judges are human, from time to time one or more will err. Notwithstanding, we have no choice but to make men judges. Judge Curtis Bok, in his book, *I Too Nicodemus,* said that the real crime of criminals was that they "have made it necessary to judge them and have so tarnished those who do it." So long as errants make it necessary for other men to judge them it is best to indulge the presumption that a judge will do what a judge ought to do. Actually we have no other choice. Furthermore, men seek to justify the confidence they believe to be reposed in them.

It would demean the entire judiciary for the appellate branch to assume that trial judges — who bear the brunt of the administration of justice and from whose ranks so many ascend to courts of last resort — will penalize with "harsher" sentences one who appeals or exercises a constitutional right which entitles him to a new trial. In our lexicon a sentence is harsh only when it exceeds merited punishment.

It may be conceded that every defendant who gets a stiffer sentence upon a retrial will impugn the motives of the judge who imposed it and charge that the increase was vindictive punishment for his successful attack of his first conviction. This will be especially true when the same judge conducts both trials. See *United States v. Saunders, supra.* For this reason we may doubt that judges will be inclined to increase sentences unless the record discloses that the public interest so requires. The irresponsible and callous charges of malfeasance which prisoners today routinely make against the judges

who presided at the trials at which they were convicted, or who denied them relief in post-conviction proceedings, are bruising to the spirit of any sensitive and concientious judge.

In *Coke v. United States, supra,* the petitioner alleged that the increase in his second-trial sentence "was to punish him for having appealed and as a threat to deter others in the exercise of that right." The reviewing judge found this charge "fully and conclusively contradicted by the entire sentencing proceeding." At the time of the defendant's first sentencing, the judge had no presentence report; the defendant had remained silent while his counsel made misrepresentations to the court; the presentence report available to the second judge revealed the extent of the defendant's irresponsibility and depravity.

In *United States v. Saunders, supra,* after his rights were fully explained to him and he had elected to waive counsel and indictment, the defendant pled guilty to bank robbery and received a sentence of fifteen years. Eleven months later, in post-conviction proceedings, he alleged that he had been denied counsel at the time he pled guilty. The record belied this accusation; the petition was denied, and defendant did not appeal. Eight months thereafter, in another petition he averred that he was under the influence of drugs at the time of his "trial and sentence." His sentence was vacated, and he was tried upon a plea of not guilty. The defendant testified. He "had obviously fabricated his defense and testified falsely." Evidence for the government was that the drug which the defendant had taken was so mild it could have been given to a child and could not possibly have affected the defendant's understanding or conduct. The jury promptly found the defendant guilty as charged in the indictment. The court secured a new presentence report, which showed the defendant to have "regressed" since his first trial. This time the same judge imposed a sentence of twenty years.

The above cases — two out of many — point up the problems which confront second-trial judges and the abuse to which courts will be subjected with impunity if they are shackled by a rule forbidding increased sentences at a second trial. The incentive to perjury is manifest, for prisoners would certainly conclude that they had nothing to lose by seeking and obtaining the second trial — which would be furnished at public expense.

A rule that a new sentence can never exceed the old could cause such disparity in punishment at the same term of court as to create a festering sense of injustice in a prisoner and confuse the public. We can envision a situation in which the judge feels that two de-

fendants, separately convicted of unrelated felonies of similar gravity, should each have a sentence of ten years. Defendant *A* was tried for the first time; defendant *B*, however, was "retried" because his plea of guilty, and the 5-10-year sentence imposed at his first trial, had been set aside in post-conviction proceedings. Should the judge sooner release *A* upon society because he could not longer restrain *B*?

When, at a prisoner's request his sentence is vacated and a new trial ordered, all courts agree that the second trial is de novo upon the issue of guilt or innocence. Because the evidence upon which the State relied at the first trial may no longer be available, because the defendant may have additional evidence, or for other reasons, the second-trial verdict may be not guilty or guilty of a lesser degree of the crime charged. On the other hand, the State may have acquired additional evidence which sheds a harsher light upon the degree and quality of defendant's conduct.

In post-conviction proceedings prisoners frequently seek to upset sentences which were imposed upon their plea of guilty. Charges that misunderstanding, coercion, or unauthorized plea-bargaining produced the plea are hard to disprove. Trial judges, considering a plea of guilty as an indication that the defendant has "already entered on the rehabilitative process, that he is purging himself thereby of his wrongdoing, and . . . that a sense of contrition therefor must have motivated his conduct," customarily extend greater leniency than when the defendant goes to trial. *United States ex rel. Starner v. Russell, supra* at 811. Furthermore, with no need to develop the case fully in order to prove defendant's guilt, in many cases the prosecuting attorney does not produce all the available evidence. In those instances, the first sentencing judge does not have the opportunity to consider fully the circumstances and details of the offense or to weigh "important, intangible factors which play a vital role in the determination of a sentence," which came to the attention of the second judge. *Shear v. Boles*, 263 F. Supp. 855, 860 (W. D. W. Va. 1967), *decision reversed* 391 F. 2d 609 (4th Cir. 1967).

"Frequently, the defendant does not testify at the first trial but takes the stand at the second when upon cross examination, and for the first time, there is developed his iniquitous deportment of an alarming nature. Another face comes to light. Should the first sentence gag the second judge from meting out a sentence appropriate and warranted in view of new, pertinent factors?" *Coke v. United States, supra* at 104.

Until recently, it was the general rule that a trial de novo meant a sentence de novo. Annot., 12 A.L.R. 3d 978 (1967); 24 C.J.S. *Criminal Law* § 1426 (1961). Should the judge's appraisal of the evidence at the second trial lead him to impose a lighter sentence no one suggests that the first sentence is a basement. By the same token it should not be a ceiling if, in the light of current information, he deems an increased sentence necessary to protect the community from a person of proven anti-social and criminal tendencies and to provide for a longer period of rehabilitation. The judge can perform his judicial function only if he is left free to impose the sentence he deems appropriate at the time.

[6-8] Weighing against the hazards which accompany a flat prohibition of increased sentences, the danger that on a second trial the judge will vindictively punish a prisoner for asserting his rights, we are of the considered opinion that the likelihood of judicial malfeasance is the lesser danger. We hold, therefore, that unless it affirmatively appears that a second sentence has been increased to penalize a defendant for exercising rights accorded him by the constitution, a statute, or judicial decision, a longer sentence does not impose an unreasonable condition upon the exercise of those rights nor does it deprive him of due process. The presumption is that the judge has acted with the proper motive and that he has not violated his oath of office. The burden is on the prisoner to overcome that presumption. We agree with the statement in *United States ex rel. Starner v. Russell, supra* at 811 (quoted with approval in *United States v. White, supra* at 449-50), that when a new trial is ordered the judge "may impose a sentence greater than one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence." There is, however, no objection to his placing in the record the basis for his action, for this will inform the prisoner and aid the judge at the post-conviction hearing.

DOUBLE JEOPARDY

[9, 10] The double-jeopardy exegesis is that the constitutional prohibition prevents not only a reprosecution for the same offense after an acquittal but also any increased punishment in a second trial resulting from the defendant's successful attack upon his first conviction; that when a defendant is first sentenced he is "impliedly acquitted of any higher penalty" and on retrial he can "only be given up to the degree of punishment of which he was originally convicted." *Patton v. North Carolina* (4th Cir.), *supra* at 645. All courts agree that when a defendant seeks a new trial by appealing his conviction he waives his protection against reprosecution. "[I]t

is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted." *Ball v. United States,* 163 U.S. 662, 672, 16 S. Ct. 1192, 1195, 41 L. Ed. 300, 303 (1896).

In *Stroud v. United States,* 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), *reh. denied* 251 U.S. 380 (1920), the defendant was convicted by a jury of murder in the first degree "without capital punishment." Upon a retrial, granted for errors in the first, the second jury again found him guilty of murder in the first degree but made no recommendation to dispense with capital punishment. Upon appeal, Stroud contended that he had been put in double jeopardy when the trial court allowed the issue of the death penalty to be submitted to the jury. The Supreme Court disposed of the contention by saying that each time the defendant had been convicted of first-degree murder and the jury's mitigation of the punishment to life imprisonment did not render the conviction less than one for first-degree murder. "The protection afforded by the Constitution is against a second trial for the same offense." Stroud, having invoked the action of the court which resulted in a further trial, had not been "placed in second jeopardy without the meaning of the Constitution." *Id.* at 18, 40 S. Ct. at 51, 64 L. Ed. at 110. The basis of decision in *Stroud* was that the defendant had not twice been placed in jeopardy. The issue of due process was not raised. On the facts the decision necessarily approved an increased sentence upon retrial after appeal.

In *Murphy v. Massachusetts,* 177 U.S. 155, 20 S. Ct. 639, 44 L. Ed. 711 (1900), the defendant, convicted of embezzlement, was first sentenced to 10-15 years, including one day of solitary confinement, under a law passed *after* the crime was committed. Because this law could not apply to past offenses, his sentence was reversed after he had served two years and seven months. A new sentence of nine years and eleven months — the first day to be in solitary confinement — was imposed. The Supreme Court rejected the defendant's contention that, by the increased sentence, he had been denied due process of law and had been twice placed in jeopardy. It held the second sentence was not invalid because "it might turn out to be for a longer period of imprisonment," and "the plea of former jeopardy or of former conviction cannot be maintained because of service of part of a sentence reversed or vacated on the prisoner's own application." *Id.* at 162, 20 S. Ct. at 642, 44 L. Ed. at 715.

In *King v. United States, supra,* the Court of Appeals for the

District of Columbia, holding that a second sentence was not invalid because the first (void because it did not contain the words "at hard labor") was increased, said:

"Until a convicted prisoner receives a sentence which can withstand attack, it may be conceived that his original jeopardy continues without interruption, and that he is therefore not put in jeopardy a second time when he receives his first valid sentence. . . . A close parallel is the doctrine that when a *conviction* is reversed, the prisoner cannot complain if on a later conviction he is given a severer sentence." *Id.* at 295. *Accord, Hicks v. Commonwealth,* 345 Mass. 89, 185 N.E. 2d 739 (1962), *cert. denied* 374 U.S. 839 (1963); *Kohlfuss v. Warden of Connecticut State Prison,* 149 Conn. 692, 183 A. 2d 626 (1962), *cert. denied* 371 U.S. 928 (1962).

Notwithstanding the well-established rule stated in the foregoing cases, both Traynor, C.J., in *People v. Henderson,* 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963), and Sobeloff, J., in *Patton v. North Carolina* (4th Cir.), *supra,* analogized from *Green v. United States, supra,* that when a defendant is sentenced at his first trial he is "impliedly acquitted" of a greater penalty in the event of a subsequent trial. The opinion in *Patton,* however, frankly recognizes that it is a fiction to speak of being "acquitted of a penalty." As heretofore pointed out, *Green* established only that a defendant may not be retried for murder in the first degree after his conviction of murder in the second degree has been upset on appeal.

[11] We find in *Green* no suggestion that the first trial judge, by his sentence, divided the crime of which the defendant was convicted into two degrees — one for which the penalty he then imposed was the maximum and the other, an undefined, more atrocious degree meriting a greater penalty — and that he acquitted the defendant of the latter by sentencing him for the former. (See dissent of Schauer, J., in *People v. Henderson, supra.*) It seems too plain for argument that the punishment is not an ingredient of the offense, and that, rather than torture logic to thwart the death sentence, it would be preferable to establish a special rule for cases involving the death penalty. This is what New Jersey apparently did. *State v. Wolf, supra.*

Mr. Justice Black, in footnote 15 to the Court's opinion in *Green, supra* at 194, 78 S. Ct. at 227, 2 L. Ed. at 208, 61 A.L.R. 2d at 1128, pointed out that the case was "clearly distinguishable" from *Stroud v. United States, supra,* in that Stroud "was retried for first-degree murder after he had successfully asked an appellate court to set aside a prior conviction for that same offense." He also quoted (in

footnote 5) the following sentence from *Ball v. United States, supra:* "The (5th Amendment) prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial." Id. at 669, 16 S. Ct. at 1194, 41 L. Ed. at 302.

[10] We reject the premise that a defendant who secures a new trial waives his right to protection from a retrial but retains a vested right in the vacated sentence as a ceiling. In our view, Haynsworth, Chief Judge, correctly stated the law in his dissent in *United States v. Walker,* 346 F. 2d 428 (4th Cir. 1965):

"When a sentence is imposed upon a defendant following a first trial, the Government may not attack it, but the defendant can. If he chooses to do so and succeeds in obtaining a retrial, he suffers no detriment from the sentence imposed after the first trial, and is entitled to no benefit from it. If his second trial results in a conviction, any lawful sentence may be imposed upon him without regard to the sentence passed after the abortive first trial.

"In that situation, of course, a heavier sentence ought not to be imposed upon a defendant because he sought vindication of his legal rights and succeeded in obtaining an order for a new trial. Judicial vindictiveness for resort to judicial processes is morally wrong, but the judge who presides at a second trial has the power and the duty to impose any sentence authorized by law, which, in light of all the facts and circumstances then known to him, other than the defendant's litigiousness, seems most appropriate and just." *Id.* at 432.

That the Fifth Amendment protection against double jeopardy has *no* application to an increased sentence at retrials was asserted in the brief for petitioner (prepared by Abe Fortas, Esq., now Mr. Justice Fortas of the United States Supreme Court), in *Gideon v. Wainwright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R. 2d 733 (1963). To reassure the Court that the overruling of *Betts v. Brady,* 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), would not result in overwhelming jail deliveries, the attorney for petitioner said: "*First,* it must be noted that a defendant who obtains a reversal of his conviction may be retried for the offense of which he was convicted. . . . Moreover, it is possible that an even more severe sentence than that originally levied may be imposed at the conclusion of the second trial. . . ." (Citations omitted.) Brief for Petitioner, *Gideon v. Wainwright,* p. 44.

EQUAL PROTECTION

The rationale that the "harsher" sentence imposed following a new trial violates the equal-protection clause seems to be this: The

only group of prisoners to whom "harsher resentencing" is applicable are those who successfully challenge their original convictions; the sentences of no other criminals are subject to increase even if new evidence magnifying the degree and quality of their crimes is discovered after sentence. A classification which subjects to increase only the sentences of those who have availed themselves of the right of a fair trial is arbitrary and unreasonable. *Patton v. North Carolina* (4th Cir.), *supra* at 642; *State v. Young, supra.* See *Coke v. United States, supra* at 102.

[12-14] Under the Fifth Amendment the only persons who can ever be retried or resentenced are those whose first sentences have been imposed under valid statutes and have been vacated at their request. Obviously, a prisoner who has accepted his sentence is not in the same classification as one who has sought and obtained a second trial. A convicted defendant has the right to appeal and to assert alleged violations of his constitutional rights in post-conviction proceedings; he has the right to accept the sentence pronounced and rely upon the constitutional provision which protects him from double jeopardy. Until a prisoner's sentence is vacated, he remains in the class protected from retrial and resentence. See Comment, 20 S.C.L. Rev. 131, 133 (1968). Therefore, the two classes being dissimilar, it is not reasonable to claim a violation of the equal-protection clause because *all* those who are tried de novo assume the risk of an increased sentence at the second trial while those who never attack their sentences do not.

[15, 16] Any attempt to subject to review or to increase the sentences of prisoners who, by appeal or post-conviction proceedings, had *unsuccessfully* sought a new trial would violate not only their right to the equal protection of the law but also their immunity from double jeopardy. So long, however, as the same rules apply to *all* those who are tried de novo, one whose sentence was increased at such a trial has not been denied equal protection because the sentences of those who have not sought retrial are not subject to increase. It is fundamental that once a right or privilege is granted it must be applied equally and indiscriminately, but when a law applies uniformly to all members of the class affected — and the classification is based on a reasonable distinction — equal protection of the laws has not been denied. *Cheek v. City of Charlotte,* 273 N.C. 293, 160 S.E. 2d 18. The constitution does not require that the same rules apply to incompatible classes.

For the reasons elaborated herein we adhere to our former decisions and affirm the judgment of the court below.

[17] Although not pertinent to decision, we deem it appropriate to note that at defendant's first trial the court consolidated for judgment the counts of felonious breaking and entering and larceny and pronounced one sentence. This was permissible, but the court was not authorized "to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts. . . ." *State v. Austin,* 241 N.C. 548, 549, 85 S.E. 2d 924, 926. In this instance, that penalty was a maximum of ten years, G.S. 14-54, G.S. 14-72; so the eight-year excess was void. Had defendant's sentence not been vacated, he would have been entitled to his discharge upon a writ of habeas corpus when he had served the time the court could lawfully impose. In the meantime, upon either petition for certiorari or habeas corpus, we would have vacated the judgment and remanded for proper sentence with instructions that defendant be given credit for all time served.

To have effected his purpose to impose a sentence of 10-18 years, the first judge should have imposed separate consecutive sentences of 5-9 years upon each count. The consolidated judgment was an inadvertence. The point is, in this case, the *maximum* sentence pronounced by the second judge did not exceed the maximum which the first judge attempted to impose.

Affirmed.

STATE OF NORTH CAROLINA v. JOSEPH EUGENE SPENCE AND GLENNWOOD O'NEIL WILLIAMS

No. 658

(Filed 11 December 1968)

1. Jury § 5— right to unbiased jury

Each party to a criminal trial must have the opportunity to present his cause to a fair and unbiased jury.

2. Jury § 7— purpose of challenge to venireman

The purpose of challenge of a venireman should be to guarantee not only freedom from any bias against the accused, but also from any prejudice against his prosecution.

3. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty — exclusion of veniremen opposed to capital punishment

In *Witherspoon v. Illinois,* 391 U.S. 510, the United States Supreme Court held that a sentence of death may not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for

cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

4. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty imposed — exclusion of jurors opposed to capital punishment — new trial as to guilt and punishment

In a trial in which defendants were convicted of first degree murder and sentenced to death, the trial court erred in permitting the State to challenge for cause prospective jurors who voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, and defendants, having aptly objected to the jury on this ground, are entitled to have the verdicts set aside and to have a new trial as to both guilt and penalty.

5. Constitutional Law § 29; Jury § 1— unconstitutional jury — verdict set aside

Where the trial jury was not selected in accordance with defendants' constitutional rights, the verdicts cannot stand but must be set aside.

6. Criminal Law § 126; Constitutional Law § 29— criminal verdict

Only a jury, and not a State or Federal Court, may return a criminal verdict.

7. Criminal Law § 135; Constitutional Law §§ 29, 30— capital punishment — decision of U. S. v. Jackson

It was held in *State v. Peele*, 274 N.C. 106, that *United States v. Jackson*, 390 U.S. 570, is not authority for holding that capital punishment may not be imposed under any circumstances in North Carolina.

PARKER, C.J., concurring.

BOBBITT, J., concurring in part and dissenting in part.

SHARP, J., joins in opinion of BOBBITT, J.

THE defendants Joseph Eugene Spence and Glennwood O'Neil Williams were indicted and tried in the Superior Court of GUILFORD County (July 11, 1966 Criminal Session) on charges of murder in the first degree. From verdicts of guilty as charged and sentences of death pronounced thereon, they appealed.

After full review, this Court, in a unanimous opinion, held that error was not committed in the trial. The verdicts and judgments were upheld.

The defendants obtained from the Supreme Court of the United States a writ of certiorari to review our decision. The petition for the writ alleged the trial court denied the defendants' constitutional rights to fair trials by the exclusion of veniremen who stated in voir dire examinations they were opposed to capital punishment. The per curiam order to us, dated July 17, 1968, contained the following:

". . . The judgments of the courts below are vacated and the cases remanded for reconsideration in the light of *Witherspoon v. Illinois,* No. 1015, decided June 3, 1968."

We reheard the cases both on briefs and on oral arguments.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General, for the State.

George W. Gordon for defendant Spence.

Jack W. Floyd for defendant Williams.

HIGGINS, J.

The directive from the Supreme Court of the United States requires us to reconsider our former decision upholding the jury's verdicts and the Court's sentences. *State v. Spence and Williams,* 271 N.C. 23, 155 S.E. 2d 802. As disclosed by the record, the defendants had objected to the jury on the ground veniremen were successfully challenged by the prosecution because of their conscientious objections to capital punishment. The directive requires us to determine whether the method employed in selecting the jury met the standards set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770.

The record of the trial contains the voir dire examinations of 11 veniremen rejected because of their varying degrees of opposition to capital punishment. We deem it unnecessary to attempt any analysis of these divergent views because of this stipulation in the record:

"A total of 150 veniremen were examined on voir dire; 79 of those examined were successfully challenged for cause by the State because of their stated opposition to capital punishment."

[1] The trial jury was selected in the manner approved by North Carolina case law. The basic concept has been that each party to a trial have opportunity to present his cause to a fair and unbiased jury. He may challenge for cause any juror who is prejudiced against him. His right is not to select a juror prejudiced in his favor, but to reject one prejudiced against him. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802; *State v. Bumper* (erroneously designated Bumpers), 270 N.C. 521, 155 S.E. 2d 173 (reversed by the Supreme Court on other grounds); *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229, and cases therein cited. The method of selection likewise appears not to have been in violation of federal rules.

[2] According to the Federal Court decisions "the function of challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise." The purpose of challenge should be to guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held." *Swain v. Alabama,* 380 U.S. 202; *Tuberville v. United States,* 303 F. 2d 411 (cert. den. 370 U.S. 946); *Logan v. United States,* 144 U.S. 263; *Hayes v. Missouri,* 120 U.S. 68.

Did the trial court commit error by permitting the prosecution to remove from the venire those who held the views on capital punishment disclosed by the record? In answering this question, the directive requires us to apply the Witherspoon tests.

In 1960 Witherspoon was tried in Cooke County, Illinois for murder. The jury found him guilty and fixed his punishment at death. The jury was selected in accordance with the Illinois statute which provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

The Supreme Court of Illinois denied Witherspoon's application for a new trial upon his stated ground that the jury was stacked against him by permitting the State to challenge for cause all who expressed opposition to or scruples against capital punishment.

[3] Witherspoon's application for certiorari was allowed by the Supreme Court of the United States. The opinion was filed July 3, 1968. Because of the impact the decision will have on trials for capital felonies in this State, we quote extensively from the opinion and the footnotes thereto:

> "The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who

said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.

* * *

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. . . .

* * *

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. . . ."

Attached to the Court's opinion are the following footnotes:

". . . The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. . . .

* * *

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the *sentence*, in this or any other case.

We have considered the suggestion, advanced in an *amicus curiæ* brief filed by 24 States on behalf of Illinois, that we should 'give prospective application only to any new constitu-

tional ruling in this area,' particularly since a dictum in an 1892 decision of this Court approved the practice of challenging for cause those jurors who expressed 'conscientious scruples in regard to the infliction of the death penalty for crime.' *Logan v. United States,* 144 U.S. 263, 298. But we think it clear, Logan notwithstanding, that the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate, see *Linkletter v. Walker,* 381 U.S. 618, 639, and we have concluded that neither the reliance of law enforcement officials, cf. *Tehan v. Shott,* 382 U.S. 406, 417; *Johnson v. New Jersey,* 384 U.S. 719, 731, nor the impact of a retroactive holding on the administration of justice, cf. *Stovall v. Denno,* 388 U.S. 293, 300, warrants a decision against the fully retroactive application of the holding we announce today."

The Court concludes:

". . . Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. . . ."

[4] The stipulation and certain of the voir dire examinations force us to conclude that veniremen were successfully challenged by the prosecution upon the ground that they were opposed to capital punishment and had religious or conscientious scruples against its infliction. A jury so selected did not meet the test laid down in Witherspoon. In its "light" the defendants were entitled to have their challenge to the jury sustained. The challenge was made in due time and was disallowed. The defendants are entitled to have the verdicts set aside.

We have considered and rejected the suggestions that: (1) under Witherspoon the verdicts should not be set aside; (2) only the death penalty should be eliminated; and (3) the cases should be remanded to the Superior Court of Guilford County for the imposition of life imprisonment sentences.

[5, 6] The Supreme Court of the United States has set aside the judgments. We are directed to pass on the legal composition of the trial jury. The indictments for first degree murder, and the defendants' pleas of not guilty, are not disturbed by Witherspoon or any other authority. If the jury verdicts — guilty as charged — are permitted to stand, the only judgment which the Superior Court has authority to enter is a judgment of death. Having concluded the trial

jury was not selected in accordance with the defendants' constitutional rights, as set out in Witherspoon, we conclude the verdicts cannot stand. They must be set aside. When that is done, the defendants stand again before the court charged with murder in the first degree. Their pleas of not guilty raise jury issues. Neither the State nor Federal Courts are authorized to enter verdicts. Only a jury may return a verdict. *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491.

[7] This Court has already held, in *State v. Peele, supra,* that *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138 (decided April 8, 1968) is not authority for holding capital punishment is abolished altogether in North Carolina. The Court said: "Jackson is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape." The concurring opinion in Peele states: ". . . This appeal does not present for decision whether *United States v. Jackson, supra,* invalidates the death penalty under present North Carolina statutes." It is now argued in this case that the quoted sentence in *Peele* was dictum. Unless the question was directly presented for decision in *Peele,* the dictum contention is correct. If, on the other hand, it was presented and necessary to a decision, the dictum contention is not correct. Peele was indicted for the rape of a female child 10 years of age. Upon arraignment, and before plea, defense counsel filed this motion.

> "The State has attempted to indict the defendant for the capital offense of rape under G.S. 14-21, which offense, upon conviction, is punishable by death except that should the defendant enter a plea of guilty under G.S. 15-162.1 and have such plea accepted by the State . . . defendant could thereby avoid the risk of a death penalty . . . that both G.S. 14-21 and G.S. 15-162.1 are unconstitutional.
>
> 4. That G.S. 15-162 by itself or construed together with G.S. 15-162.1 and G.S. 14-21 is unconstitutional for the reason that G.S. 15-162 compels an affirmative response if the risk of the death penalty for maintaining one's silence upon arraignment is to be avoided.
>
> WHEREFORE, defendant prays that the indictment be quashed for the reasons set forth above."

The Court denied the motion to quash on all grounds alleged. The defendant took Exceptions 2, 3 and 4. The defendant's brief listed as the first question involved: "1. Did the Court err in failing to allow defendant's motion to quash the indictment for the rea-

son that G.S. 14-21 is unconstitutional as shown by Exception No. 4, R. 20?" Three other questions were discussed in the brief. One-half of the defendant's brief in the *Peele* case was devoted to the discussion of Question No. 1 and the basis of the discussion was the ruling of the Supreme Court of the United States in *Jackson.* It must be remembered that in order to proceed to judgment in a criminal case, the trial court must acquire jurisdiction of the offense and of the offender. Jurisdiction of the offense is acquired by formal accusation (warrant or indictment). Jurisdiction of the offender is acquired by arrest and arraignment before the court. If the defendant, upon arraignment, challenges the validity of the indictment as Peele did, the first inquiry of the court must relate to the validity of the indictment. It must be found to be valid before the court may proceed further. The defendant Peele argued the ruling in *Jackson* abolished capital punishment under North Carolina statutes and that the bill charging the capital offense should be quashed on that ground. So, the question was directly presented and decided in *Peele.*

The contention is again advanced that capital punishment is abolished in North Carolina, a contention which was rejected in

In the present review, we are ordered to examine the method of jury selection. The directive required us to reconsider in the light of *Witherspoon.* We go out of our way if we attempt to go beyond that directive. We have the right to assume, and act on the assumption, that our reconsideration should begin and end on the question of jury selection, which was the sole question involved in *Witherspoon.* The decision in *Jackson* was two months old when we were ordered to reconsider *Spence and Williams.* If the high court intended for us to review the case in the light of *Jackson,* the directive should and no doubt would have included *Jackson* along with *Witherspoon.* *Peele.*

We have concluded the jury which convicted Spence and Williams was not selected according to their constitutional rights as set forth in *Witherspoon.* Although the defendants are indicted for having committed a most horrible crime, they cannot be executed and should not be imprisoned for that crime until a jury, selected in accordance with their constitutional rights, has convicted them. The State has waived neither its right nor its duty to require them to answer the charge of murder in the first degree. To that end we order a

New trial.

PARKER, C.J., concurring:

Every man knows that in criminal law a judgment of a court of criminal jurisdiction formally declaring to the accused the legal consequences of his guilt must be based upon a conviction or upon a plea of guilty or a plea of *nolo contendere* to the charge against him. *S. v. Thompson,* 267 N.C. 653, 148 S.E. 2d 613; *S. v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49; 21 Am. Jur. 2d Criminal Law § 525 (1965); 24 C.J.S. Criminal Law § 1556 (1961). The defendants, Spence and Williams, were indicted and tried in the Superior Court of Guilford County on charges of murder in the first degree. They were found guilty as charged with no recommendation that their sentences be imprisonment for life in the State's Prison. On appeal this Court held that no error was committed in the trial, and the verdicts and judgments were upheld. 271 N.C. 23, 155 S.E. 2d 802.

According to the verdicts the North Carolina statute G.S. 14-17 provides for a mandatory sentence of death. There was no conviction of murder in the first degree with a recommendation by the jury for imprisonment for life in the State's Prison. G.S. 14-17.

On appeal the Supreme Court of the United States remanded this case below with an order that the judgment in it should be vacated and the case is remanded for consideration in the light of *Witherspoon v. Illinois,* No. 1015, decided June 3, 1968. In the light of the *Witherspoon* decision, which in effect overruled the highest courts of 35 states in the Union, *S. v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; Annot., 48 A.L.R. 2d 563; and the cases of *Tuberville v. United States,* 303 F. 2d 411, cert. den. 307 U.S. 946, 8 L. Ed. 2d 813, and *United States v. Puff,* 211 F. 2d 171, cert. den. 347 U.S. 963, 98 L. Ed. 1106, we have ordered a new trial because of alleged infirmity in the selection of the jury under the *Witherspoon* decision. In my opinion, the case cannot be remanded for new judgments of life imprisonment because there is no verdict and no plea to support life imprisonment.

Until recent years the infliction of the death penalty in a proper case by the State has not been questioned. In my judgment, the opinion of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 750, 20 L. Ed. 2d 138, does not abolish the death penalty under the applicable North Carolina statutes. In the majority opinions in the *Witherspoon* case and the *Jackson* case, broad, comprehensive statements of law have been made which make it difficult to determine precisely and definitely what the majority opinions hold. This is illustrated by the divergent views expressed by members of the Court in the instant case. If a majority of the

Supreme Court of the United States is determined to abolish the death penalty in this country by judicial decision and in defiance of the united wisdom of their predecessors on that Court since its inception until the last few years, in my opinion, they should come out and definitely and plainly say so instead of leaving the law in the state of uncertainty and confusion that, in my opinion, exists today. If the death penalty in a proper case is to be abolished in this country, in my opinion, it should be done by a vote of the people or by their duly elected representatives. I concur in the majority opinion in this case.

BOBBITT, J., concurring in part and dissenting in part:

Joseph Eugene Spence and Glenn O'Neil Williams, in separate indictments, were charged with the murder of Alton Artamous Maynard. The cases were consolidated for trial. As to each defendant, the jury returned a verdict of guilty of murder in the first degree and did not recommend that the punishment be imprisonment for life. In accordance with these verdicts and the provisions of G.S. 14-17, the trial judge, as to each defendant, pronounced a judgment imposing a death sentence. Upon appeal, this Court, as set forth fully in the opinion of Parker, C.J., found nothing in any of defendants' assignments of error which "would justify another trial as to either defendant," and upheld the verdicts and judgments. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802.

Defendants filed a petition with the Supreme Court of the United States for a writ of *certiorari* to review the decision of this Court. The petition sets forth eight specific alleged violations of their constitutional rights. It was asserted *inter alia* that each had been denied "his constitutional right to trial by a jury of his peers when fifty-two per cent of the veniremen drawn are disqualified from serving on his jury merely because of a stated reluctance to return a death verdict."

Pending action on defendants' petition, the Supreme Court of the United States, on June 3, 1968, decided *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770. Petitions for *certiorari* had been filed in *Jessie Ellison, Petitioner, v. Texas,* and in *Robert Eddie Louis Jackson, Petitioner, v. George J. Beto, Director, Texas Department of Corrections.* On June 17, 1968, the Supreme Court of the United States in a *per curiam* order, applicable to the three cases, granted "the petitions for writs of certiorari," and ordered: "The judgments of the courts below are vacated and the cases re-

manded for reconsideration in the light of *Witherspoon v. Illinois.*" 392 U.S. 649, 20 L. ed. 2d 1350, 88 S. Ct. 2290.

In *Witherspoon v. Illinois, supra,* the Supreme Court of the United States was reviewing on *certiorari* the decision of the Supreme Court of Illinois in *People v. Witherspoon,* 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), which had affirmed a Circuit Court's dismissal of a petition filed by Witherspoon under the Illinois Post-Conviction Hearing Act.

In 1960, a jury had convicted Witherspoon of the murder of a police officer and had fixed his penalty at death. This judgment was affirmed by the Supreme Court of Illinois. *People v. Witherspoon,* 27 Ill. 2d 483, 190 N.E. 2d 281 (1963). In prior Illinois Post-Conviction and Federal Habeas Corpus proceedings the relief sought by Witherspoon had been denied. The ground on which Witherspoon sought relief in the proceedings now under consideration was asserted for the first time in the petition filed therein.

In granting *certiorari,* the Supreme Court of the United States limited consideration to the following question: "Whether the operation of the Illinois statute providing that the state could challenge for cause all prospective jurors who were opposed to, or had conscientious scruples against, capital punishment deprived the petitioner of a jury which fairly represented a cross section of the community, and assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence, in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution." *Witherspoon v. Illinois,* 389 U.S. 1035, 19 L. ed. 2d 822, 88 S. Ct. 793.

In *Witherspoon,* Mr. Justice Stewart, expressing the views of five members of the Court, stated: "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." Also, Mr. Justice Stewart stated: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was. . . . It

has not been shown that this jury was biased with respect to the petitioner's guilt." Footnote 21 of the majority opinion includes the following: "Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the *conviction,* as opposed to the *sentence,* in this or any other case." The separate opinion of Mr. Justice Douglas, who considered the decision too narrow, epitomizes the holding of the majority in these words: "Although the Court reverses as to penalty, it declines to reverse the verdict of guilt rendered by the same jury."

I reject the idea that jurors are "conviction-prone" simply because they have no conscientious or religious scruples against capital punishment. My experience as a trial judge convinces me they are not. The correctness of this view is demonstrated in *Bumper v. North Carolina,* 391 U.S. 543, 20 L. ed. 2d 797, 88 S. Ct. 1788.

It is noted that Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White dissented from the decision in *Witherspoon.*

The clear decision of the majority in *Witherspoon* was (1) that the sentence of death could not be carried out, and (2) that the verdict establishing Witherspoon's guilt was not disturbed. The decision of the Supreme Court of Illinois (1967), which had affirmed in *all* respects the Circuit Court's dismissal of Witherspoon's post-conviction petition, was "Reversed." The word, "Reversed," when considered in context with the opinion, signifies only that the Supreme Court of Illinois, upon remand of the case, would render decision in conformity with the opinion of Mr. Justice Stewart.

The Supreme Court of the United States, in its *per curiam* order of June 17, 1968, *vacated* the judgment (decision) of this Court (*State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802) and remanded the case to us for reconsideration in the light of *Witherspoon.* Upon reconsideration, it is clear that, in accord with our prior decisions but contrary to the law as declared in *Witherspoon,* veniremen were excluded for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Thus, under *Witherspoon,* the defendants cannot "constitutionally be put to death at the hands of a tribunal so selected."

Under *Witherspoon,* the trial judge cannot exclude prospective jurors *for cause* simply because they voice general objections to the death penalty or express conscientious or religious scruples against the infliction of capital punishment. If, contrary to my opinion, pun-

ishment by death is permissible *under our present statutes,* it would seem a futile gesture for the prosecutor to ask jurors who have conscientious or religious scruples against capital punishment to exercise their "unbridled" discretion in favor of a verdict that would require the pronouncement of a death sentence.

I concur in the Court's holding that the jury which tried defendants "did not meet the test laid down in *Witherspoon.*" I dissent from the conclusion that this entitled defendant to a new trial *as to guilt* and *as to penalty.* In my opinion, for reasons stated below, the verdicts of guilty of murder in the first degree should not be disturbed; the death sentences should be vacated; and the case should be remanded for the pronouncement of judgments of life imprisonment.

Article XI, Sec. 2, of the Constitution of North Carolina, provides: "The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

North Carolina statutes containing provisions for punishment by death are quoted below.

G.S. 14-17 provides: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

G.S. 14-21 provides: "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death; *Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*"

G.S. 14-52 provides: "Any person convicted, according to due

course of law, of the crime of burglary in the first degree shall suffer death: *Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.* Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

G.S. 14-58 provides: "Any person convicted according to due course of law of the crime of arson shall suffer death: *Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*"

The italicized portion of each of the quoted statutes is incorporated therein by Chapter 299 of the Session Laws of 1949. Under the 1949 amendments, as interpreted by this Court, whether a jury, upon finding a defendant guilty of murder in the first degree, or of rape, or of burglary in the first degree, or of arson, shall recommend that the punishment be imprisonment for life in the State's prison, is a matter within the "unbridled" discretion of the jury. *State v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212; *State v. Denny,* 249 N.C. 113, 105 S.E. 2d 446. The opinion in *McMillan* states: "No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend."

Although not the basis for my conclusion herein, reference is made to the opinion of Tobriner, J., with whom Traynor, C.J., and Peters, J., concurred, in the decision of the Supreme Court of California in *In re Anderson,* 73 Cal. Rptr. 21, 447 P. 2d 117, filed November 18, 1968. In this opinion, Justice Tobriner concurs in the majority (six) view that *Witherspoon* required that the Court "set aside the penalty previously imposed in the two cases now before us." In addition, it expresses the minority (three) view that due process of law and the equal protection of the laws is denied when the issue of life or death is left to the "unbridled" discretion of a jury. The Chief Justice and six Associate Justices comprise the Supreme Court of California.

G.S. 15-162.1, the codification of Chapter 616 of the Session Laws of 1953, provides:

"(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such per-

son and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.

"(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

"(c) Unless and until the State accepts such plea, no reference shall be made in open court at the time of arraignment or at any other time to the tender or proposed tender of such plea; and the fact of such tender shall not be admissible as evidence either for or against the defendant in the trial or at any other time and place. The defendant shall have the right to withdraw such plea, without prejudice of any kind, until such time as it is accepted by the State."

It is the province of the General Assembly to determine whether, as a matter of State policy, all or any of the crimes of murder, arson, burglary and rape, should be punished by death. I do not suggest the General Assembly is prohibited by the Constitution of the United States from providing for the punishment by death of a defendant who is convicted of (1) murder in the first degree, or (2) rape, or (3) burglary in the first degree, or (4) arson. Indeed, I perceive no constitutional defect in the provisions of the quoted statutes prior to the 1949 amendments and the enactment of Chapter 616 of the Session Laws of 1953. Our statutes, prior to the 1949 amendments, declared *as the policy of the State of North Carolina* that each of the four felonies referred to in Article XI, Sec. 2, of our Constitution, was punishable by death. Subsequent to the enactment of the 1949 amendments, whether the punishment was to be death or life imprisonment was to be determined by juries, case by case, rather than by a law applicable alike to all who committed these crimes. If provisions for capital punishment are to be retained in respect of any or all of these so-called capital felonies, constitutional pitfalls would be avoided if the provisions of the 1949 amendments and the provisions of G.S. 15-162.1 were repealed. However, these are matters for legislative consideration and determination.

My dissent from that portion of the Court's decision which sets aside the verdicts and orders a new trial is based on the authority and underlying reasoning of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 570, 20 L. ed. 2d 138, 88 S.

Ct. 1209, decided April 8, 1968. In my view, the death penalty provisions of our present statutes, when considered in the light of *Jackson,* are invalid.

In *Jackson,* the Supreme Court of the United States held *the death penalty provision* of the Federal Kidnapping Act (18 U.S.C. § 1201(a)) *invalid* because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. The remainder of the statute, the death penalty provision being separable, was held valid. Six of the nine members of the Supreme Court of the United States joined in the *Jackson* decision. Two, Mr. Justice Black and Mr. Justice White, dissented. Mr. Justice Marshall took no part in the consideration or decision of the case.

In *Pope v. United States,* 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145, decided June 17, 1968, the Supreme Court of the United States, based on its decision in *Jackson,* held *the death penalty provision* of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) was invalid but the remainder of the statute, the death penalty provision being separable, was valid. Seven of the nine members of the Supreme Court of the United States joined in this decision. Mr. Justice Black and Mr. Justice White dissented.

In *Jackson,* a Federal District Court in Connecticut dismissed the count in the indictment charging a violation of the Federal Kidnapping Act which, in pertinent part, provides: "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." On the basis of these quoted provisions, the district court held the entire Act unconstitutional and quashed the portion of the indictment that charged a violation thereof. *United States v. Jackson,* 262 F. Supp. 716 (D. Conn. 1967). On direct appeal by the Government, the Supreme Court of the United States reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion. Mr. Justice Stewart closed his opinion for the Court with these words: "Thus the infirmity of the death penalty clause does not require the total frustration of Congress' basic purpose — that of making interstate kidnapping a federal crime. By holding the death penalty clause of the Federal Kidnapping Act unenforceable, we leave the statute an operative whole, free of any constitutional

objection. The appellees may be prosecuted for violating the Act, but they cannot be put to death under its authority."

The Supreme Court of the United States has held (1) "that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States," *Malloy v. Hogan,* 378 U.S. 1, 12 L. ed. 2d 653, 84 S. Ct. 1489, and (2) "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee," *Duncan v. Louisiana,* 391 U.S. 145, 20 L. ed. 2d 491, 88 S. Ct. 1444. The question is whether our statutes contain the constitutional infirmity that caused the Supreme Court of the United States to declare invalid the death penalty provision of the Federal Kidnapping Act.

These excerpts from the opinion of Mr. Justice Stewart state the basis of decision in *Jackson.*

(1) "Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."

(2) "It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnapping Act."

The Federal Kidnapping Act, as construed in *Jackson,* provides

the death penalty shall be imposed *if* the jury so recommends. Our statutes provide the death penalty shall be imposed *unless* the jury recommends life imprisonment. If there be any real difference, it would seem that the pressure upon a defendant to enter a plea that will avoid "the risk of death" would be greater under our statutes.

This difference is noted. In North Carolina, certainly in respect of all felony cases, a defendant cannot plead not guilty, waive a jury trial and have his guilt determined by the trial judge. Article I, Section 13, of the Constitution of North Carolina; *State v. Camby,* 209 N.C. 50, 182 S.E. 715, and cases cited. (Note: Prior to the adoption of G.S. 15-162.1, the court would not under any circumstances accept a plea of guilty of murder in the first degree. *State v. Blue,* 219 N.C. 612, 14 S.E. 2d 635; *State v. Simmons,* 236 N.C. 340, 72 S.E. 2d 743.) Rule 23(a) of the Federal Rules of Criminal Procedure provides: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing *with the approval of the court and the consent of the Government.*" (Our italics.) Hence, in federal prosecutions, a defendant has no absolute right to waive jury trial and have his guilt determined by a judge rather than by a jury.

Our statutes provide that the tender by a defendant of a plea of guilty to a capital offense has no legal significance unless and until the tendered plea is accepted for the State by the solicitor (our prosecuting attorney) with the approval of the presiding judge. Rule 11 of the Federal Rules of Criminal Procedure provides: "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Hence, a defendant in a federal prosecution cannot require acceptance of his plea as a matter of right.

In *Jackson,* Mr. Justice Stewart states: "It is true that a defendant has no constitutional right to insist that he be tried by a judge rather than a jury, *Singer v. United States,* 380 U.S. 24, 13 L. ed. 2d 630, 85 S. Ct. 783, and it is also true 'that a criminal defendant has (no) absolute right to have his guilty plea accepted by the

court.' *Lynch v. Overholser,* 369 U.S. 705, 719, 8 L. ed. 2d 211, 220, 82 S. Ct. 1063."

In my view, the grounds on which the Supreme Court of the United States invalidated the death penalty provision of the Federal Kidnapping Act apply with equal force to our statutes and invalidate the death penalty provisions thereof. I am fully aware of the force and impact of this conclusion. However, in my judgment, under our present statutes, no sentence of death can be upheld as valid, and a trial ending in a death sentence is a futile expenditure of time, money and human resources. In any event, the question should be drawn into sharp focus and settled definitively by the Supreme Court of the United States as soon as possible.

The Court's opinion in *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568, after setting forth differences between the provisions of the Federal Kidnapping Act and the North Carolina Statutes codified as G.S. 14-21 and G.S. 15-162.1, expresses the view "that *Jackson* is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape." In my opinion, then and now, the statement was dictum, unnecessary to decision of the question presented by that appeal. Peele pleaded not guilty. The jury convicted him of rape and recommended that his punishment be imprisonment for life. In accordance with the verdict, judgment of life imprisonment was entered. The validity of a death penalty was not involved. *Jackson* was relevant to the factual situation under consideration in *Peele* only as authority for the proposition that the death penalty provision, *if invalid,* was separable; and that, since the felony of rape existed as theretofore, the motion to quash the indictment was properly overruled.

The Court of Appeals in *Parker v. State,* 2 N.C. App. 27, 162 S.E. 2d 526, reviewing on *certiorari* a judgment dismissing a post-conviction petition, cited and quoted from *State v. Peele, supra,* and expressed views in accordance with the expressions in *Peele.* The decision of the Court of Appeals in *Parker v. State, supra,* under G.S. 7A-28 and G.S. 7A-31, was not subject to further review by this Court. In my view, G.S. 7A-28 and G.S. 7A-31 should be amended promptly to the end that decisions of the Court of Appeals in post-conviction proceedings will be subject to review by this Court. Frequently, as in *Parker v. State, supra,* most serious constitutional questions are presented for decision in post-conviction proceedings.

South Carolina and New Jersey have statutory provisions similar to ours. Confronted by *Jackson,* the Supreme Court of South Car-

olina, in *State v. Harper,* ..... S.C. ....., 162 S.E. 2d 712 (1968), and the Supreme Court of New Jersey, in *State v. Forcella,* 52 N.J. 263, 245 A. 2d 181 (1968), held unconstitutional and invalid statutes similar to our G.S. 15-162.1 and retained as valid their statutory provisions providing for the death penalty. I perceive no basis for declaring G.S. 15-162.1 unconstitutional and invalid. The policy decision is for the General Assembly. The General Assembly must decide whether the death penalty is to be retained by statutory amendments involving the repeal of G.S. 15-162.1 or whether our statutory provisions are to be so modified as to provide for punishment by life imprisonment when a person is *convicted* or *pleads guilty* to one of the crimes heretofore denominated a capital felony. In this respect, my views are in full accord with those expressed in the dissenting opinion of Justices Jacobs and Hall in *State v. Forcella, supra.*

The conclusions I reach are these: Under *Witherspoon,* the verdicts of guilty of murder in the first degree are not disturbed. Under *Jackson,* the death penalty, under our present statutes, is invalidated. Under our statutes, the punishment for murder in the first degree is either death or life imprisonment. Upon invalidation of the death penalty, the only permissible punishment is life imprisonment. Consequently, my vote is to vacate the death sentences and to remand the case to the superior court for the pronouncement as to each defendant of a judgment of life imprisonment.

The foregoing opinion was written prior to the filing on November 26, 1968, of the opinions in the split decision (two to one) of a panel of the Court of Appeals for the Fourth Circuit in *Alford v. North Carolina,* 405 F. 2d 340 (4th Cir. 1968). Cf. *Townes v. Peyton,* 404 F. 2d 456 (4th Cir. 1968).

Alford was not confronted with the necessity (1) of pleading guilty to murder in the first degree and receiving a sentence of life imprisonment, or (2) of pleading not guilty and thereby risking conviction by the jury, without recommendation of life imprisoncent, and *a death sentence.* The State did not require Alford to tender a plea of guilty of murder in the first degree in order to avoid the possibility of a death sentence. The State accepted his plea of guilty of murder in the second degree, for which the maximum punishment is imprisonment for thirty years; and, by defendant's tender and the State's acceptance of this plea to an included lesser degree of unlawful homicide, the defendant avoided the possibility of a sentence of life imprisonment. In my opinion, *Jackson* applies when, but only when, a plea of guilty of murder in the first degree is exacted as the only means by which a defendant may avoid the possibility of *the death penalty.*

I disagree sharply with the idea that a defendant, who is charged with murder as provided in G.S. 15-144 and is represented by counsel, acts under coercion when, on account of the weight or strength of the evidence tending to establish his guilt, he pleads guilty to murder in the second degree or to manslaughter, voluntary or involuntary. Nor, under like circumstances, do I think a defendant charged with rape acts under coercion when he pleads guilty to an assault with intent to commit rape or to an assault on a female by a male person over the age of eighteen years. Nor, under like circumstances, do I think a person acts under coercion when, charged with burglary in the first degree, arson, or other felony, he pleads guilty to "a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." G.S. 15-170. Nor, under like circumstances, do I think a person acts under coercion when, charged with a felony, he pleads guilty to an included misdemeanor, *e.g.,* when indicted for larceny of personal property of the value of more than $200.00, a felony, he pleads guilty to larceny of personal property of the value of $200.00 or less, a misdemeanor.

True, apart from *Jackson,* a defendant's plea of guilty to any criminal offense must be vacated if in fact it is not made voluntarily and understandingly. However, when a defendant elects to tender a plea of guilty to an included crime of less degree, both he and his counsel *necessarily take into consideration* the evidence of the State, the evidence available to the defendant, and all other factors pertinent to the advisability of tendering such plea, *including the possibility of conviction by the jury of the crime charged, or of a more serious included lesser degree thereof, and the risk of greater punishment pursuant to such conviction.*

SHARP, J., joins in this opinion.

STATE v. EDWARD THEODORE RAY

No. 741

(Filed 11 December 1968)

1. Constitutional Law § 29; Indictment and Warrant § 2— necessity for valid indictment

A valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and

to give authority to the court to render a valid judgment. N. C. Constitution, Art. I, § 12.

2. Indictment and Warrant § 2— return by illegally constituted grand jury

An indictment returned by a grand jury not legally constituted is not a valid indictment.

3. Grand Jury § 3; Constitutional Law § 29— indictment by improperly constituted grand jury

A conviction of a Negro cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race.

4. Grand Jury § 3— challenge to racial composition — burden of proof

The burden is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictment, but once a *prima facie* case is made out the burden shifts to the prosecution.

5. Grand Jury § 3— use of tax lists

A jury list is not discriminatory merely because it is made from the tax list, although it is better practice to supplement such list by resorting to voter registration and other available lists.

6. Grand Jury § 3— sufficiency of evidence for prima facie showing of discrimination

Defendant's evidence that the tax rolls used in compiling the jury list designated the race of each taxpayer *is held* insufficient to make a *prima facie* showing of unconstitutional discrimination against Negroes in the grand jury selection where (1) the computer firm hired to compile the jury list was instructed by the county to prepare the list without regard to race or sex and to allow no words on the list which would identify a person's race, (2) the compiled jury list contained no designations as to race, (3) no names were eliminated from the list except nonresidents and corporations, and (4) there was no evidence as to the racial composition of the county or as to the number of Negroes who have served upon the grand or petit juries of the county.

7. Grand Jury § 3— evidence of no discrimination

A jury list containing the names of over half of the population of the county is some evidence in itself that there was no discrimination in the preparation of the list.

8. Criminal Law § 166— the brief — abandonment of exception

Where the denial of defendant's motion to quash the array of the petit jury is not brought forward in an assignment of error and discussed in the brief of defendant, an exception thereto is deemed to be abandoned. Rule of Practice in the Supreme Court No. 28.

9. Criminal Law § 15— change of venue — pretrial publicity

In prosecution of a Negro defendant upon indictment charging the rape of a white woman, defendant's motion for change of venue on the ground

of widespread pretrial publicity by the news media of the county is addressed to the sound legal discretion of the trial court, whose ruling thereon will not be disturbed on appeal where (1) the trial court's interrogation of the jurors failed to show that they had formed an opinion in respect to the guilt or innocence of the defendant and (2) there is no showing that defendant had exhausted his peremptory challenges.

10. Jury § 7— challenges

A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed.

11. Searches and Seizures § 1— search without warrant — search on premises of another

Immunity from unreasonable searches and seizures is a personal right, and one cannot object to the search of another's premises or property if the latter consents to the search, even though property is found for the possession of which defendant is subsequently prosecuted.

12. Searches and Seizures § 1; Criminal Law § 84— seizure without warrant of defendant's clothing — reasonableness of seizure — admissibility

In a prosecution for rape, the seizure by police officers without a warrant of defendant's bloodstained sweater allegedly worn by him at the time of the rape was not unlawful, and the sweater was properly admitted into evidence, where (1) the sweater was in a friend's home where defendant was permitted to sleep, (2) the friend's wife voluntarily gave to the officers the suitcase wherein the sweater was found, (3) the suitcase was in a room other than the one in which defendant slept, and (4) defendant paid no rent, had no key to the house, and exercised no control over the house.

13. Rape § 4; Criminal Law § 42— competency of evidence — defendant's clothing

In prosecution for rape, trial court properly refuses to strike evidence that F.B.I. laboratory tests showed bloodstains on defendant's sweater, since the jury could reasonably infer from the evidence that defendant wore the sweater at the time of the alleged offense and since the stains were corroborative of the State's theory of the case.

14. Rape § 4; Criminal Law § 68— competency of evidence — hair

In a prosecution of Negro defendant for the rape of a white woman, admission of testimony that hair possessing Negro characteristics was found in the debris of the prosecutrix' automobile where the alleged rape took place is proper.

15. Searches and Seizures § 1— lawfulness of seizure

Cigarettes which constituted evidence of the crime for which defendant was charged were not obtained as a result of an unlawful search and seizure where defendant's friend brought the cigarettes to the police to be given to defendant.

STATE *v.* RAY

APPEAL by defendant from *Carr, J.*, April 1967 Session of DURHAM.

Criminal prosecution upon the following indictment charging the capital offense of rape:

> "The Jurors for the State, Upon Their Oath, Present, That, EDWARD THEODORE RAY, in Durham County, on or before the 7th day of December, 1966, with force and arms, at and in the County aforesaid, did, unlawfully, willfully, and feloniously ravish and carnally know Jeane Daily, a female, by force and against her will against the form of the statute in such case made and provided and against the peace and dignity of the state."

Defendant, who was represented by his court-appointed attorneys C. C. Malone, Jr., a Negro, and R. Roy Mitchell, Jr., a white person, entered a plea of not guilty. Verdict: Guilty of rape with the recommendation that punishment be imprisonment in the State's Prison for life. See G.S. 14-21. Upon the return of the verdict, defendant's counsel asked that the jury be polled. Each juror upon the poll said that he found for his verdict that the defendant was guilty of rape with the recommendation that punishment be imprisonment in the State's Prison for life, and that he still assented thereto.

From a judgment of life imprisonment, pursuant to the provisions of G.S. 14-21, defendant appealed.

Attorney General T. W. Bruton, Deputy Attorney General James F. Bullock, and Deputy Attorney General Harry W. McGalliard for the State.

C. C. Malone, Jr., for defendant appellant.

PARKER, C.J.

Defendant is an indigent. By order of the trial court, he was permitted to appeal *in forma pauperis*, and the county of Durham was ordered to furnish his counsel a transcript of the trial, and the county of Durham was ordered to pay the cost of mimeographing the appeal and the brief of his counsel. A writ of *certiorari* was allowed, upon petition of defendant's counsel, C. C. Malone, Jr., giving him additional time to prepare his case on appeal, which accounts for the delay in the hearing of the appeal. C. C. Malone, Jr., one of the trial counsel and defendant's counsel of record in this Court, filed a brief and made an oral argument here.

A brief summary of the State's evidence is as follows: Mrs. Jeane Daily, a white woman, was married to John Calvin Daily, and they had a son two years old. They lived in the city of Durham. On 7 December 1966 about 7:30 p.m., she went shopping alone and parked her 1965 Pontiac Tempest in the back parking lot next to Sears Roebuck and Company, one of two parking lots operated by Sears Roebuck and Company. Sears Roebuck and Company is on Main Street in the city of Durham. She remained in Sears Roebuck and Company's store about thirty minutes. She then returned to her automobile and got in it. Before she could close the front door on her side, she saw defendant, Edward Theodore Ray, standing at the open door of her automobile. He pointed a pistol at her and told her to move over. She refused. Defendant told her if she did not move over he would blow her head off. Defendant Ray got in the car, crawled over her, and while still pointing the pistol at her ordered her to drive. She did not see anyone else in the parking lot. She drove out of the closest exit, made one right turn and then another, at which time she did not know where she was. She drove for approximately ten minutes, making several right and left turns. She brought the automobile to a halt at the command of the defendant in a dark area which seemed to be under construction. Defendant told her to get into the back seat. Defendant had put the pistol in his pocket but drew it again when out of fear she began screaming. She then got into the back seat at the defendant's command, and defendant Ray got into the back seat of the automobile with her. Defendant started pulling and jerking at her raincoat and blouse in an effort to take them off. At this point defendant Ray noticed her wrist watch and said that he would take the watch and started pulling on it. Defendant was unable to unfasten the catch on the watch and told her to take it off. When she took it off, she noticed the guard chain was broken. She also noticed that defendant Ray was wearing a dark sweat shirt and dark trousers. Defendant made her remove her skirt, and he raped her. It is not necessary to repeat her words in respect to the sordid details of the rape. As she was lying in the back seat of the car she heard an automobile and said, "There is a car." Defendant Ray jumped up and she started screaming, at which time defendant Ray got out of the automobile into the street. When defendant opened the door she got out of her automobile and ran to an automobile which was passing them driving very slowly. As she was running to catch up with the automobile, she heard a gunshot behind her. When she reached the automobile which had passed at a slow rate of speed, she asked the driver to

please help her. The driver opened the door and she crawled into the back seat of the car. At that time she was completely naked.

George W. Jackson was employed as a night watchman by M. B. Kahn Construction Company, which was in the process of constructing the Fayetteville Street Housing Project in the city of Durham. As he was making his rounds as night watchman in his automobile about ten or twelve minutes after 8 p.m. on the night in question, he noticed a car standing still and heard someone screaming and hollering. When he paused to stop his automobile beside the Daily automobile, a man raised up in the back seat. The lady was still hollering. As soon as the man in the back seat raised up, he (Jackson) idled his car off very slowly. He saw a Negro man who got out of the car and ran. Mrs. Jeane Daily ran to his car, screaming and asking for help. She had no clothes on. He opened his automobile door and she climbed over into the back seat. As she was getting into his car, he heard a shot, the sound coming from behind him. By the time she was fully in his automobile, he heard another shot. He then heard someone running through the housing project stepping on loose boards that had been left there. He asked Jeane Daily what had happened. After she told him and after seeing her naked, he told her to cover herself with his overcoat which was in the back seat. She had blood on her legs. He drove to a service station and called the police and Jeane Daily's husband.

After Mrs. Daily was assaulted, W. H. Upchurch, a detective in the police department of the city of Durham, found a cigarette lighter on the floor of the back seat of her automobile. Mrs. Daily and her husband stated the lighter did not belong to them. Mary Ann Gibson, a witness for the State, testified that defendant Ray was living in the living room of her house during December 1966. She identified the cigarette lighter the police found in Mrs. Daily's automobile as a cigarette lighter belonging to defendant Ray. Defendant Ray had permitted her to use it in her house when she did not have a match. It had an unusual design-like umbrella handle. She has never seen a cigarette lighter like it before. The flap on the lighter that defendant Ray had was loose. She saw defendant put the cigarette lighter in his pocket on the night of 7 December 1966. She testified that the next day, to wit, 8 December 1966, defendant Ray asked her and her husband if they had seen a cigarette lighter anywhere around the house. She saw the lighter the last time on 7 December 1966. Defendant left her house when it was about dark on 7 December 1966 wearing a dark blue pull-over sweater and a pair of overalls, and did not return until about 9 o'clock that night. De-

fendant returned wearing the same garments; however, it appeared as though he had been running through bushes for his trousers were full of briars. She had seen defendant Ray with a pistol that looked like State's Exhibit No. 6. On 7 December 1966 she heard Ray ask her husband for some bullets and Ray fired the pistol once in her back yard.

Alden Gibson, the husband of Mary Ann Gibson, testified in brief summary: During December 1966 defendant Ray was living in his house. He was unemployed and paid no rent. During the afternoon of 7 December 1966 he and Ray drank some wine. On 7 December 1966 Ray asked him to fix a jammed gun for him. After he fixed the pistol Ray asked him for some bullets. He gave Ray some bullets around 6:30 or 6:45 p.m. that night and Ray left the house. Ray fired the gun in the air once as he left the house. He recognized State's Exhibit No. 6, the pistol, as the automatic pistol Ray had and took with him on 7 December 1966. It was the pistol he unjammed for Ray. He was at home when Detective Upchurch of the Durham police force came there on 12 December 1966 and arrested Ray. State's Exhibit No. 6, the pistol, was found behind the pillow of the sofa in the front room after defendant was arrested. Ray had been sitting on the couch just before his arrest.

When defendant Ray was searched at the county jail after his arrest, a watch was found in the watch pocket of his trousers. The chain on it was broken. Mrs. Daily testified that the wrist watch taken from Ray's pocket was the Bulova watch which she was wearing on the night she was raped, and she identified the watch by scratches on the top of the crystal of the watch.

Defendant assigns as error the denial of his motion aptly made to quash the indictment for the reason that he is a Negro and Negroes were excluded from service upon the grand jury that returned the indictment against him solely by reason of their race, in violation of the equal protection clause of the 14th Amendment to the United States Constitution and Article I, section 17, of the North Carolina Constitution.

[1, 2] It is hornbook law that a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment. North Carolina Constitution, Article I, section 12; *S. v. Yoes and Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386; *S. v. Bissette,* 250 N.C. 514, 108 S.E. 2d 858. An indictment returned by a grand jury not legally constituted is not a valid indictment. *S. v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109.

[3] It is no longer open to question that in the United States and in the State of North Carolina a conviction of a Negro cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *S. v. Covington,* 258 N.C. 495, 128 S.E. 2d 822; *Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513; *Whitus v. Georgia,* 385 U.S. 545, 17 L. Ed. 2d 599; *Eubanks v. Louisiana,* 356 U.S. 584, 2 L. Ed. 2d 991; *Reece v. Georgia,* 350 U.S. 85, 100 L. Ed. 77.

[4] The burden is upon the defendant to establish the racial discrimination alleged in his motion to quash the indictment. *S. v. Lowery and S. v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870; *S. v. Wilson, supra; S. v. Covington, supra; Miller v. State, supra; Whitus v. Georgia, supra; Akins v. Texas,* 325 U.S. 398, 89 L. Ed. 1692; *Fay v. New York,* 332 U.S. 261, 91 L. Ed. 2043. However, once a *prima facie* case is made out the burden shifts to the prosecution. *S. v. Wilson, supra; Whitus v. Georgia, supra.*

[5] A jury list is not discriminatory merely because it is made from the tax list. *S. v. Lowery and S. v. Mallory, supra; Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469. However, it is better practice to supplement such list by resorting to voter registrations and other available lists.

[6] The indictment in this case was returned at the April 1967 Session of Superior Court of Durham County. Defendant in support of his motion to quash the indictment against him upon the ground of alleged racial discrimination introduced evidence in substance as follows:

The names for service on the grand jury selected in February 1967 were drawn from the number one side of the jury box in Durham County in June 1966. The sheriff selected 50 or 52 names from the number one box for jury service, of which the first nine names drawn from a hat by a child serve on the grand jury. (Nine grand jurors are drawn in January of each year and nine grand jurors are drawn in July of each year, but there are always eighteen grand jurors serving. G.S. 9-22.) The jury box is purged every two years in Durham County, the last time being some 18 months prior to April 1967. The jury list from which both sides of the jury box are made up is provided by Arista Data Processing Company from the names on the tax rolls, which Arista also compiles from information furnished by the county. The key punch operators in the tax supervisor's office in Durham County punched name and address cards from each tax abstract, as signed by the taxpayer, and this is the

source document from which Arista made up the tax list, from which it compiled the jury list.

Arista was instructed by Murray Upchurch, assistant county accountant of Durham County, to make up the jury list from all the names on the tax rolls without regard to race or sex, and to be sure that there were no identifying words on the slips of paper which would tend to identify the persons as to race. Some 58,000 names were on the list compiled by Arista. The list was cut into strips containing one name and address on each, and these strips were placed in a box which was turned over to the sheriff. Mr. Upchurch testified that he inspected the list and was satisfied that Arista had complied with his instructions. The race of the individual taxpayer does appear on the tax abstract reference, and was known to the person or persons making up the tax information supplied to Arista. However, no names were deleted before sending the list to Arista.

Alton Gamble, programmer and assistant handler for Arista Data Processing Company, testified that in order to make the jury list Arista took the same magnetic tape that they used in producing the tax bills and printed each person's name that listed taxes; that no names were eliminated from the list except nonresidents and corporations; and that there were no designations as to race or creed appearing on the jury list. The magnetic tape from which the jury list was made does contain the race of the taxpayer. On cross-examination, Gamble agreed that it is possible with data processing equipment to eliminate names with racial identifying codes on them.

J. M. Mangum, sheriff of Durham County, testified that he had been affiliated with the sheriff's department of Durham County for 34 years, and that during these years he had been in and out of the courtroom at most of the criminal terms; that he had observed as many as three Negroes on the grand jury at one time; that he could not recall a time when he had observed more than three Negroes on the grand jury.

The court made the following finding of fact: "And upon said evidence the Court finds as a fact that Negroes under the procedure followed in the obtaining of the list of jurors from which the Grand Jury that returned said bill of indictment was drawn were not excluded from service upon said Grand Jury solely by reason of their race in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 17, of the Constitution of North Carolina." Whereupon, the trial court denied the defendant's motion to quash the indictment.

Defendant contends that the names of taxpayers were listed in racially designated books prior to 1966, which provided ample opportunity for selection by race on the part of the personnel responsible for supplying names for jury lists, all of whom were white. There is no evidence in the record to support defendant's assertion in his brief that all persons who were responsible for supplying the names for the jury list were white. Nor is there evidence that racially segregated books were used prior to 1966. Defendant further contends that as the tax returns of individuals bear a designation as to race there was ample opportunity for discrimination in the selection of names to be placed in the jury box from which the grand and petit jurors are drawn. The contention ignores evidence that Arista Data Processing Company was instructed to compile their jury list without regard to race or sex, and to be sure that there would be no identifying words on the slips of paper comprising the jury list which would tend to identify a person's race. It also ignores the testimony of Alton Gamble, programmer and assistant handler for Arista, that there were no designations as to the race or creed appearing on the jury list that was prepared for Durham County. Defendant's contention also ignores the testimony of Murray Upchurch, assistant Durham County accountant, that he was satisfied by his inspection of the jury list that his instructions to Arista that there were to be no designations as to race or creed appearing on the list had been complied with.

[7] There is no evidence at all in the record as to the number of Negroes in Durham County and the number of white persons. The United States census for 1960 gave the population of Durham County as 111,995. According to defendant's own evidence, some 58,000 names of prospective jurors were in the jury boxes of Durham County. This is over half of the population of the county. When consideration is given to the fact that a large percentage of the residents of the county are persons under 21 years of age, a jury list containing the names of over half of the population of the county is some evidence in itself that there was no discrimination in the preparation of the list.

There is no evidence as to how many Negroes have served upon the grand jury and the petit juries of Durham County. Sheriff Mangum testified that in the 34 years he had been connected with the sheriff's department of Durham County he had observed as many as three Negroes on the grand jury at one time.

There is no evidence in the record before us that any qualified Negro was racially discriminated against in the preparation of the

jury list for Durham County either in the selection of the first nine jurors who found the indictment in this case or in the case of the last nine jurors who found the indictment in this case.

The two counsel appointed by the court to represent defendant in this case are experienced lawyers with many years practice in the county of Durham. If there had been any racial discrimination in the jury list of Durham County, it is a reasonable, if not certain, inference that they would have produced it. They did not do so.

The method of the preparation of the jury list and drawing of the original panel is set forth in G.S. 9-1 through G.S. 9-5 inclusive. It seems to have been substantially followed in this case. Conjecture with not a shred of evidence to support it is not a basis for judicial determination.

[6] In our opinion, and we so hold, defendant has totally failed to make out a *prima facie* case of the exclusion of Negroes from service upon the grand jury that found the indictment against him in this case.

The court properly denied defendant's motion to quash the indictment and his assignment of error thereto is overruled.

[8] Defendant then moved to quash the array of the petit jury. Upon that motion he introduced no evidence but relied upon the evidence that he had introduced as to the composition of the grand jury. This motion was denied by the court and the defendant excepted. Defendant has not assigned the denial of the motion to quash the array of the petit jury as error and has not brought it forward and discussed it in his brief. For the reasons assigned above the motion to quash the array of the petit jury was properly denied. As the denial of this motion has not been brought forward in an assignment of error and discussed in the brief of defendant, it is deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 810.

[9] After defendant's motion to quash the indictment had been denied, he made a motion, pursuant to the provisions of G.S. 1-84, that his case be transferred to some adjacent county for trial. In support of his motion he filed two affidavits — one made by himself and a joint affidavit made by his attorneys of record, C. C. Malone, Jr., and R. Roy Mitchell, Jr. These affidavits are in substance as follows: That there are probable grounds to believe, and they believe, that the defendant cannot obtain a fair and impartial trial in Durham County for the reason that the defendant is a Negro man and the prosecuting witness is a white woman and she as well as her

husband are members of families of some importance in the community, causing much discussion among the citizens of Durham County; that there has been wide coverage by all phases of the news media including radio, television, and newspaper articles about the case; and that the circulation of such news has spread to such an extent that it would be difficult, if not impossible, to obtain jurors in Durham County who have not read about, or observed on television the defendant in custody of police officers, from which various persons in the county have no doubt formed conclusions as to the guilt or innocence of the defendant. In the statement of the case on appeal it is stated that the defendant "offered affidavits of counsel and newspaper clippings showing the widespread publicity given the case in the news media throughout the country (sic)."

The following appears in the statement of the case on appeal in substance except when quoted: After hearing the argument of counsel the court then in open court interrogated the jurors as to whether or not they had read about, heard by radio, or seen on television anything about the case. The court then read the bill of indictment charging rape and requested all jurors in the courtroom to raise their hands if they recalled having read, heard or seen anything in the news media about the case. About fifty per cent of the jurors present raised their hands. "Whereupon, at the request of defense counsel, the Court informed the Jurors that the evidence would show that a young woman was kidnapped from the Sears Roebuck parking lot and carried off, then inquired of those jurors who had not previously raised their hands if they recalled having heard, read or seen anything about the case in the news media in the country (sic), whereupon, almost all of the Jurors who had not previously raised their hands, did so; indicating that practically the entire Jury panel had read, heard or seen all of the publicity given the case." The defendant then through his counsel moved the court for a special venire from a contiguous county, and in support of said motion offered in evidence newspaper clippings and affidavits of attorneys as to radio and television coverage of the case. The record before us does not contain affidavits of attorneys, other than the defense attorneys, and no newspaper clippings referred to in the case on appeal.

There is nothing in the record to show or to suggest that any of the jurors had formed an opinion in respect to the guilt or innocence of the defendant. To hold that a prospective juror was disqualified for jury service in a particular case merely because he had read of it or listened to it over television or radio would mean that in a case

that was given publicity in the newspapers or on the radio and television, only the most illiterate or ignorant jurors would be qualified. That would be an absurd result.

The brief of defendant's counsel signed by C. C. Malone, Jr., states this:

> "The defendant submits to this Honorable Court that he, a Negro, was charged originally with the offenses of rape, kidnap, and common law robbery, which offenses were alleged to have been committed upon the person of a young white woman, a member of an old, substantial and well respected family in the community, and a member of which family was well known throughout the county as a successful and respected merchant. All of which facts would engender a much more than passing interest in the case throughout the community, coupled with the fact that the defendant was a Negro of dubious background, an indigent and escaped felon; all of which combined in this case in a manner so as to inflame the passions and tempers of the various citizens throughout the community to a degree perhaps unparalleled in recent annals in and around the county."

The defendant did not testify at any stage of the proceedings. There is nothing in the record before us to substantiate the fact stated in his brief that he is of dubious background and an escaped felon except a statement of Wallace Upchurch, a police officer, who testified on the *voir dire* in the absence of the jury that defendant was an escaped felon. There was no objection by defendant's counsel to the statement of Upchurch on the *voir dire*. The court denied defendant's motion. It appears in the record that in addition to the regular jurors a special venire of 100 persons was summoned as prospective jurors. The State filed no affidavits in the case. Defendant assigns as error the denial of his motion.

[10] The record fails to disclose that defendant had exhausted his peremptory challenges or that any juror was accepted to which he had legal objection on any ground. It is well settled that a defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed. *S. v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341.

[9] Defendant's motion for a change of venue was addressed to the sound legal discretion of the trial court. *S. v. Brown,* 271 N.C. 250, 156 S.E. 2d 272; *S. v. McKethan, supra; S. v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *Irvin v. Dowd,* 366 U.S. 717, 6 L. Ed. 2d 751; *Reynolds v. United*

States, 98 U.S. 145, 25 L. Ed. 244. The record fails to disclose that the trial judge abused his discretion in denying the motion. This assignment of error is overruled.

Defendant introduced no evidence, except on his motion to quash the indictment and on his motion for a change of venue.

The State introduced evidence tending to show in substance the following, some of which has been stated above: Defendant was permitted to sleep in the living room of the home of Mary Ann Gibson and her husband Alden Gibson. Defendant was unemployed. Alden Gibson considered him as a friend, and he never charged him anything for living in his home. He and defendant drank together, and Gibson's wife prepared meals for defendant. He paid no rent and did not have a key to the house except when Mary Ann Gibson was out. At all other times she opened the door for him. For defendant's convenience Mary Ann Gibson let defendant keep his clothes in one of her suitcases which was kept in another room of the house. About dark on the night of 7 December 1966 defendant left the house wearing a dark blue pull-over sweater and overalls. He returned after nine o'clock wearing the same clothes, and it appeared to Mrs. Gibson who opened the door for him that defendant had been running through bushes for his pants were full of briars. Defendant did not leave the house again until he was arrested on 12 December 1966. The officers had learned from Alden Gibson that defendant might have been the person wanted for the rape of prosecutrix Mrs. Daily. Defendant was personally known to Officer Upchurch. On the basis of their information the officers went to the Gibson home to arrest defendant. Alden Gibson invited the officers inside. Defendant was sitting in a chair in the living room and was arrested by the officers. The officers did not have a warrant for his arrest or a search warrant. On the night of the arrest, after defendant had been carried from the Gibson home, the officers asked Mrs. Gibson if defendant had any clothes. She then went into her bedroom and got the suitcase containing defendant's clothes from under the baby's crib and gave it to the officers. The suitcase was in Mary Ann Gibson's room over which defendant had no control. A sweater was taken from this suitcase. This sweater was received in evidence over the objection and exception of defendant, and defendant assigns its admission in evidence as error. This sweater was examined by the F.B.I. laboratory in Washington, D. C. On the lower front portion of this sweater and on the left sleeve of the sweater were reddish brown smears that showed from the laboratory tests of the F.B.I. they came from human blood. Defendant moved that the testimony

of what was found on the sweater in the F.B.I. laboratory be stricken out. The court denied this motion, and defendant assigns this as error.

The State introduced evidence of Robert E. Neill, a special agent with the F.B.I., whose particular specialty is the microscopic examination of hairs and fibers, textile material, and related materials in criminal cases. He testified in substance that he found on the sweater introduced in evidence and in the debris of Jeane Daily's automobile hair possessing Negro characteristics. Defendant assigns this admission in evidence over his objection and exception as error.

Jeane Daily testified on cross-examination that before going to Sears Roebuck and Company's store she had stopped at Eckerd's on Broad Street and purchased a carton of Winston cigarettes. The cigarettes and sales slip were placed in a brown paper bag, which she placed under the front seat on the driver's side of the car. She does not know of her own knowledge what became of the cigarettes. She was shown a paper bag with cigarettes in it and a sales slip marked State's Exhibit No. 9 which she identified as being in all respects similar to the cigarettes that she had purchased at Eckerd's and similar to the sales slip she had been given when she made the purchase. Mary Ann Gibson testified that defendant was carrying a brown paper bag when he returned to her house with his trousers full of briars. She also testified that the next day after defendant had been arrested and carried to jail she gave to the police the paper bag containing four packs of Winston cigarettes and an Eckerd's sales slip. Officer Upchurch testified that she gave them to him six days after his arrest. Mary Ann Gibson told the officers that they belonged to defendant and to give them to him as he had left them on the table the night before he was arrested. Defendant moved to strike this testimony of Mary Ann Gibson. His motion was overruled, and defendant excepted and assigned this as error.

[11] Immunity from unreasonable searches and seizures is a personal right and one cannot object to the search of another's premises or property if the latter consents to the search, even though property is found for the possession of which defendant is subsequently prosecuted. *S. v. Mills*, 246 N.C. 237, 98 S.E. 2d 329; *S. v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501, cert. den. 351 U.S. 919, 100 L. Ed. 1451; Annot., 31 A.L.R. 2d 1081, § 3 (1953); 79 C.J.S. Searches and Seizures § 52 (1952); 4 Wharton's Criminal Law and Procedure § 1530 (Anderson Ed., 1957).

The case of *Spencer v. People* (Supreme Court of Colorado *en banc*), 429 P. 2d 266, is in point. Spencer was arrested, tried and found guilty of burglary and larceny. These charges arose out of

the burglary of the Fountain-Fort Carson High School in Fountain, Colorado. The information charged that the defendant broke into the school, pried open the door of the school vault, pried open the safe which was in the vault, and stole a 16 millimeter movie camera and more than $600. The defendant was arrested on October 13, 1964. He told the police that he was staying at 106 West Brookside, an address in El Paso County. That night, several officers went to the address given by the defendant and were admitted into the house by the occupant, a Mrs. Henderson. She showed the officers a bedroom where the defendant had been staying. In response to a request by the officers for property belonging to the defendant, Mrs. Henderson produced the camera in question and handed it to the officers. The officers left the premises without taking the camera with them. At about noon the next day, October 14, 1964, the officers returned to the house and asked Mrs. Henderson if she would be willing to give them the camera. She did so voluntarily. At no time did the officers obtain a warrant to search the house or to seize the camera. Mrs. Henderson did not object to the presence of the officers in her home on either day and she did, in fact, freely aid them in the search. The record shows that defendant was staying at Mrs. Henderson's home at her invitation. The record also shows that the bedroom in question was open to access by anyone in the house since there was no door between the bedroom and the rest of the house, or at least there was no closed or locked door at the time of the visits by the officers. One of the officers testified that he saw articles of clothing, which apparently belonged to Mrs. Henderson, in the closet in the defendant's bedroom. The Court said in its opinion:

> "There is no assertion that this search was made under a search warrant, or with the consent of the defendant, and the premises searched clearly were not the scene of the arrest of the defendant. Therefore, the validity of the search depends on the consent given by Mrs. Henderson. See *Smuk v. People*, 72 Colo. 97, 209 P. 636. The record clearly shows that Mrs. Henderson did give her consent to the search on both occasions, and it is also clear that she actively aided the officers in looking through the bedroom. We hold that the consent given by Mrs. Henderson was sufficient to make the search valid and constitutional. Mrs. Henderson resided in the house with her five year old daughter. Mrs. Henderson was either the owner of the house, or was at least the person in full control of the house. And, it is important to note, the record also shows that she had the right of unlimited access to the bedroom in question. Under these circumstances, her consent was valid. The apparent owner of the prop-

erty who has equal rights to the use of the premises and has equal access to the premises may legally authorize a search of those premises. *Woodard v. United States,* 102 U.S. App. D. C. 393, 254 F. 2d 312 (1958), cert. denied, 357 U.S. 930, 78 S. Ct. 1375, 2 L. Ed. 2d 1372; *Calhoun v. United States,* 172 F. 2d 457 (5th Cir. 1949), cert. denied, 337 U.S. 938, 69 S. Ct. 1513, 93 L. Ed. 1743; *People v. Gorg,* 45 Cal. 2d 776, 291 P. 2d 469; *People v. Howard,* 166 Cal. App. 2d 638, 334 P. 2d 105; *Van Wyck v. State,* 56 Okl. Cr. 241, 37 P. 2d 321; Annot., 31 A.L.R. 2d 1078 (1953) §§ 3, 6. And see, *Burge v. United States,* 342 F. 2d 408 (9th Cir. 1965), cert. denied 382 U.S. 829, 86 S. Ct. 63, 15 L. Ed. 2d 72; *People v. Swift,* 319 Ill. 359, 150 N.E. 263. The seizure of the camera and the later introduction of it into evidence were proper."

Calhoun v. United States, 172 F. 2d 457 (5th Cir. 1949), reh. den. 15 March 1949, is another case in point. In that case the Court held as summarized in the third headnote in the National Reporter Series:

"Where owner voluntarily gave police officers permission to search house without a warrant, defendant could not complain of search of a room therein which he was permitted to occupy whenever he happened to be there but which he did not own or rent and over which he had no authority when not personally occupying it."

The Court in its opinion said:

". . . As to the appellant Calhoun, who complained that his shoes were taken from his room, the record discloses that no shoes were introduced in evidence. Moreover, it does not appear that Calhoun either owned or rented the room in question. The best that can be said of Calhoun's occupancy of this room is that he was permitted to use it whenever he happened to be there. So far as appears, he had no authority over this room when he was not personally occupying it. The owner and master of the house was the witness Tomme. The latter voluntarily gave the officers permission to search his home without a warrant, and voluntarily turned the money over to the post-office inspector.

"We find no reversible error in the record, and the judgment appealed from is affirmed."

[12] In the instant case the defendant did not own, lease, control or possess the Gibson house but was permitted to sleep in the living

room in that house. He paid no rent and did not have a key to the house except when Mary Ann Gibson went out. At all other times she opened the door for him. For defendant's convenience Mary Ann Gibson let defendant keep his clothes in one of her suitcases which was kept in another room of the house. On the night of the arrest, after defendant had been carried from the Gibson house, the officer asked Mrs. Gibson if defendant had any clothes. She then went into her bedroom and got the suitcase containing the defendant's clothes from under the baby's crib and voluntarily gave it to the officers. The sweater was taken from this suitcase by the officers. While it is not crystal clear from the record that defendant was wearing this sweater at the time of the alleged rape, yet in our opinion a jury could draw a fair inference from the evidence that he was wearing this sweater at the time of the alleged rape. We are fortified in our opinion by the fact that defendant's experienced counsel makes no suggestion to the contrary in his brief. Under these facts the taking of this sweater by the officers was not the result of an unlawful search and seizure, and the sweater was properly and correctly admitted in evidence.

[13] The State introduced evidence in this case tending to show that defendant was guilty of the crime of rape upon the body of Mrs. Jeane Daily, and that after the commission of the crime of rape Mrs. Daily had blood on her legs. There is also evidence in the record that on the night in question she was on the second day of her menstrual period. The trial court properly refused to strike out the evidence that laboratory tests of the F.B.I. showed that on the lower front portion of the sweater and on the left sleeve of the sweater turned over to the police by Mary Ann Gibson were reddish brown smears that came from human blood, for the simple reason that the jury could make a reasonable inference from the evidence that the sweater was a garment worn by the defendant at the time named in the indictment, and bore stains corroborative of the State's theory of the case. *S. v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *S. v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *People v. Hartley* (Dist. Ct. of Appeals), 17 Cal. Rptr. 286. For the same reason the court properly admitted into evidence the testimony of a special agent of the F.B.I., whose particular specialty is the microscopic examination of hairs and fibers, textile material, and related materials in criminal cases, that on the sweater introduced in evidence there was hair possessing Negro characteristics. *Nicholas v. State* (Court of Criminal Appeals), 270 S.W. 555; *People v. Kirkwood,* 17 Ill. 2d 23, 160 N.E. 2d 766; 75 C.J.S. Rape §§ 47 and 59.

[14] The court properly admitted into evidence the expert testi-

mony that hair possessing Negro characteristics was found in the debris of Mrs. Jeane Daily's automobile where the alleged rape took place. Certainly no constitutional rights of defendant were violated by the search of Mrs. Jeane Daily's automobile.

[15] Defendant assigns as error the failure of the court to sustain defendant's objection and motion to strike testimony regarding a paper bag containing cigarettes and a sales slip, as set forth above with particularity, on the ground that this evidence was obtained as a result of an illegal search and seizure. The evidence indubitably discloses that these cigarettes were given by Mary Ann Gibson to the police to carry to the prisoner. She evidently thought he smoked cigarettes and gave the officers the cigarettes to carry to defendant. These cigarettes under the circumstances were not obtained as a result of an unlawful search and seizure. Defendant's objection and exception were properly overruled.

All defendant's assignments of error are overruled. In the case below we find.

No error.

STATE OF NORTH CAROLINA v. DENNIS McDANIEL

No. 657

(Filed 11 December 1968)

1. Criminal Law § 84— in-court admission which is "fruit" of erroneously admitted evidence

While the "poison tree" doctrine applies to an in-court admission found to be "fruit" of unconstitutionally obtained and erroneously admitted evidence, the State is not barred from claiming the normal consequences of defendant's in-court admission if, as a matter of good sense, the connection between defendant's testimony and the erroneously admitted evidence is so "attenuated as to dissipate the taint."

2. Constitutional Law § 33— right against self-incrimination

A defendant has a right under both the State and Federal Constitutions not to be compelled in any criminal case to be a witness against himself. Amendments V and XIV, U. S. Constitution; Article I, § 11, N. C. Constitution.

3. Criminal Law §§ 75, 84, 169— error in admitting evidence cured by defendant's testimony — in-court admission induced by erroneously admitted evidence

Where properly admitted evidence of the State was sufficient to permit the jury to find defendant guilty of murder by stabbing deceased with a

knife, error in the admission, over defendant's objection, of (1) a hearsay statement by deceased that it was defendant who cut him, (2) an unconstitutionally obtained in-custody statement by defendant that he intentionally stabbed deceased, and (3) the knife allegedly used in the crime which was found as a result of the in-custody interrogation *is held* cured when defendant testified in his own behalf, in attempting to establish self-defense, that he intentionally stabbed deceased with the knife, defendant's testimony being induced not by the introduction of the erroneously admitted evidence but by the strength of the State's competent evidence. *Harrison v. United States*, 392 U.S. 219, distinguished.

BOBBITT, J., dissenting.

SHARP, J., joins in dissenting opinion.

APPEAL by defendant from *Bailey, J.*, at the January 1967 Criminal Session of COLUMBUS.

Upon an indictment, proper in form, the defendant was tried for the murder of Chester Leggett, found guilty of murder in the second degree, and sentenced to imprisonment in the State Prison for a term of twenty to thirty years. He appealed, assigning as error the denial of his motion for a directed verdict of not guilty and the admission, over his objection, of certain evidence. This Court affirmed, holding there was no error in the denial of the motion for a directed verdict of not guilty and, while there were errors in the admission of certain evidence introduced by the State, they were cured by the defendant's own testimony establishing the same facts. *State v. McDaniel*, 272 N.C. 556, 158 S.E. 2d 874.

The defendant petitioned the Supreme Court of the United States for a writ of certiorari. Thereafter, that Court rendered its decision in *Harrison v. United States*, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047. One week later, it granted the petition of this defendant for a writ of certiorari, vacated the judgment of this Court, and remanded the cause to this Court for further consideration in the light of the *Harrison* case. Justices Black, Harlan and White dissented. The order of remand states:

> "THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding."

Pursuant to the judgment and remand by the Supreme Court of the United States, the case was restored to the docket of this Court for further argument. John A. Dwyer, court appointed counsel, who

had represented the defendant at his trial in the superior court, in the hearing of the appeal in this Court and in the Supreme Court of the United States, having died, the present counsel for the defendant was appointed. He filed a new brief and presented the argument for the defendant at the further hearing in this Court.

Attorney General Bruton, Deputy Attorney General Bullock and Assistant Attorney General Goodwyn for the State.

Williamson & Walton for defendant appellant.

LAKE, J.

In our former opinion in this case, 272 N.C. 556, 158 S.E. 2d 874, we held:

1. It was error to admit, over objection, a statement by the deceased, not made in the presence of the defendant and not qualifying as a dying declaration, that it was the defendant who had cut him;

2. It was error to admit, over objection, statements made to a police officer by the defendant, while in custody, to the effect that he had intentionally cut the deceased with a knife, because the procedure required by former decisions of this Court (see *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1) for determining the competency of such statements was not followed;

3. It was error to admit in evidence, over objection, the knife which the State contends the defendant used to stab the deceased, the knife having been found by a police officer as a result of an interrogation of the defendant while in custody, there being no showing that he was warned of his constitutional rights as specified in *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and, for the same reason, it was error to admit the testimony of the officer relating to the finding of the knife; but

4. These errors were cured and rendered harmless by the fact that the defendant, himself, took the stand and testified that he did intentionally stab the deceased, that he did so with the knife in question, that he subsequently placed the knife where it was found by the officer and that he told the interrogating officer where to find the knife, and, therefore, these errors of the trial court do not entitle the defendant to a new trial.

We adhere to these rulings insofar as the law of North Carolina, separate and apart from the Constitution of the United States as interpreted by the Supreme Court of the United States, is concerned.

Harrison v. United States, 392 U.S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047, was decided after our former opinion in this case was issued. As required by the mandate of the Supreme Court of the United States, we now come to consideration of the effect, if any, of the rule announced by that Court in *Harrison v. United States* upon the present case. This requires an analysis of the *Harrison* case and a comparison of this case with it.

The *Harrison* case was before the Supreme Court of the United States as the result of Harrison's third trial in the courts of the District of Columbia upon the charge of murder. In each of the three trials, the jury found the defendant guilty and judgment was entered upon the verdict in the federal trial court. The first conviction was vacated by the Court of Appeals on grounds not involved in the opinion of the Supreme Court.

At Harrison's second trial the Government introduced confessions made by him, without which it did not have evidence sufficient to identify him as the killer. See the opinion of the Court of Appeals, 359 F. 2d 214. The substance of the confessions was that Harrison and two others, armed with a shotgun, had gone to the house of the deceased intending to rob him and the deceased had been killed while resisting their entry into his home. Harrison then took the stand in his own behalf and testified that he and his companions had gone to the home of the victim for the purpose of pawning the shotgun and the victim had been killed accidentally while Harrison was presenting the gun to him for inspection. Harrison's conviction at the second trial was vacated by the Court of Appeals (359 F. 2d 214) on the ground that the confessions had been obtained in violation of his rights, as declared in *Mallory v. United States,* 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479, and in *Harling v. United States,* 295 F. 2d 161. In a footnote to the decision of the Supreme Court (in its review of the third trial), it stated that it was then proceeding upon the assumption that the Court of Appeals was correct in ruling that the confessions were inadmissible, but that it was intimating no view of its own upon that question.

It will be noted that in his testimony at the second trial Harrison did not corroborate the erroneously admitted confessions. His testimony merely placed him at the scene of the killing with the gun in his hand prior to its discharge. It contradicted the most damaging part of the confessions in that it denied any felonious intent or act.

Consequently, the rule relied upon by us in our former opinion in the present case would not apply to the *Harrison* case and the error, if any, in admitting the confessions of Harrison was not cured by his subsequent testimony. Under our rule, Harrison would have been granted a new trial following his second conviction, assuming the confessions were erroneously admitted.

When Harrison was brought to trial for the third time, six years after the first trial, "prosecution witnesses were dead or unavailable." See dissenting opinion of Mr. Justice White. At the third trial, the prosecution did not offer the confessions in evidence, but, over objection, read to the jury Harrison's testimony at the second trial, thus placing him, by this testimony, at the scene of the killing with the shotgun in his hand immediately prior to the killing. The ground of Harrison's objection, stated to the trial court, was that the defendant "had been induced to testify at the former trial only because of the introduction against him of the inadmissible confessions." Harrison did not testify at the third trial. Without the introduction of the transcript of his testimony at the second trial the Government's evidence would not have been sufficient to convict him. The Court of Appeals affirmed the conviction at the third trial. 387 F. 2d 203.

Thus, the question for the Supreme Court of the United States, upon its review of the third conviction of Harrison, was this: Where a defendant, by the prosecution's introduction in evidence of unlawfully obtained confessions, has been "induced" at a former trial to testify, may his testimony, so induced, be admitted in evidence against him at a retrial on the same charge over his objection upon the ground that it was so induced? The Supreme Court of the United States held that under those circumstances such testimony may not be introduced against the defendant. That decision is, of course, binding upon us. The Court, however, did not have before it in the *Harrison* case the question with which we are confronted, which is this: Where an admission, unconstitutionally obtained, is introduced in evidence over the defendant's objection, is the error cured when the defendant then takes the stand in his own behalf at the same trial and testifies to precisely the same facts, the State having introduced ample evidence, apart from that so erroneously admitted, to carry the question of the defendant's guilt to the jury?

In reaching the decision in the *Harrison* case, the majority of the Supreme Court of the United States said:

> "A defendant who chooses to testify waives his privilege against compulsory self-incrimination *with respect to the testi-*

mony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place *only by reason of the strength of the lawful evidence adduced against him.* [Emphasis added.]

"Here, however, the petitioner testified only after the Government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby — the fruit of the poisonous tree, to invoke a time-worn metaphor. * * *

"The question is not *whether* the petitioner made a knowing decision to testify, but *why.* If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible. * * *

"The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would have testified as he did even if his inadmissible confessions had not been used. * * * Having 'released the spring' by using the petitioner's unlawfully obtained confession against him, the Government must show that its illegal action did not induce his testimony.

"No such showing has been made here. *In his opening statement to the jury, defense counsel announced that the petitioner would not testify in his own behalf.* Only after his confessions had been admitted in evidence did he take the stand. It thus appears that, but for the use of his confessions, the petitioner might not have testified at all. But even if the petitioner would have decided to testify whether or not his confessions had been used, it does not follow that he would have admitted being at the scene of the crime and holding the gun when the fatal shot was fired. On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already spread the petitioner's confessions before the jury. That is an inference the Government has not dispelled. [Emphasis added.]

"It has not been demonstrated, therefore, that the petitioner's testimony was obtained 'by means sufficiently distinguishable' from the underlying illegality 'to be purged of the primary taint.' "

[3] We now turn, for comparison, to the record in the case before us. It was stipulated at the trial that the cause of Leggett's death was a stab wound in the chest. Prior to the introduction of the erroneously admitted evidence, the State had offered, without objection, clearly competent evidence, not contradicted, that approximately one hour before Leggett was found in a dying condition with three stab wounds in his chest and shoulder, the defendant and Leggett had a fight, that when he went into the fight the defendant had a knife in his hand, that Leggett retreated until he was backed up against a fence, that while Leggett was in that position the defendant advanced on him and the defendant's right arm went up three times, whereupon Leggett first fell back against the fence and then ran from the scene and that Leggett was found, dying, a block and a half from the scene of the fight.

Clearly, the properly admitted evidence of the State was sufficient to permit the jury to find the defendant guilty of murder; that is, that he killed Leggett by intentionally stabbing him with a knife after Leggett had withdrawn from the fight and was trying to flee. The purpose of the defendant's testimony was not to deny that he stabbed Leggett, that he stabbed him intentionally, or that he stabbed him with the knife erroneously placed in evidence by the State. On the contrary, he testified that he did so stab Leggett with that knife. The whole purpose of his testimony was to establish that the stabbing was justified because it was done in self defense. It is unrealistic to suppose that, confronted with the competent evidence introduced by the State, he would not have sought to establish this defense had the State not introduced any of the erroneously admitted evidence.

At no time during the trial did the defendant, or his trial counsel, intimate that he did not intend to take the witness stand in his own behalf or that he would deny that he stabbed the deceased. At no time in the trial court did the defendant, or his trial counsel, suggest that his testimony was "impelled" by the introduction of the erroneously admitted evidence. The defendant was represented by his trial counsel when the case was first argued in this Court. Neither in his brief nor in his oral argument was there the slightest suggestion that the defendant's testimony at the trial was "impelled" or induced by the improperly admitted evidence. His contention at

that time was that no error committed by the admission of the unconstitutionally obtained evidence could be cured by a defendant's testifying to the same facts.

The record before us does not include the petition for certiorari filed in the Supreme Court of the United States on behalf of the defendant by his trial counsel, or his brief in support thereof. There is nothing before us to indicate that even there his trial counsel contended that he was "impelled" by the erroneously admitted evidence to put his client on the witness stand. Of course, he was "impelled" to do so by the strength of the State's case, but that case included ample evidence of intentional killing with a knife, which was clearly competent and which was introduced without objection.

Upon the reargument of this case before us, following the remand by the Supreme Court of the United States, the defendant was represented by his newly appointed counsel, his trial counsel having died. Quite properly, in view of the remand order, his present counsel contended on the reargument that his client's testimony at the trial was "impelled" by the evidence erroneously admitted or, at least, the State could not prove the contrary.

It is obviously impossible for the State now to offer evidence to show what motivated the defendant's testimony at his trial. Even if evidence on that question could now be taken, the defendant could not now be compelled to answer questions on that subject. Neither could his trial counsel be so compelled, if he were still living. We must determine whether the defendant's own testimony was the fruit of poison or was an antidote thereto from consideration of the record before us, including the absence therefrom of any contention by the defendant, or his trial counsel, prior to the remand order, that his testimony was impelled by the trial judge's error.

The doctrine of the "poisonous tree" originated as an application of the constitutional protection against unreasonable searches and seizures. In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426, the Court, speaking through Mr. Justice Holmes, held that photographed copies made by the Government of books it had unconstitutionally seized could not be placed in evidence by it against the owner of the books, saying:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus

obtained became sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

In *Nardone v. United States,* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307, the Court, speaking through Mr. Justice Frankfurter, held inadmissible evidence obtained by unconstitutional wire tapping, but said:

"Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."

In *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, the doctrine was applied to exclude, as fruit of an unlawful search, a statement made and conditions observed as a result of such search and so as to exclude articles obtained through "exploitation" of such statement. Speaking through Mr. Justice Brennan, the Court said:

"Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. * * *

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

In *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171, the Court held that a defendant, whose confession is offered in evidence by the State, must be given an opportunity to show it was induced by his being confronted with unconstitutionally seized evidence.

[1] In the *Harrison* case, the Court has applied the "poison tree" doctrine to an in-court admission found to be "fruit" of an unconstitutionally obtained and erroneously admitted out-of-court confession. But the Court has not, in the *Harrison* case, departed from

the limitations placed upon the doctrine in the *Silverthorne, Nardone* and *Wong Sun* cases. The State is not barred from claiming the normal consequences of the defendant's in-court testimony if, "as a matter of good sense," the connection between it and the erroneously admitted evidence is so "attenuated as to dissipate the taint."

[2] Here, there was no unlawful search or seizure. The constitutional right upon which the defendant relies is the right, conferred upon him by the Constitution of the United States, Amendments V and XIV (see *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653), not to be "compelled in any criminal case to be a witness against himself." That right is also firmly established in this State by Art. I, § 11, of the Constitution of North Carolina, and has repeatedly been recognized and proclaimed by the decisions of this Court. *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2 1104; *State v. Hollingsworth*, 191 N.C. 595, 132 S.E. 667; *State v. Medley*, 178 N.C. 710, 100 S.E. 591; *Smith v. Smith*, 116 N.C. 386, 21 S.E. 196; *LaFontaine v. Southern Underwriters*, 83 N.C. 133. Harrison, at all phases of his third trial and the review thereof, contended that he was so compelled at his second trial and because of that compulsion his statements thereat, like his custodial confession, could not be used against him on his third trial. The record in the *Harrison* case lent support to that contention. The record in the present case does not.

[3] The distinctions between this case and the *Harrison* case are these:

1. In the *Harrison* case, the prosecution offered the defendant's in-court statements, made at a former trial, as part of its case in chief at the retrial. Here, the defendant's testimony was introduced in the same trial by the defendant and the question is as to its efficacy as a cure of error in admitting evidence of the State identical in nature.

2. In the *Harrison* case, at the time the in-court statement of the defendant at the former trial was offered in evidence against him, the defendant objected on the ground that it was fruit of a poisonous tree; that is, it was, itself, coerced and, therefore, incompetent. Here, no such contention was made, either in the trial court or in this Court, until after the remand of the case to us by the Supreme Court of the United States.

3. In the *Harrison* case, it affirmatively appears from the record that, at the start of the second trial, at which the defendant's in-court statement was made, the defendant announced he would not take the stand in his own behalf, and after the illegally obtained

out-of-court confessions were introduced by the prosecution, he changed his course at that trial and took the stand to give the testimony which was used against him at the subsequent trial. Thus, the record there affirmatively showed the defendant was compelled by the prosecution's use of the illegally obtained confessions to make the in-court statement, used at the third trial, and so showed the statement was "fruit" of the illegally obtained confessions. Here, there is nothing in the record to indicate any change in the defendant's trial strategy as the result of the error of the trial court.

4. In the *Harrison* case, the Government's evidence at the second trial, apart from the erroneously admitted confessions, was not sufficient to sustain a conviction, so clearly it was the admission in evidence of the confessions which "impelled" Harrison to testify. Here, the State's competent evidence was ample to support a conviction and thus to "impel" this defendant to testify as he did, even had the erroneously admitted evidence not been offered.

The coercive effect of unconstitutionally obtained evidence is not, per se, greater than the coercive effect of like evidence incompetent for any other reason. To hold that a defendant in a criminal action, once evidence has been erroneously admitted over his objection, may then take the stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State to compel him to testify against himself. If the jury believes his evidence in justification of his conduct, he will be acquitted and can never be tried again. If the jury does not believe him and finds him guilty of the offense, he gets a new trial because of the court's error. We think such result is not required by the Constitution of the United States, as interpreted in the *Harrison* case, under the circumstances disclosed by this record. Here, in view of the strength of the State's competent evidence and of the failure of the defendant and his trial counsel, prior to the remand to us, to claim that his in-court testimony was compelled or impelled by the trial court's errors, we think that to deny the curative effect of his testimony would push the doctrine of the poisonous tree to "a drily logical extreme" not in accord with common experience in the courtroom.

We, therefore, adhere to our previously expressed view that the defendant's own testimony cured the errors of the trial judge and rendered them harmless.

No error.

BOBBITT, J., dissenting:

At Fall Term 1967, I concurred in *the result,* "No Error," of the Court's decision. *State v. McDaniel,* 272 N.C. 556, 158 S.E. 2d 874.

Officer Heye testified defendant, although not interrogated, persisted in telling what had happened; and that under these circumstances, defendant told him he had cut Leggett with a knife and meant to do it, intending thereby to put a stop to Leggett's "picking and staying in behind him all the time." This volunteered testimony, in my opinion, was competent; and, in view of its probative force, I did not consider the other challenged rulings on evidence, if erroneous, of such prejudicial significance as to justify awarding a new trial. However, the Court decided Heye's testimony was incompetent.

Further consideration in the light of *Harrison v. United States,* 392 U.S. 219, 88 S. Ct. 2008, 20 L. ed. 2d 1047, must proceed upon the basis that the incompetency of Heye's said testimony is the established law of this case. When so considered, it is my opinion that the prejudicial impact of Heye's testimony, particularly the portion thereof in which he stated defendant had told him he had cut Leggett with a knife and meant to do it, intending thereby to put a stop to Leggett's "picking and staying in behind him all the time," was of such adverse probative force as to constitute a material factor in determining whether it was advisable for the defendant to take the witness stand and testify in his own behalf. The thrust of this evidence contradicts the view that defendant was acting in self-defense.

Accepting the Court's prior determination that Heye's testimony was erroneously admitted as the law of this case, it is my opinion that, under authority of *Harrison,* defendant should be awarded a new trial.

SHARP, J., joins in dissenting opinion.

REDEVELOPMENT COMMISSION OF HIGH POINT v. GUILFORD COUNTY AND CITY OF HIGH POINT

No. 687

(Filed 11 December 1968)

1. Taxation § 19— exemption from taxation — property of State and municipal corporations

The provision of Article V, § 5, of the N. C. Constitution which exempts

from taxation property belonging to the State and to municipal corporations is self-executing.

2. Municipal Corporations § 4; Taxation § 21— exemption from taxation — municipal redevelopment commission

A municipal redevelopment commission created pursuant to G.S. Ch. 160, Art. 37, is a municipal corporation for the purpose of tax exemption.

3. Taxation § 38— remedy of taxpayer against collection of tax

Ordinarily, the rule that the sovereign may not be denied or delayed in enforcement of its right to collect revenues applies to municipalities and every subdivision of state government, and when a tax is levied against a taxpayer he must pay it under protest and sue for recovery after he has exhausted all existing administrative remedies.

4. Taxation § 36— injunction — when available

Injunction will lie to restrain the collection of a tax which is itself illegal or invalid.

5. Taxation § 36— injunction — property allegedly exempt from taxation

Injunction is a proper remedy where the taxpayer contends the taxing body is without authority to impose the tax because of the constitutional provision exempting from taxation property belonging to the State and municipal corporations.

6. Taxation § 21— property of State or municipality — requisites for exemption from taxation

In order for property acquired and held by the State or a municipality to be exempt from taxation under Article V, § 5, N. C. Constitution, it must be held for a public or governmental purpose.

7. Taxation § 21— determination of whether State or municipal property is exempt

The facts and circumstances of each case determine whether there is such public purpose as to bring the State or municipal corporation within the claimed exemption.

8. Taxation § 21— exemption of State or municipal property — primary use controls

In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental or secondary use, will control.

9. Taxation § 21— incidental revenue from State or municipal property

Where the primary and principal use to which property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to public use.

10. Pleadings § 19— effect of demurrer

A demurrer admits, for the purpose of testing the sufficiency of the pleading, well-stated allegations of fact and relevant inferences of fact reasonably deducible therefrom.

11. Taxation §§ 21, 36— municipal redevelopment commission — action to restrain collection of tax — sufficiency of complaint — incidental revenue derived from property

In an action to restrain the collection of municipal and county ad valorem taxes levied upon property held by plaintiff municipal redevelopment commission on the ground that the property is exempt from taxation under Art. V, § 5, N. C. Constitution, plaintiff's complaint *is held* to state a cause of action for injunctive relief where it alleges sufficient facts to show that all property held by plaintiff was acquired and held primarily for governmental and public purposes according to a definitely evolved plan to use the property for the public, and that income derived from the property was incidental and secondary to the dominant public use.

12. Taxation § 36— injunction to prevent tax collection — pleadings

When a plaintiff seeks the equitable relief of injunction, his pleadings should be full in alleging facts necessary to show the illegality or invalidity of the tax.

APPEAL by plaintiff from decision of the Court of Appeals (1 N.C. App. 512, 162 S.E. 2d 108) filed 10 July 1968, reversing judgment of the Superior Court of GUILFORD County April 1968 Regular Session, High Point Division.

On 27 February 1968 plaintiff instituted this action against defendants to restrain the collection of ad valorem taxes upon real property acquired and held by plaintiff.

Plaintiff alleged in his complaint that it is a duly created redevelopment commission, existing under the provisions of Article 37, Chapter 160, of the General Statutes of North Carolina. Plaintiff is engaged in the public business for which it was created and organized and has acquired fee simple title to certain real property for the purposes of redevelopment pursuant to Article 37, Chapter 160, of the General Statutes, consisting of the following basic types: (1) improved income-producing, (2) improved non-income-producing, and (3) unimproved income-producing, and (4) unimproved nonincome-producing. While obtaining relocation sites for the occupants of the properties so acquired and held by it, it is necessary for plaintiff to collect the income which the properties produce. It is further alleged that defendants have illegally assessed and levied and are attempting to collect ad valorem taxes upon property owned and held by plaintiff.

Each defendant demurred to the complaint. The trial court held that the complaint failed to state facts sufficient to constitute a cause of action, for the reason that the properties held by plaintiff were not, as a matter of law, exempt from ad valorem taxes. Plaintiff appealed to the North Carolina Court of Appeals. That Court ad-

judged that the nonincome-producing property held by plaintiff was exempt from taxation and that the income-producing property was subject to ad valorem taxes, and thereupon reversed the judgment sustaining the demurrers.

Plaintiff appealed to this Court under provisions of G.S. 7A-30(1).

Haworth, Riggs, Kuhn and Haworth for plaintiff.

David I. Smith for defendant Guilford County.

BRANCH, J.

The question presented to this Court for decision is: Did the Court of Appeals err in holding as a matter of law that real property acquired and held for redevelopment pursuant to the North Carolina Urban Redevelopment law is not exempt from taxation if it produces income?

[1] Appellant claims this exemption from taxation under provisions of Article V, Section 5 of the North Carolina Constitution, which in pertinent part provides: "Property belonging to the State or to municipal corporations, shall be exempt from taxation." This provision of the Constitution is self-executing. *Piedmont Memorial Hospital v. Guilford County,* 218 N.C. 673, 12 S.E. 2d 265.

[2] The Court of Appeals correctly held that appellant is a municipal corporation for the purpose of tax exemption. *Redevelopment Commission v. Security Nat'l Bank,* 252 N.C. 595, 114 S.E. 2d 688; *Mallard v. Housing Authority,* 221 N.C. 334, 20 S.E. 2d 281; *Wells v. Housing Authority,* 213 N.C. 744, 197 S.E. 693. We note in this connection that appellee concedes, and properly so, that appellant was created and exists for a public purpose.

Appellee maintains that in this case injunction is an improper procedure for determining whether plaintiff is exempt from the tax.

G.S. 105-281 provides: "All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation."

[3-5] Ordinarily, the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect revenues applies to municipalities and every subdivision of state government, and when a tax is levied against a taxpayer he must pay same under protest and sue for recovery after he has exhausted all existing administrative remedies. *Bragg Development Co. v. Braxton,* 239 N.C. 427, 79 S.E. 2d 918.

G.S. 105-406 reads as follows:

> *"Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose,* no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; . . ." (Emphasis ours)

This statute and our case law recognize a distinction between an erroneous tax and an illegal or invalid tax. An illegal or invalid tax results when the taxing body seeks to impose a tax without authority, as in cases where it is asserted that the rate is unconstitutional, *Perry v. Commissioners of Franklin County,* 148 N.C. 521, 62 S.E. 608, or that the subject is exempt from taxation, *Southern Assembly v. Palmer,* 166 N.C. 75, 82 S.E. 18. Injunction will lie when the tax or assessment is itself invalid or illegal. *Purnell v. Page,* 133 N.C. 125, 45 S.E. 534; *Sherrod v. Dawson,* 154 N.C. 525, 70 S.E. 739; *Wynn v. Trustees of Charlotte Community College,* 255 N.C. 594, 122 S.E. 2d 404. Here, the equitable remedy of injunction is proper since appellant contends that the taxing body is without authority to impose the tax because of the constitutional exemption.

[6] In applying this constitutional exemption this Court for a period of years developed two divergent viewpoints: (1) that property held by the State or a municipality is exempt without regard to the purpose for which it was acquired and held. *Weaverville v. Hobbs,* 212 N.C. 684, 194 S.E. 860; *Andrews v. Clay County,* 200 N.C. 280, 156 S.E. 855. (2) In order for the exemption to apply to property acquired and held by the State or a municipality, the property must be held for public or governmental purposes. *Winston-Salem v. Forsyth County,* 217 N.C. 704, 9 S.E. 2d 381; *Warrenton v. Warren County,* 215 N.C. 342, 2 S.E. 2d 463; *Wells v. Housing Authority, supra; Benson v. Johnston County,* 209 N.C. 751, 185 S.E. 6; *Board of Financial Control v. Henderson County,* 208 N.C. 569, 181 S.E. 636; *Atlantic & N. C. R. R. v. Board of Comm'rs.,* 75 N.C. 474.

[6] The decided current of authority follows, and we think correctly so, the view of the latter line of cases. We deem it necessary to briefly review these controlling decisions.

In *Atlantic & N. C. R. R. v. Board of Comm'rs., supra,* the Court, in holding that the provisions of the North Carolina Constitution which provided that "property belonging to the State shall be exempt

from taxation" did not embrace the interest of the State in such enterprises as the operation of railroads, said:

> "The Capitol is not taxed because the State would be paying out money just to receive it back again, less the expenses of handling it. And if taxed for local purposes it would to that extent embarrass the State government.
>
> . . .
>
> "But where the State steps down from her sovereignty and embarks with individuals in business enterprises, the same considerations do not prevail. . . .
>
> "(W)e do not think the exemption in the Constitution embraces the interest of the State in business enterprises, but applies to the property of the State held for State purposes."

In the case of *Benson v. Johnston County, supra,* the plaintiff, a municipality, acquired certain property within its corporate limits by tax foreclosure. After acquisition of the property, the municipality rented the property and received rents therefrom. The county levied an ad valorem tax against the property, and the municipality contended that the property was exempt from taxation from the date the municipality acquired the title, relying on Article V, Section 5 of the North Carolina Constitution, and N. C. Code §§ 7880(2), (177) (Michie 1935). The Court held that the property was liable for county taxes, since it was not used by the city for governmental purposes, and stated:

> "We think that the question involved in this controversy was settled in *Board of Financial Control v. Henderson County,* 208 N.C. 569, (571-2) where it is said: 'So the question in this controversy narrows itself down: Can the City of Asheville, a municipal corporation, acquire business property in another county, hold and rent it without the payment of taxes in that county? We think not. The property is not held or used for any governmental or necessary public purpose, but for purely business purposes.' "
>
> Quoting with approval from the case of *Village of Watkins Glen v. Hager,* 252 N.Y.S. 146, the Court stated: " 'It is manifest there are two classes of property of municipal corporations exempt from taxation. First is that class of property held for public use, in that it is used in connection with the operation of the functions of government, such as municipal buildings; second, that class of property held for a public use, in that it is for the benefit of the people for their free use, and enjoyment, such

as parks, playgrounds, athletic fields, art museums, and public uses of a similar nature.

"'When the municipal corporation, however, acquires and holds property without devoting the same to either class of purpose, it is simply held without use. The fact that it is to a certain extent used for the purpose of producing income, *when there is no definite plan evolved for its use* by or for the public, cannot reasonably be said to constitute holding for a public use. . . .' (Emphasis ours)

. . . . .

"There is no evidence in the record of this case indicating that the Town of Benson ever had any intention of devoting the lands purchased under tax foreclosure proceedings for a public purpose. The lands were rented, and the town received the rental income. They were held for sale, and the present action was brought because of bidders for the property. The only suggestion of a public purpose or public use is that the purchase of the tracts was necessary to protect the town's tax liens. Having done that, the town held the lands as would any other purchaser, renting the property as a private individual would have done, and now it proposes to sell the lands, as any private individual purchaser might have done."

In the case of *Warrenton v. Warren County, supra,* the facts show that the defendant municipality acquired a hotel within its corporate limits by purchase under a foreclosure sale, in order to protect an investment which had been made in the hotel corporation by the Town of Warrenton. In holding that the provisions of Article V, Section 5 of the State Constitution applied to State or municipal property which is used for a governmental or public purpose, and that the property of the defendant municipality used for business purposes was not exempt from taxation by the county, the Court stated:

"The property is neither held for nor used for governmental or necessary public purposes, but merely for business purposes, and in competition with any other hotel that may be established in the town of Warrenton or vicinity. 'If a municipal corporation can go into a rental business and escape taxation, it would have a special privilege not accorded to others who are in a like business.' *Board of Financial Control v. Henderson County, supra.*"

Wells v. Housing Authority, supra, involves a "municipal corporation" so nearly akin to appellant in purpose and structure that

we consider its holding very persuasive. In that case defendant Housing Authority was created pursuant to Chapter 456 of the Public Laws of 1935 for the purpose of protecting low-income citizens from unsafe or unsanitary conditions by providing for them low cost rental dwellings and apartments. The Court held defendant Housing Authority to be such a "municipal corporation" as is exempt from state, county and municipal taxation by virtue of Article V, Section 5 of the North Carolina Constitution, and that the property held by it for rental purposes was held for a public purpose. It is to be noted that even though income was presumably derived from the rental of the property held by defendant Housing Authority, the property was declared by the Court to be exempt from taxation.

The cases cited as controlling authority reached differing results as to whether the tax exemption applied. However, differing results do not necessarily do violence to the rule of law when there are factual differences. The cases of *Benson v. Johnston County, supra,* and *Warrenton v. Warren County, supra,* are easily distinguishable. In the instant case the allegations of the complaint show acquisition of property with intent to use for a public purpose, a definite plan evolved for its use for the public, and an actual public use of the property. In *Benson v. Johnston County, supra,* and *Warrenton v. Warren County, supra,* neither acquisition with intent to use for public purpose nor a definitely evolved plan for public use was shown. It was shown that the property was held for strictly business purposes. The same distinctions apply between this case and the cases of *Atlantic & N. C. R. R., v. Board of Comm'rs, supra, Board of Financial Control v. Henderson County, supra,* and *Winston-Salem v. Forsyth County, supra.* Conversely, applying the same principles of law to the factual situation of *Wells v. Housing Authority, supra,* and *Mallard v. Housing Authority, supra,* the Court found that the exemption did apply.

[7] A definition of public purpose sufficient to fit all fields of the law and all factual situations is not possible. In Black's Law Dictionary 1394 (4th Ed. 1957), we find the following:

> "In the law of taxation, eminent domain, etc., this is a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private interest, inclination, or liberality. . . . The term is synonymous with governmental purpose. . . . A public purpose or public business has for its objective the promotion of the public health, safety, morals,

general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political division,. . . ."

The facts and circumstances of each case determine whether there is such public purpose as to bring the State or municipal corporation within the claimed exemption. For example, the purposes for which the municipal corporation was created, whether it has departed from the protected area of immunity, or if the reason for its immunity has ceased to exist, should be considered.

We observe, parenthetically, that the word "necessary" used by some of the authorities herein cited seems to be without significance in describing a public purpose in the context of this tax exemption.

[8] In determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental or secondary use, will control. *Iota Benefit Ass'n. v. County of Douglas,* 165 Neb. 330, 85 N.W. 2d 726; 51 Am. Jur., Taxation § 539 (1944). An exemption of the entire property may be allowed notwithstanding an intermingled private use, when the latter use is only incidental. 51 Am. Jur., Taxation § 576 (1944).

[9] The general rule is stated at Annot., 3 A.L.R. 1439, 1445 (1919) as follows: "(W)here the primary and principal use to which property is put is public, the mere fact that an income is incidentally derived from it does not affect its character as property devoted to public use."

It would seem unreasonable and to the obvious detriment of the taxpayer that property primarily used for a public purpose and incidentally producing income should be reduced to nonincome-producing property in order to maintain its tax exempt status while the property is necessarily held by a municipality in order to carry out its public purpose.

[10] In applying the rules herein set forth it must be borne in mind that this case is before us on demurrers and that for the purpose of testing the sufficiency of the pleading the well-stated allegations of fact and relevant inferences of fact reasonably deducible therefrom are admitted to be true, and the pleading must be liberally construed so as to give the pleader the benefit of every reasonable intendment in his favor. *Glover v. Brotherhood of Ry. Employees,* 250 N.C. 35, 108 S.E. 2d 78.

[11] We hold that plaintiff alleged sufficient facts from which it might be reasonably inferred that all of the property held by appellant was acquired and held primarily for governmental and public

purposes according to a definitely evolved plan to use the property for the public. The collection of rent while the property was being held for a public or governmental purpose was incidental and secondary to the dominant public use and did not remove it "from the city hall" to "the market place."

[12] When a plaintiff seeks the equitable relief of injunction, his pleadings should be full in alleging facts necessary to show the illegality or invalidity of the tax. *McDonald v. Teague,* 119 N.C. 604, 26 S.E. 158. Here, although plaintiff's pleadings meet minimum requirements, it would be well advised to move to amend its pleadings to the end that it might more fully allege facts as to the acquisition and use of the property.

The Court of Appeals erred in holding, as a matter of law, that the income-producing property held and acquired for redevelopment purposes was not exempt from taxation because it produced income. The demurrers should have been overruled.

Modified and affirmed.

STATE OF NORTH CAROLINA v. ARTHUR JACKSON, ALIAS HARVEY MILLS

No. 575

(Filed 11 December 1968)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence — "recent possession" doctrine

In a prosecution upon indictment charging burglary in the first degree and felonious larceny, the State consenting to reduce the charge of first-degree burglary to felonious breaking and entering, defendant's motion for nonsuit is properly overruled when the State offers evidence that the amount and denominations of the bills found on the defendant within a few minutes after the time of the offenses were identical to the amount and denominations of the bills taken from the pocketbook of the prosecuting witness' daughter, together with testimony of the prosecuting witness identifying defendant as the person he saw in his bedroom at 2:30 in the morning going through his daughter's pocketbook.

2. Burglary and Unlawful Breakings § 6; Larceny § 8— "recent possession" doctrine — instructions

In prosecution on two-count indictment charging that defendant burglariously entered a dwelling house for the purpose of committing the felony of larceny and that he feloniously stole the sum of $17.00, before

defendant's guilt may be inferred from his unexplained possession of the money, the trial court must instruct the jury to find from the evidence and beyond a reasonable doubt that the money in defendant's possession was the identical money taken from the dwelling, and its failure so to instruct is error.

3. Larceny § 5— presumption from recent possession of stolen property

Evidence or inference of guilt arising from the unexplained possession of recently stolen property is strong, or weak, or fades out entirely, on the basis of the time interval between the theft and the possession.

4. Larceny § 5— presumption arising from recent possession of stolen property

In order for the inference or presumption of guilt resulting from the possession of stolen property to arise, the possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly.

APPEAL by defendant from *McConnell, J.*, May 1, 1967 Criminal Session, ROWAN Superior Court.

The defendant, Arthur Jackson, alias Harvey Mills, was indicted in a two count bill which charged that the defendant (1) burglariously entered the dwelling house of Van and Helen Steele, in the nighttime, for the purpose of committing the felony of larceny, and (2) feloniously stole the sum of $17.00, the property of Brenda Steele. The defendant, upon arraignment, was found to be indigent. The Court appointed counsel. "Before the case was submitted to the jury the State agreed to reduce the charge from first degree burglary to felonious breaking and entering."

The State's evidence tended to show that Van Steele, at about 2:30 a.m. on January 3 [sic], 1967, was awakened and saw, by the light from an adjoining room, a colored male whom he later identified as the defendant in his bedroom "rambling through my daughter's pocketbook." The breaking had been effected by cutting the screen door to the porch and by opening the closed back door to the house.

Brenda Steele testified that her pocketbook was left in the bedroom and that in the wallet "I had a five dollar bill, and . . . a ten dollar bill, and two one dollar bills". Those four bills were stolen. The $17.00 was not folded, ". . . it was just in there straight". Mr. Steele immediately notified the police, giving a description of the man whom he had seen in his bedroom.

Officer Clark, within a few minutes after he was called to the Steele home, obtained a description of the intruder, and arrested

the defendant, Arthur Jackson, alias Harvey Mills. Officer Clark testified: "(A)nd when I circled the block (in which the Steele's lived), I ran up on Arthur Jackson, or Harvey Mills. . . ." The officer further testified, as an incident to the arrest he searched the defendant. ". . . The first packet I opened up had a ten, a five, and two ones, and that was folded. . . ." He had money in other pockets.

Mr. Steele testified the defendant was the man he saw in his bedroom. The defendant did not offer evidence. The jury returned verdicts of guilty. From the concurrent sentences of 8 to 10 years for housebreaking and 5 to 10 years for larceny, the defendant appealed. The Court signed an order allowing the appeal *in forma pauperis* and appointed counsel to perfect the appeal. The record shows the solicitor accepted service of the case on appeal on the 26th day of July, 1968, and agreed thereto.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General for the State.

John H. Rennick for the defendant.

HIGGINS, J.

The Court's charge contained the following:

> "As recent possession of stolen goods is evidence that the defendant committed the larceny, it may also be evidence that the larceny was committed in the house by the person who broke and entered it. Proof of possession by the defendant shortly after the breaking and entering, that is, possession of the goods alleged to have been stolen, is to be considered by the jury; and, if unexplained, and if breaking and entered by someone is shown, it will be sufficient when accompanied by other circumstances tending to connect him with the commission of the offense to warrant conviction, although the other evidence might not alone be sufficient. In other words, where recent possession of stolen property is considered relevant, it raises a presumption of the breaking and entry and of larceny, and the presumption is stronger or weaker depending upon the time which has elapsed since the property was stolen, when the property was stolen."

[1] The denomination of the bills found on the defendant, and Mr. Steele's evidence with respect to his identity, were sufficient to go to the jury on both counts in the indictment. *State v. Allison,*

265 N.C. 512, 144 S.E. 2d 578; *State v. Lambert,* 196 N.C. 524, 146 S.E. 2d 139; *State v. Williams,* 187 N.C. 492, 122 S.E. 13.

[2-4] However, before the defendant's guilt on either count may be inferred from the defendant's unexplained possession of the money, the jury should have been required to find from the evidence and beyond a reasonable doubt that the money in the defendant's possession was the identical money taken from the Steele home. Evidence or inference of guilt arising from the unexplained possession of recently stolen property is strong, or weak, or fades out entirely, on the basis of the time interval between the theft and the possession. The inference arising from the possession of recently stolen property is described as "the recent possession doctrine". Possession may be recent, but the theft may have occurred long before. In that event, no inference of guilt whatever arises. Actually, the possession of *recently stolen goods* gives rise to the inference. The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly. *State v. Foster,* 268 N.C. 480, 151 S.E. 2d 62; *State v. Jones,* 227 N.C. 47, 40 S.E. 2d 458; *State v. Patterson,* 78 N.C. 470; *State v. Kent,* 65 N.C. 311.

[2] The Court's charge failed to require the jury to find from the evidence and beyond a reasonable doubt that the bills found on the defendant were the same bills stolen from the Steele home. If so found, the inference of guilt applied to the theft and likewise to the breaking and entering which was necessary to enable a thief to gain access to the property. *State v. Jones, supra; State v. Neill,* 244 N.C. 252, 93 S.E. 2d 155; *State v. Hullen,* 133 N.C. 656, 45 S.E. 513. The Judge committed error in failing to charge the presumption or inference does not apply until the identity of the property is established.

The defendant's counsel, appointed to perfect the appeal, was without experience in criminal procedure. After notice of appeal was given, however, he made inquiries of the Clerk of this Court and the Attorney General with respect to the preparation and service of the case on appeal and the time the appeal was due in the Supreme Court. The case on appeal was filed here long after it was due. However, the Attorney General has seen fit to file a brief and has failed to move that the appeal be dismissed for failure to docket in time. We have, however, treated counsel's inquiries as a petition for certiorari. We have allowed the petition and considered the appeal on its merits. The trial was held, judgment was entered, and notice

of appeal was given prior to October 1, 1967, and hence to be considered here rather than in the North Carolina Court of Appeals.

For the failure of the Judge to require the State to carry the burden of showing the identity of the stolen property, the defendant is entitled to a

New trial.

APPENDIXES

AMENDMENTS TO
SUPREME COURT RULES

AMENDMENTS TO
STATE BAR RULES

HISTORY OF THE SUPREME COURT

PRESENTATION OF
JUSTICE CONNOR PORTRAIT

AMENDMENTS TO RULES

AMEND RULES OF PRACTICE IN THE SUPREME COURT, 254 N.C. 783, AS FOLLOWS:

Delete Rule 5 and insert in lieu thereof the following:

"5. Direct Appeal from Judgment of Superior Court—When Docketed.

A direct appeal of right from a judgment of a superior court which includes a sentence of death or imprisonment for life as provided in G.S. 7A-27(a) shall be docketed in the Supreme Court within one hundred twenty (120) days from the date on which judgment was pronounced in the superior court. The appeal will be calendared by the Supreme Court for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court. The appellant's brief must be filed within ten (10) days after the appeal is docketed; and the appellee's brief must be filed within twenty (20) days after the appeal is docketed."

Delete Rule 6 and insert the following in lieu thereof:

"6. Appeals in Criminal Cases — Priority.

Appeals in criminal cases shall have priority over civil cases and will be calendared accordingly by the Supreme Court for hearing, unless for cause otherwise ordered."

Delete Rule 7 and insert the following in lieu thereof:

"7. Hearings.

During the Spring Term of the Supreme Court hearings will be held on the second Tuesday of the months of February, March, April and May; and during the Fall Term, hearings will be held on the second Tuesday of the months of September, October, November and December. Hearings will begin on these dates and will continue from day to day until appeals in all calendared cases have been heard."

Delete paragraph 2 of Rule 28 and insert the following in lieu thereof:

"Appellant shall, upon delivering a copy of his brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a copy thereof. If the printed or typewritten copies of appellant's brief have not been filed with the clerk of this

Court to be mimeographed within the time required by the rules of this Court, the appeal will be dismissed on motion of appellee unless for good cause shown the Court shall give further time to print the brief.

Delete Rule 29 and insert the following in lieu thereof:

"29. Appellee's Brief.

Within the time required by the rules of this Court, the appellee shall file with the clerk a copy of his brief for mimeographing, and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument by the appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Adopted by the Court in conference on 11 December 1968.

HUSKINS, J.
For the Court

AMEND RULES OF PRACTICE IN THE SUPREME COURT BY DELETING RULES 1, 2, 3, 3(A), 3(B) AND 3(C), AS SAME NOW APPEAR IN 200 N.C. 813, NOW OBSOLETE, AND INSERTING A NEW RULE

NUMBERED 1 TO READ AS FOLLOWS:

"1. *Terms of Court.* There shall be two terms of Court each year — a Spring Term commencing on the first Tuesday in February and a Fall Term commencing on the first Tuesday in September."

Adopted by order of the Court in conference this the 31 day of January, 1969.

HUSKINS, J.
For the Court

AMEND SUPPLEMENTARY RULES OF THE SUPREME COURT, 271 N.C. 744, by rewriting Rule 5 to read as follows:

"Rule 5. Record on Appeal in the Supreme Court — What Constitutes.

"(a) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 1 or Rule 2 of these Supplementary Rules, or pursuant to G.S. § 7A-30 or G.S. § 7A-31, the record and exhibits, if any, docketed in the Court of Appeals shall constitute the record on appeal in the Supreme Court; provided such record complies with the Rules of the Court of Appeals.

"(b) When a cause is docketed in the Supreme Court pursuant to the provisions of Rule 2 of these Supplementary Rules, the petitioner shall attach to his petition a copy of the opinion of the Court of Appeals. Likewise, the petitioner in any cause docketed in the Supreme Court under G.S. § 7A-31, after it has been determined by the Court of Appeals, shall attach to his petition a copy of the opinion of the Court of Appeals. Unless a narration of the evidence is contained in the record initially docketed in the Court of Appeals, the transcript of the evidence shall, if pertinent to questions raised by the petitioner, be filed with the Clerk of the Supreme Court by the Clerk of the Court of Appeals."

Adopted by order of the Court in conference this the 14 day of June 1968.

HUSKINS, J.
For the Court.

AMEND SUPPLEMENTARY RULES OF THE SUPREME COURT OF NORTH CAROLINA, 271 N.C. 744, AS FOLLOWS:

Delete Rule 3, including amendments thereto adopted April 30, 1968, and insert the following in lieu thereof:

"Rule 3. Appeals as of Right from the Court of Appeals to the Supreme Court.

When an appeal as a matter of right is taken to the Supreme Court from a decision of the Court of Appeals as provided in G.S. 7A-30, the appealing party shall:

(a) within 15 days from the date of the certificate of the clerk of the Court of Appeals to the trial tribunal, give written notice of appeal to the clerk of the Court of Appeals, to the clerk of the Supreme Court, and to the opposing parties;

(b) when the appeal is based on involvement of a substantial constitutional question, specify in the notice of appeal the article and section of the Constitution allegedly involved and state with particularity how appellant's rights thereunder have been violated; affirmatively state that the constitutional question involved was timely raised (in the trial court if it could have been or in the Court of Appeals if not) and either not passed upon or passed upon erroneously;

(c) file supplemental briefs as required by Rule 7, Supplementary Rules of the Supreme Court (271 N.C. 747).

All appeals under G.S. 7A-30 shall be docketed in the Supreme Court within ten (10) days after giving the required notice of appeal.

The Supreme Court shall calendar the cause for hearing at any time it may deem appropriate after the expiration of twenty-eight (28) days from the date on which the cause was docketed in the Supreme Court.

The appellant's brief must be filed within ten (10) days after the appeal is docketed, and the appellee's brief must be filed within twenty (20) days after the appeal is docketed."

Amend Rule 8 of the Supplementary Rules by Substituting the word "ten" for the word "fourteen" in the second sentence, and by substituting the words "twenty days" for the words "twenty-one days" in the third sentence.

Amend Supplementary Rule 8 by adding a new paragraph at the end thereof reading as follows:

> "The cause shall be deemed docketed as of the date certiorari is granted or an order certifying transfer to the Supreme Court is entered pursuant to Supplementary Rule 13."

Amend Supplementary Rule 6 by adding a new paragraph to read as follows:

> "The cause shall be deemed docketed in the Supreme Court as of the date the Supreme Court in writing orders the transfer of said cause to the Supreme Court pursuant to Supplementary Rule 13."

Adopted by the Court in conference on 11 December 1968.

HUSKINS, J.
For the Court

AMENDMENTS TO BAR RULES

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations of The North Carolina State Bar were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Paragraph 3 of Article III, of the Certificate of Organization of The North Carolina State Bar as amended by G.S. 84-22 and as shown in 221 N.C. 583 is amended to read as follows:

> "Par. 3. At each annual meeting of The North Carolina State Bar the active members present shall elect a President and two Vice-Presidents who shall assume the duties of their offices on the first day of November following their election and hold office for one year or until their successors are elected and qualified. The Secretary-Treasurer shall be elected by the Council annually. No officer elected by the Council or by The North Carolina State Bar need be a member of the Council. All such officers shall be the officers of the Council with the same titles."

Section 1 of Article V of the Certificate of Organization of The North Carolina State Bar as amended in 212 N.C. 840 is rewritten as follows:

> "1. Annual Meetings. — The annual meeting of The North Carolina State Bar, beginning with the year 1969, shall be held at such time and place within the State of North Carolina, after such notice (but not less than 30 days) as the Council may determine."

Section 4 of Article V of the Certificate of Organization of The North Carolina State Bar as amended in 243 N.C. 795 is amended to read as follows:

> "4. Quorum. — At all annual and special meetings of The North Carolina State Bar, a quorum shall be determined by the provisions of the Statute applicable thereto, but there shall be no voting by proxy."

Section 1 of Article VI of the Certificate of Organization of The North Carolina State Bar as appears in 205 N.C. 858 is amended to read as follows:

> "1. Regular Meetings. — Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April, and July, at such time

and place after such notice (but not less than 30 days) as the Council may determine; and on the day before the Annual Meeting of The State Bar, at the location of said Annual Meeting. The hour of meeting shall in each case be at 10 o'clock a.m. Any regular meeting may be adjourned from time to time as a majority of members present may determine."

Paragraph 1 of Section 5 of Article VI of the Certificate of Organization as appears in 205 N.C. 858 is amended to read as follows:

"5. Standing Committees of the Council. — Within twenty (20) days after his election, the President of the Council shall select the standing committees to serve for one year beginning January 1 of the year succeeding his election which said committees shall consist of:"

Paragraph 1 of Sub-section "a" of Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar as amended in 243 N.C. 795 is rewritten to read as follows:

"a. An Executive Committee of not less than five Councilors to be selected by the President."

Paragraph 1 of Sub-section "b" of Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar as amended in 243 N.C. 795 is rewritten to read as follows:

"b. Committee on Legal Ethics and Professional Conduct of not less than three Councilors selected by the President."

Paragraph 1 and numbered Paragraphs 1, 2, 3, and 7 of Subsection "c" of Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar as amended in 253 N.C. 820, 821 is rewritten to read as follows:

"c. Committee on Grievances of not less than three Councilors selected by the President.

"1. It shall be the duty of the Committee on Grievances to investigate and study all complaints or allegations of misconduct which may be made against members of the State Bar. The Committee shall likewise have authority to investigate and study on its own motion all matters which may have come to its attention relating to alleged unprofessional conduct on the part of any member of The North Carolina State Bar. The Committee may include in its investigation all matters which may come to its attention with reference to the member complained of. It shall make a report to the Council at each quart-

erly meeting of the action taken by it upon all matters which have come to its attention, and its recommendations in regard thereto. If the recommendation of the Committee on Grievances is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the Committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

"2. The Secretary may require all complaints to be in the form of affidavits upon forms prepared for such purpose. Where the complaint or allegation on its face requires it, the Secretary shall obtain certified copies of court records, or verified copies of any other exhibit or exhibits, which shall accompany and be attached to the complaint. The provisions of this paragraph shall be directory only and not mandatory.

"3. All complaints or charges of misconduct lodged with the Secretary shall be immediately forwarded to the Chairman of the Grievance Committee for initial screening.

* * * * * *

"7. Where, in each case in which the Council votes action other than dismissal, the Secretary shall keep a docket on such case, listing thereon the action taken, the date thereof, and the progress of the case from the time of its original institution until its final conclusion."

Paragraph 1 of Sub-section "d" of Section 5 or Article VI of the Certificate of Organization of The North Carolina State Bar as amended in 243 N.C. 795 is rewritten to read as follows:

"d. Committee on Legislation and Law Reform of not less than three Councilors selected by the President."

Sub-section "e" of Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar as appears in 221 N.C. 587 is amended to read as follows:

"e. Committee on Unauthorized Practice of not less than three Councilors selected by the President."

Sub-section "f" of Section 5 of Article VI of the Certificate of Organization of The North Carolina State Bar as appears in 221 N.C. 587 is amended to read as follows:

"f. Committee on Membership of not less than three Councilors selected by the President."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolutions, at a regular quarterly meeting unanimously adopt said amendments to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 6th day of September, 1968.

B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 1st day of October, 1968.

R. HUNT PARKER
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 1st day of October, 1968.

HUSKINS, J.
For the Court

History of the Supreme Court of North Carolina From January 1, 1919, Until January 1, 1969

By Emergency Justice Emery B. Denny

The History of the Supreme Court of North Carolina covering the first century of its existence from January 1, 1819, until January 1, 1919, was written by Chief Justice Walter Clark and published in Volume 177 of the *North Carolina Supreme Court Reports*, beginning at page 617.

On January 1, 1919, the members of the Supreme Court were Chief Justice Walter Clark and Associate Justices Platt D. Walker, George H. Brown, William A. Hoke and William R. Allen.

Associate Justice George H. Brown announced early in 1920 that he would not be a candidate to succeed himself but would retire at the end of his term, December 31, 1920. He was succeeded by Walter P. Stacy, who was nominated and elected to the eight year term which began on January 1, 1921. Justice Brown died in Washington, North Carolina, March 16, 1926.

Associate Justice William R. Allen died in Goldsboro on September 8, 1921. Governor Morrison appointed Judge William J. Adams as Justice Allen's successor.

Associate Justice Platt D. Walker died in Raleigh on May 22, 1923, and Governor Morrison appointed the Honorable Heriot Clarkson as his successor.

Chief Justice Walter Clark died in Raleigh on the 19th day of May, 1924, and Governor Morrison appointed Associate Justice William A. Hoke Chief Justice and Judge George W. Connor to succeed Justice Hoke as Associate Justice.

Upon the retirement of Chief Justice Hoke on March 16, 1925, Governor McLean appointed Associate Justice Stacy Chief Justice and the Honorable L. R. Varser as Associate Justice to succeed Justice Stacy. Chief Justice Hoke died in Raleigh on September 13, 1925.

Walter Parker Stacy was born in Ansonville, North Carolina, December 26, 1884. He was graduated at the University of North Carolina in 1908. He studied law at the Law School of the University and was admitted to the bar in 1909. Locating in Wilmington, North Carolina, in 1910, Stacy began the practice of law with the Honorable Graham Kenan under the firm name of Kenan and

Stacy. He was elected Representative from New Hanover County to the General Assembly of 1915. He made such a favorable impression as a member of the General Assembly that Governor Craig appointed him resident Judge of the Eighth Judicial District on November 30, 1915, as successor to Judge Rountree who had resigned. Judge Stacy assumed his duties on the bench on January 1, 1916, at the age of thirty-one. He was elected to the unexpired term of Judge Rountree in November, 1916. On February 14, 1920, Judge Stacy resigned as Judge of the Superior Court to resume the practice of law with his former law partner.

However, his career as a private practitioner at the bar was of short duration. When Associate Justice George H. Brown announced in April, 1920, that he would not be a candidate to succeed himself, Judge O. H. Guion, resident Judge of the Eighth Judicial District; Judge William J. Adams, resident Judge of the Thirteenth Judicial District; Judge Benjamin F. Long, resident Judge of the Fifteenth Judicial District; Dean N. Y. Gulley of the Wake Forest Law School; the Honorable N. J. Rouse of Kinston, North Carolina, and Judge Stacy became candidates in the Democratic primary in June, 1920, for the nomination of Associate Justice of the Supreme Court. Judge Stacy received the highest vote in the June primary and Judge Long the second highest vote. In the second primary, Judge Stacy was nominated and in November was elected to a full eight year term, beginning January 1, 1921.

Upon the retirement of Chief Justice Hoke on March 16, 1925, Governor McLean appointed Justice Stacy Chief Justice. In 1926, in 1934, in 1942 and again in 1950, he was nominated without opposition in the primary and elected Chief Justice for eight year terms.

Judge Stacy did not confine his services and activities solely to his work as Associate Justice or as Chief Justice of the Supreme Court. He lectured during the summers of 1922-1925, inclusive, at the Law School of the University of North Carolina and was tendered, but declined, the deanship of the school in 1923. He lectured at Northwestern University School of Law in the summers of 1926 and 1927. He was called upon to assist in the settlement of many controversies between management and labor while he was Chief Justice of the Supreme Court. He was named by the United States Board of Mediation, under the Railway Labor Act, as neutral arbitrator to serve on the Board of Arbitration, later elected chairman of the board, to settle a wage controversy between the Brotherhood of Locomotive Engineers and certain railroads in the Southeastern Territory of the United States in 1927 and 1928.

In 1928 President Coolidge appointed Chief Justice Stacy a

member of the Emergency Board, under the Railway Labor Act, to investigate and report respecting a dispute between officers and members of the Order of Railway Conductors and the Brotherhood of Railway Trainmen and certain railroads west of the Mississippi River. The U. S. Board of Mediation appointed him in January, 1931, to serve as neutral arbitrator in a controversy between the Brotherhood of Railway Trainmen and the New York Central, the "Big Four" and the P. & L. E. Railroads. And again in November, 1931, he served as neutral arbitrator between the Brotherhood of Railway and Steamship Clerks and the Railway Express Agency. In 1932 President Hoover appointed him a member of the Emergency Board of three, which board elected him chairman, to investigate and report concerning a number of disputes existing between the L. & A. and L. A. & T. Railroads and certain of their employees. The U. S. Board of Mediation appointed him in 1933 to serve as neutral arbitrator in several controversies between the Boston & Maine Railroad and certain of its employees. Also in 1933 Chief Justice Stacy was appointed by the President as member of a board to investigate a labor dispute involving the Texas & New Orleans Railroad, and in 1934 to investigate a labor dispute involving the Delaware & Hudson Railroad. President Roosevelt appointed him chairman of the National Steel & Textile Labor Relations Board in 1934. In 1938, the President appointed him chairman of an Emergency Board of three to investigate and report on a threatened strike of railroad employees due to a wage reduction controversy on Class I railroads. He was again appointed by the President as an alternate member of the National Defense Mediation Board in 1941 and also a member of the National War Labor Board. He was appointed by President Roosevelt in 1942 as a member of the National Railway Labor Panel. Again, in 1944, President Roosevelt appointed him chairman of the President's Committee on Racial Discrimination in Railroad Employment. President Truman appointed him chairman of the President's National Labor Management Conference in 1945. Thus, it is apparent that Chief Justice Stacy gave much of his time and talent over many years, at the request of four Presidents of the United States, in an effort to settle controversies between labor and management, controversies which were of such magnitude that the national interest required their prompt settlement.

However, it was in his position as Chief Justice that he rendered his most effective service to the people of his State. Chief Justice Stacy was a member of the Court for more than thirty years and was Chief Justice for twenty-six and a half years. He died in Raleigh September 13, 1951.

William Jackson Adams was born at Rockingham, in Richmond County, North Carolina, January 27, 1860. In 1877 he entered Trinity College, which was then located in Randolph County. Adams remained a student at that institution, now Duke University, until the close of the fall term of 1878. In January, 1879, he transferred to the University of North Carolina where he graduated in 1881. He studied law at the University's School of Law and was admitted to the bar in 1883, beginning his practice immediately thereafter at Carthage, North Carolina. He was a member of the House of Representatives of the General Assembly of North Carolina in 1893 and a member of the State Senate in 1895. Governor Glenn appointed him resident Judge of the Thirteenth Judicial District in December, 1908, to succeed Judge Walter H. Neal, resigned. Judge Adams was elected to a full term of eight years in November, 1910, and was re-elected in 1918. On September 19, 1921, Governor Morrison appointed him Associate Justice of the Supreme Court to succeed Justice William R. Allen, deceased. In November, 1922, Justice Adams was elected to the unexpired term of Justice Allen. In November, 1926, he was elected for a full term of eight years. He died May 20, 1934.

Heriot Clarkson was born at Kingville, in Richland County, South Carolina, August 21, 1863. His family moved to Charlotte, North Carolina, in 1873. He was educated at the Carolina Military Institute of Charlotte and studied law at the Law School of the University of North Carolina. Clarkson was admitted to the bar in 1884 and opened his law office in Charlotte where he practiced for nearly forty years. In 1898 he was elected to the House of Representatives of the General Assembly of North Carolina, the session which became known as the "White Supremacy Legislature." He also served as Solicitor of the Twelfth Judicial District from 1904 until 1910. On May 26, 1923, Governor Morrison appointed him Associate Justice of the Supreme Court to fill the vacancy created by the death of Justice Walker. In 1924 Clarkson was elected to serve out the unexpired term of Justice Walker; in November, 1926, he was elected for an eight year term and was re-elected in 1934. He died in Charlotte on January 27, 1942.

George Whitfield Connor was born October 24, 1872, at Wilson, North Carolina. He was the son of Henry Groves Connor, who served as Associate Justice of the Supreme Court of North Carolina from January 1, 1903, until June 1, 1909, when he was appointed United States District Judge for the Eastern District of North Carolina by President Taft. George W. Connor graduated at the University of North Carolina in 1892. Immediately after his graduation at the age of nineteen, he was elected principal of the Goldsboro Graded

School. Two years later he was elected Superintendent of the Wilson Schools, a position he held for three and one-half years, resigning to become a partner in the mercantile firm of Hadley-Harris & Company. Connor served for five years as Chairman of the Wilson County Board of Education. He worked by day and studied law at night and was admitted to the bar in 1899. He represented Wilson County in the General Assembly of North Carolina for three successive terms, 1909, 1911 and 1913. He was Speaker of the House in 1913. On March 20, 1913, Governor Craig appointed him resident Judge of the Second Judicial District, a position he held until June 17, 1924, when Governor Morrison appointed him Associate Justice of the Supreme Court to succeed Justice Hoke who had been appointed Chief Justice upon the death of Chief Justice Clark. Connor was elected in November, 1924, to fill out the unexpired term of Justice Hoke and was re-elected for full terms of eight years in November, 1928 and 1936. He died in Raleigh April 23, 1938.

Lycurgus Rayner Varser was born in Gates County, North Carolina, August 13, 1878. He graduated at Wake Forest College in 1899, studied law at the Wake Forest Law School and was admitted to the bar in 1901. He practiced law in Kinston, North Carolina, for ten years before moving to Lumberton in 1911. An able and outstanding member of the bar, Varser represented clients in many counties of the State. He was elected to the State Senate in 1920 and 1922. Governor McLean appointed him Associate Justice of the Supreme Court on March 17, 1925, to fill out the vacancy created by the elevation of Justice Stacy to the office of Chief Justice. Justice Varser resigned on December 31, 1925, and returned to the private practice of law in Lumberton. He died in Lumberton October 19, 1959.

Willis James Brogden was born near Goldsboro, North Carolina, October 18, 1877. He was graduated at the University of North Carolina in 1898 and studied law at Trinity College, now Duke University, and at the School of Law of the University of North Carolina. He was admitted to the bar in 1907. Brogden practiced law in Durham and served as Mayor of that city from 1911 until 1915. Governor McLean appointed him Associate Justice of the Supreme Court on January 1, 1926, to succeed Justice Varser, resigned. He was elected to the unexpired term of Justice Stacy in November, 1926, and for a full term of eight years in November, 1928. He died in Durham October 29, 1935.

Michael Schenck was born at Lincolnton, North Carolina, December 11, 1876. He was educated in the public schools of Greensboro, North Carolina, Oak Ridge Institute, the University of North Carolina and the Law School of the University. He was admitted to

the bar in 1903. From 1913 until 1918, he served as Solicitor of the Eighteenth Judicial District. In 1918 he was appointed a Major in the United States Army and assigned to duty in the office of the Judge Advocate General's Department where he served during 1918 and 1919. Schenck served as resident Judge of the Eighteenth Judicial District from 1924 until 1934. On May 23, 1934, Governor Ehringhaus appointed him Associate Justice of the Supreme Court to succeed the late Justice Adams. He was elected in November, 1934, for a full eight year term and re-elected in 1942. He retired in January, 1948, and died in Raleigh November 6, 1948.

William Agustus Devin was born in Granville County, North Carolina, July 12, 1871. He was educated at Horner Military School, Wake Forest College and the Law School of the University of North Carolina. He was admitted to the bar in 1898 and practiced law in Oxford, North Carolina. Devin was a Representative in the General Assembly from Granville County in 1911 and 1913. He served as resident Judge of the Tenth Judicial District from 1913 until 1935. On November 1, 1935, Governor Ehringhaus appointed him Associate Justice of the Supreme Court to succeed the late Justice Brogden. He was elected for an eight year term in November, 1936, and re-elected in November, 1944. Upon the death of Chief Justice Stacy, Governor Scott appointed him Chief Justice on September 17, 1951. He was elected to fill out the unexpired term of Chief Justice Stacy which began on January 1, 1951. Chief Justice Devin retired on January 30, 1954. He returned to his home in Oxford where he died February 18, 1959.

Maurice Victor Barnhill was born in Halifax County, North Carolina, December 5, 1887. He was educated in the public schools of Halifax County, Enfield Graded School, Elm City Academy and the University of North Carolina Law School. He was admitted to the bar in 1909 and practiced law in Rocky Mount, North Carolina. A Representative from Nash County in the General Assembly of 1921, he was appointed resident Judge of the Second Judicial District in June, 1924, and continued to serve in that capacity until June 30, 1937. When the membership of the Supreme Court was increased from five to seven, effective from and after July 1, 1937, Governor Hoey appointed Judge Barnhill an Associate Justice of the Supreme Court and he took the oath of office and entered upon his duties as a member of the Court on July 1, 1937. He was elected for an eight year term in November, 1938, and re-elected in 1946. Upon the retirement of Chief Justice Devin, Governor Umstead appointed him Chief Justice on February 1, 1954. In November, 1954, he was elected to fill out the unexpired term to which Chief Justice Devin had been elected. Chief Justice Barnhill, by reason of a

serious asthmatic condition, retired August 21, 1956. He died in Raleigh on October 12, 1963.

John Wallace Winborne was born in Chowan County, North Carolina, July 12, 1884. He graduated at the University of North Carolina and studied law at the University's Law School, being admitted to the bar in 1906. Winborne located in Marion, North Carolina, and became a member of the leading law firm in McDowell County, a firm which practiced for many years under the name of Pless, Winborne, Pless and Proctor. When the membership of the Supreme Court was increased from five to seven, effective from and after July 1, 1937, Governor Hoey appointed Winborne an Associate Justice. He was elected for an eight year term in November, 1938, and re-elected in November, 1946 and 1954. He was appointed Chief Justice by Governor Hodges upon the retirement of Chief Justice Barnhill, August 21, 1956. He was elected in November, 1956, to fill out the term expiring December 31, 1958. In November, 1958, Chief Justice Winborne was elected to a full term of eight years. He retired March 8, 1962, and returned to his home in Marion, where he died July 9, 1966.

Aaron Ashley Flowers Seawell was born in that part of Moore County, near Jonesboro, which is now Lee County, North Carolina, October 30, 1864. He graduated at the University of North Carolina in 1889 and studied law at the Law School of the University. He was admitted to the bar in 1892. A Representative in the General Assembly in 1901, 1913, 1915 and 1931, Seawell also served as a member of the State Senate in 1907 and 1925. He was appointed Assistant Attorney General in 1931; and Governor Ehringhaus elevated him to Attorney General January 16, 1935, to succeed Attorney General Dennis G. Brummitt, deceased. He was elected to a four year term in November, 1936. Governor Hoey, on April 30, 1938, appointed him Associate Justice of the Supreme Court to succeed Associate Justice George W. Connor, deceased. He was elected in November, 1938, for the unexpired term, ending December 31, 1944. In November, 1944, Justice Seawell was elected to a full eight year term. He died in Durham, North Carolina, October 14, 1950, just 16 days before his 86th birthday.

Emery Byrd Denny was born in Surry County, North Carolina, November 23, 1892. He was reared on a farm located about three miles southwest of the town of Pilot Mountain. He attended the public schools of Surry County and was graduated in 1913 from the Business Department and in 1914 from the Academic Department of Gilliam's Academy, a preparatory school in Alamance County. Lacking funds to continue his education, he obtained a job as a bookkeeper and continued in that capacity until September, 1916,

at which time he entered the Law School of the University of North Carolina and remained a student there until December, 1917, when he joined the aviation section of the Signal Corps in the United States Army in World War I. He served in the Armed Forces until May, 1919. In June he returned to the University to resume his law studies and was admitted to the bar in August, 1919. After his admission to the bar, he located in Gastonia, North Carolina, where he practiced law until February, 1942. In the meantime, he was elected Mayor of Gastonia for four successive terms and served as County Attorney for Gaston County for fifteen years. He also served as Legislative Counsel to Governor Broughton during the General Assembly of 1941. On January 29, 1942, Governor Broughton appointed him Associate Justice of the Supreme Court to succeed the late Justice Clarkson. Denny took the oath of office and entered upon his duties as a member of the Court on February 3, 1942. In November, 1942, he was elected to serve out the unexpired term of Justice Clarkson and also for an eight year term. He was re-elected in 1950 and 1958. Governor Sanford appointed him Chief Justice on March 9, 1962, to succeed Chief Justice Winborne, retired. In November, 1962, he was elected to serve out the unexpired term of Chief Justice Winborne. Chief Justice Denny retired on February 5, 1966, and qualified as an Emergency Justice of the Supreme Court, which position he still holds. He continues to reside in Raleigh.

Sam James Ervin, Jr., was born at Morganton, North Carolina, September 27, 1896. He graduated at the University of North Carolina, studied law at the Law School of the University at Chapel Hill and was admitted to the bar in 1919. He entered the Law School of Harvard University in the fall of 1919 and graduated therefrom in 1922. Ervin served in France with the First Division for 18 months during World War I; he was twice wounded in battle, twice cited for gallantry in battle and awarded the French Fouragere, the Purple Heart with an Oakleaf Cluster, the Silver Star, and the Distinguished Service Cross. He returned to Morganton in 1922 and joined his father's law firm where he engaged in the general practice of law for many years. He was a Representative from Burke County in the General Assembly in 1923, 1925 and in 1931. He was a Special Superior Court Judge from 1937 until 1943 when he resigned to resume the practice of law. His brother, Joseph W. Ervin, was elected to the 77th Congress of the United States in November, 1944, from the Tenth North Carolina Congressional District. Upon his death on December 25, 1945, Judge Ervin was elected to fill the vacancy and served as a member of the House of Representatives in the 77th Congress from January 22, 1946, until January 3, 1947. He was not a candidate to succeed himself but re-

turned to his law practice in Morganton. Governor Cherry appointed him Associate Justice of the Supreme Court and he entered upon his duties with the Court on February 3, 1948, as successor to Justice Schenck, retired. He was elected in November, 1948, to the unexpired term of Justice Schenck and re-elected in November, 1950, for a full term of eight years. On June 5, 1954, Justice Ervin resigned from the Supreme Court to accept an appointment by Governor Umstead to the United States Senate, where he continues to serve with distinction and is considered one of its leading members.

Murray Gibson James was born in Pender County, North Carolina, November 5, 1892. He graduated from North Carolina State College in 1918 and attended graduate school of the University of North Carolina in 1921. Having studied law under a private tutor, he was admitted to the bar in 1924. He attended the Fourth Officers Training School at Camp Sevier, Greenville, South Carolina, which was transferred to the Central Infantry Officers Training School at Camp Gordon, Georgia, where he graduated August 26, 1918, and was commissioned a second lieutenant of infantry in the United States Army. On January 13, 1919, at Camp Grant, Illinois, he was discharged from the service, but was commissioned in the Reserve Corps, from which he resigned in 1925. Appointed by Governor Scott as Associate Justice of the Supreme Court to fill the vacancy created by the death of Justice Seawell, James took his oath of office and became a member of the Court on October 20, 1950. The Honorable Jeff. D. Johnson, Jr., was nominated for the unexpired term of Justice Seawell by the State Democratic Executive Committee and was elected thereto in November, 1950. Judge Johnson took his oath of office and became a member of the Court on November 29, 1950. Justice James returned to his law practice in Wilmington, North Carolina. He died in Wilmington on April 18, 1968.

Jefferson Deems Johnson, Jr., was born in Garland, North Carolina, June 6, 1900. He graduated from Trinity College, now Duke University, and from what is now Duke University Law School. Having been admitted to the bar in 1926, Johnson opened his law office in Clinton, North Carolina. He was a member of the State Senate in 1937 and in 1941. Appointed a Special Superior Court Judge in 1941 by Governor Broughton, he continued to serve in that capacity until June, 1945, when he returned to his law practice in Clinton. Johnson was nominated by the State Democratic Executive Committee and elected in November, 1950, to fill out the unexpired term of Justice Seawell, deceased, as Associate Justice of the Supreme Court. He was re-elected in November, 1952, for an eight year term. He retired because of ill health on January 31, 1959. Justice Johnson died in Raleigh June 19, 1960.

Itimous Thaddeus Valentine was born near Spring Hope, Nash County, North Carolina, November 14, 1887. He attended the public schools of Nash County and was a student at Mars Hill College for two years. He studied law privately and at the Law School of Wake Forest College, being admitted to the bar in 1915. In the fall of 1915 he entered Guilford College and graduated there in 1917. Valentine had a distinguished career as a soldier in World War I. After the close of World War I, he opened his law office in Spring Hope, later moving to Nashville, North Carolina, the County seat. In World War II he was a Colonel in the United States Army, serving in the Judge Advocate General's Department from 1943 until 1947. He was appointed Associate Justice of the Supreme Court by Governor Scott on September 17, 1951, as successor to Justice Devin who had been appointed Chief Justice upon the death of Chief Justice Stacy. He was defeated in the Democratic Primary in 1952 by Judge R. Hunt Parker for the unexpired term of Justice Devin and for the eight year term, beginning January 1, 1953. Judge Parker was elected in November, 1952, and assumed his duties as a member of the Court on November 25, 1952. Justice Valentine returned to the practice of law in Nashville where he practices with his son, the Honorable Itimous T. Valentine, Jr.

Robert Hunt Parker was born in Enfield, North Carolina, February 15, 1892. He attended the University of North Carolina for three years and graduated at the University of Virginia in 1912 and from the University of Virginia Law School in 1915. He also attended the Wake Forest Law School in the summer of 1914 and was admitted to the bar in 1914. Parker served for nearly 17 months as a Field Artillery officer in France during World War I. He was the Representative from Halifax County in the General Assembly in 1923. He served as Solicitor of the Third Judicial District from February 23, 1924, until September 24, 1932 when he was unanimously nominated by the Judicial District Executive Committee to fill the unexpired term of Judge Garland E. Midyette, deceased. He was appointed by Governor Gardner to fill Judge Midyette's unexpired term until the election. He was elected to fill the unexpired term in November, 1932. He was nominated and elected without opposition in 1934, 1942, and 1950. In 1952 Parker was nominated in a contested Democratic primary for Associate Justice of the Supreme Court to fill out the unexpired term of Justice Devin who had been appointed Chief Justice upon the death of Chief Justice Stacy. He was also elected for an eight year term beginning on January 1, 1953, and was re-elected in 1960. On February 5, 1966, Governor Moore appointed him Chief Justice to succeed Chief Justice Denny, retired. In November, 1966, Chief Justice Parker was elected to a full eight year term.

William Haywood Bobbitt was born in Raleigh, North Carolina, October 18, 1900. He was graduated at the University of North Carolina in 1921 and studied law at the University's School of Law. From the time he was admitted to the bar in January, 1922, until December 31, 1938, he practiced law in Charlotte, North Carolina. Having been associated with the firm of Stewart & McRae until September 1, 1922, he then became a member of the firm of Parker, Stewart, McRae & Bobbitt from September 1, 1922 until October 1, 1925. A member of the firm of Stewart, McRae & Bobbitt from October 1, 1925, until October 1, 1930, Bobbitt, on October 1, 1930, became a member of the firm of Stewart & Bobbitt and continued as a member of this firm until December 31, 1938. Having been elected resident Judge of the Fourteenth Judicial District in November, 1938, and re-elected in 1946, he continued to serve in this capacity until he was appointed Associate Justice of the Supreme Court by Governor Umstead. He took the oath of office and entered upon his duties as a member of the Court on February 1, 1954, as successor to Justice Barnhill who had been appointed Chief Justice upon the retirement of Chief Justice Devin. He was elected in November, 1954, to the unexpired term of Associate Justice Barnhill and also for an eight year term which began on January 1, 1955. Justice Bobbitt was re-elected in November, 1962, and is now the senior Associate Justice of the Supreme Court.

Carlisle Wallace Higgins was born at Ennice in Alleghany County, North Carolina, October 17, 1889. He was graduated at the University of North Carolina in 1912 and studied law at the University of North Carolina School of Law. He was admitted to the bar in 1914. Higgins practiced law in Sparta, North Carolina, for twenty years, thirteen of which were with the Honorable Rufus A. Doughton, a former Speaker of the House of Representatives, Lieutenant Governor, Commissioner of Revenue and Chairman of the State Highway Commission. Higgins was the Representative from Alleghany County in the General Assembly of 1925 and a member of the State Senate from the Twenty-Ninth Senatorial District in the General Assembly of 1929. He was Solicitor of the Eleventh Judicial District from 1930 to 1934. Having been appointed United States Attorney for the Middle District of North Carolina, he moved to Greensboro, North Carolina, July 1, 1934, and served in that capacity until 1945. From 1945 until 1947, he was Assistant Chief and Acting Chief of the International Prosecution Section of the International Military Tribunal, Tokyo, Japan. Upon the completion of his duties with the International Military Tribunal, he resumed the practice of law in June, 1947, in Winston-Salem, North Carolina. Governor Umstead appointed Higgins Associate Justice

of the Supreme Court on June 8, 1954, to succeed Associate Justice Ervin, resigned. In November, 1954, he was elected to the unexpired term of Justive Ervin. He was re-elected in November, 1958, and in 1966 to full eight year terms.

William Blount Rodman, Jr., was born in Washington, North Carolina, July 2, 1889. He is the grandson of William B. Rodman who served as Associate Justice of the Supreme Court from January 1, 1869, until December 31, 1878. He was graduated at the University of North Carolina in 1910, studied law at the University of North Carolina School of Law and was admitted to the bar in 1911. He practiced law in Washington, North Carolina. Rodman served as a Lieutenant in the United States Navy in World War I. In 1919-1920 he was Mayor of Washington, North Carolina. A State Senator from the Second Senatorial District in 1937 and 1939, he served as President of the North Carolina State Bar in 1941. He was also the Representative in the General Assembly from Beaufort County in 1951, 1953 and 1955. In July, 1955, Governor Hodges appointed Rodman Attorney General to succeed the late Harry McMullan. One year later, in August, 1956, Governor Hodges appointed him Associate Justice of the Supreme Court as successor to Justice Winborne who had been appointed Chief Justice upon the retirement of Chief Justice Barnhill on August 21, 1956. He was elected to the unexpired term of Justice Winborne in November, 1956, and re-elected to a full eight year term in November, 1962. Justice Rodman retired August 30, 1965, and qualified as an Emergency Justice of the Supreme Court, which position he still holds. Upon his retirement he returned to his home in Washington, North Carolina, where he now resides.

Clifton Leonard Moore was born in Burgaw, North Carolina, September 28, 1900. He graduated from the University of North Carolina in 1923 and from the Law School of George Washington University in 1927. He was admitted to the bar in 1927 and practiced law in Burgaw. Moore served as Solicitor of the Fifth Judicial District from 1943 until 1954. In 1954 he was appointed resident Judge of the Fifth Judicial District and continued to serve in that capacity until February 2, 1959, when Governor Hodges appointed him Associate Justice of the Supreme Court to succeed Justice Jefferson D. Johnson, Jr., retired, for the term ending December 31, 1960. He was elected in November, 1960, for a term of eight years. Justice Moore died July 12, 1966.

Susie Marshall Sharp was born in Rocky Mount, North Carolina, July 7, 1907. She attended North Carolina College for Women, now the University of North Carolina at Greensboro, for two years, 1924-1926. She entered the Law School of the University of

North Carolina in the fall of 1926 and graduated therefrom in 1929. She was licensed to practice law in 1928. Immediately after her graduation, she entered her father's law office in Reidsville, North Carolina, and continued to practice law under the firm name of Sharp & Sharp until 1949. She served as City Attorney of Reidsville from 1939 until 1949. In 1949 Governor Scott appointed her a Special Superior Court Judge, a position she held for thirteen years. Judge Sharp was the first woman to serve as a Judge of the Superior Court in North Carolina and, up to this time, the only one. On March 14, 1962, Governor Sanford appointed her Associate Justice of the Supreme Court to succeed Associate Justice Denny who had been appointed Chief Justice upon the retirement of Chief Justice Winborne. In November, 1962, she was elected to the unexpired term of Justice Denny and was re-elected in November, 1966, for a term of eight years. Since the writer was the first Chief Justice of the Supreme Court of North Carolina to preside over the sessions of the Court which numbered a woman among its members, he desires to make this observation. Justice Sharp is an unusually attractive and charming lady who was a successful practitioner at the bar, an able trial Judge, learned in the law; and as a member of the Supreme Court, she is making the Court one of its most valuable members.

Isaac Beverly Lake was born in Wake Forest, North Carolina, August 29, 1906. He graduated at Wake Forest College, now Wake Forest University, in 1925. He graduated at Harvard University Law School in 1929, having been admitted to the bar in 1928. Lake was granted the degree of Master of Laws by the Columbia University School of Law in 1940 and the degree of Doctor of the Science of Law by this same institution in 1947. He was a member of the Faculty of the Law School of Wake Forest College for nineteen years. Assistant Attorney General of North Carolina from 1952 until 1955, Lake practiced law in Raleigh from 1955 until August, 1965. On August 30, 1965, he was appointed by Governor Moore an Associate Justice of the Supreme Court to succeed Associate Justice Rodman, retired. He was elected in November, 1966, to the unexpired term of Justice Rodman which expires December 31, 1970.

James William Pless, Jr., was born in Brevard, North Carolina, July 1, 1898. He attended the University of North Carolina from 1913-1915 and Davidson College from 1915-1917. He also attended the Law School of the University in 1918-1919 and was admitted to the bar in 1919. Pless served in the Army of the United States in World War I. From 1919 until 1934, he was a member of his father's law firm, Pless, Winborne & Pless, later Pless, Winborne, Pless and Proctor, in Marion, North Carolina. This firm has furnished two

members of the Supreme Court, Chief Justice Winborne and Justice Pless. In 1924 Governor Morrison appointed him Solicitor of the Eighteenth Judicial District when he was only twenty-six years of age, which office he held until 1934 when Governor Ehringhaus appointed him resident Judge of the Eighteenth Judicial District. Pless continued to serve as resident Judge of this district until 1966, a period of thirty-two years. Judge Pless was appointed Associate Justice of the Supreme Court by Governor Moore on February 5, 1966, to succeed Associate Justice Parker who had been appointed Chief Justice upon the retirement of Chief Justice Denny. In November, 1966, he was elected to the unexpired term of Justice Parker. Justice Pless retired on February 5, 1968, and qualified as an Emergency Justice of the Court, a position he still holds. Upon his retirement, he returned to his home in Marion.

Joseph Branch was born in Enfield, North Carolina, July 5, 1915. He attended Wake Forest College, now Wake Forest University, and graduated from the Wake Forest School of Law in 1938. He was admitted to the bar in 1937 and practiced law in Enfield. Branch served during World War II in the Armed Forces of the United States from 1943 until 1945. He was a Representative in the General Assembly of North Carolina from Halifax County in 1947, 1949, 1951 and 1953 and served as Legislative Counsel for Governor Hodges in 1957 and for Governor Moore in 1965. He was appointed by Governor Moore Associate Justice of the Supreme Court on July 21, 1966, to fill the vacancy occasioned by the death of Justice Clifton L. Moore. Justice Branch was elected in November, 1966, to the unexpired term of Justice Moore and re-elected to an eight year term in November, 1968.

John Frank Huskins was born in Burnsville, North Carolina, February 10, 1911. He was graduated at the University of North Carolina in 1930, studied law at the School of Law of the University and was admitted to the bar in 1932. He was twice elected Mayor of Burnsville; but during his second term, he resigned to accept a Commission in the United States Navy. He served in the Navy in World War II from July, 1942, until February, 1946. He is now a Lieutenant Commander in the United States Naval Reserve. Huskins represented Yancey County in the General Assembly in 1947 and 1949. On May 25, 1949, Governor Scott appointed him Chairman of the North Carolina Industrial Commission. He was reappointed to that position by Governor Umstead on May 28, 1953. He resigned in January, 1955, to accept an appointment as a Special Superior Court Judge. In November, 1956, he was elected to a six year term as resident Judge of the newly created Twenty-fourth Judicial Dis-

trict, composed of the counties of Avery, Madison, Mitchell, Watagua and Yancey. He was re-elected in November, 1962, for a full eight year term. Huskins was appointed by Chief Justice Denny as Director of the newly created Administrative Office of the Courts on July 1, 1965, and reappointed to that office by Chief Justice Parker in February, 1966. Governor Moore appointed him Associate Justice of the Supreme Court to succeed Justice Pless, retired. He took his oath of office and assumed his duties as a member of the Court on February 5, 1968. Justice Huskins was elected to a full eight year term in November, 1968.

Our first State Constitution was adopted on December 18, 1776. However, a Supreme Court as contemplated by the Constitution of 1776 was not established by the General Assembly until forty-two years later in November, 1818. The Court was authorized to begin to function on January 1, 1819. It held its first session on January 5, 1819.

The Supreme Court from its creation until the adoption of the Constitution of 1868 consisted of three members. These members were chosen for life by the General Assembly and the members of the Court elected one of their number Chief Justice. During the above period, from 1819 until 1869, only thirteen men served on the Supreme Court.

The Constitution of 1868 provided for a Chief Justice and four Associate Justices to be elected by the people for terms of eight years. The law provided that in the event of a vacancy on the Court, the Governor should fill the vacancy by appointment until the next general election.

The Constitutional Convention of 1875 recommended a number of amendments to the Constitution and among them was one to reduce the number of members of the Supreme Court to three on January 1, 1879. The amendment was adopted, but there was a provision in the Constitution to the effect that no elected official could be removed from his office until the expiration of his term. Therefore, the five members of the Court who had been elected in 1876 could have remained on the Court until the expiration of their terms on December 31, 1884. However, according to Clark's History of the Court, Justice Reade ended his tenure on the Court by accepting the presidency of the Raleigh National Bank on January 1, 1879, and Justice Rodman resigned on December 31, 1878, and returned to the private practice of law. Consequently, the Court began its work when the January Term, 1879 opened with only three members and continued with that number until December 31, 1888. The Constitution had been amended again to provide for a Chief

Justice and four Associate Justices. Pursuant to the amendment, Alphonso C. Avery and James E. Shepherd were elected Associate Justices in 1888 for eight year terms beginning January 1, 1889.

The Court consisted of five members until the Constitution was again amended in 1936 providing for a Chief Justice and not more than six Associate Justices. The General Assembly enacted legislation authorizing the appointment of two additional Associate Justices as of July 1, 1937. Governor Hoey appointed Judge M. V. Barnhill and the Honorable J. Wallace Winborne Associate Justices. Both took their oaths and assumed their duties as members of the Court on July 1, 1937. Both were elected for eight year terms in November, 1938.

Only sixty-six persons, including Judge Murphey, have served on our Supreme Court up to this time. Judge Murphey was commissioned pursuant to a provision in the Act creating the Court providing for the Governor to appoint someone to sit when any one of the three incumbents was disqualified to sit because of having been counsel in any cause pending before the Court. Judge Murphey sat in a number of cases during 1819 and 1820.

Eighteen persons have served as Chief Justice during the Court's one hundred and fifty years. All of these eighteen Chief Justices had previous tenure as Associate Justices except Taylor and Smith. Taylor was elected Chief Justice by his associates, Leonard Henderson and John Hall, when the Court was organized. William Nathan Harrell Smith was appointed from the bar as Chief Justice by Governor Vance upon the death of Chief Justice Pearson. Smith assumed his duties as Chief Justice January 14, 1878.

Chief Justice Clark served longer on the Supreme Court than any other member. He became a member of the Court on November 16, 1889, and served continuously from that time until his death on May 19, 1924 — thirty-four years, six months and three days. He served as Chief Justice from January 1, 1903, until his death — twenty-one years, four months and eighteen days.

Chief Justice Stacy had the second longest tenure on the Court and the longest tenure as Chief Justice. He assumed his duties as an Associate Justice on January 1, 1921, and continued as a member of the Court until his death September 13, 1951 — thirty years, eight months and twelve days. During his tenure he served as Chief Justice from March 17, 1925, until his death — twenty-six years, four months and twenty-six days.

Justices Walker and Denny are the only members of the Court to serve for more than twenty years as an Associate Justice. A number of others have served for more than twenty years as a mem-

ber of the Court, but such tenure has included services as Associate Justice and as Chief Justice. For example, the elder Ruffin served nearly twenty-five years, almost six years as an Associate Justice and nineteen years as Chief Justice; and Chief Justice Pearson served as a member of the Court twenty-nine years and twenty-one days — nineteen years of that time was as Chief Justice.

Clark's History of the Court states the religious persuasion of the members of the Court from 1819 until January, 1919, as follows: ". . . three have been Roman Catholics, Gaston, Manly and Douglas; two Baptists, Faircloth and Montgomery; four Methodists, Merrimon, Clark, Cook, and Allen; seven Presbyterians, Nash, Reade, Dick, Smith, Dillard, Avery, and Burwell; one Freethinker, and the remaining twenty-three Episcopalians."

Since the close of the period covered by Clark's History of the Court, twenty-six additional persons have been members of the Court, including its present membership. Of these, three have been Presbyterians, Seawell, Ervin and James; nine Methodists, Stacy, Adams, Barnhill, Johnson, Bobbitt, Higgins, Moore, Sharp and Pless; eight Baptists, Varser, Brogden, Devin, Denny, Valentine, Lake, Branch and Huskins; and the remaining six Episcopalians, Clarkson, Connor, Schenck, Winborne, Parker and Rodman.

In the period from 1819 to 1869, all the members of the Supreme Court except Gaston had previously served on the Superior Court. During its second fifty years, from 1869 through 1918, twenty-seven persons sat on the Court; and of these, fifteen were appointed or elected directly from the bar, to wit: Rodman, Dick, Settle, Boyden, Bynum, Faircloth, Smith, Ashe, Dillard, Davis, Burwell, Montgomery, Douglas, Walker and Manning. During the last fifty years, twenty-six additional members have served on the Court; and of these, twelve were appointed from the bar, to wit: Clarkson, Varser, Brogden, Winborne, Seawell, Denny, James, Valentine, Higgins, Rodman, Lake and Branch.

The Judicial section of our Constitution was amended in 1962 and 1965 to provide for a General Court of Justice to consist of the Supreme Court, an intermediate Court of Appeals, the Superior Courts and a system of District Courts.

The Court of Appeals began to function on October 1, 1967, and was created for the purpose of relieving the Supreme Court of a substantial part of its work load which for the past ten or twelve years had been exceedingly heavy for an appellate court.

The District Courts have been functioning in certain Judicial Districts of the State since December, 1966, and all the counties of the State will be under the system by the first Monday in Decem-

ber, 1970. The District Courts will replace all courts inferior to the Superior Court and will have uniform jurisdiction, costs and procedure.

List of members of the Supreme Court since January 1, 1819

CHIEF JUSTICES

John Louis Taylor*	1819-1829
Leonard Henderson	1829-1933
Thomas Ruffin	1833-1852
Frederick Nash	1852-1858
Richmond M. Pearson	1858-1868
Richmond M. Pearson	1868-1878
William N. H. Smith**	1878-1889
Augustus S. Merrimon	1889-1892
James E. Shepherd	1892-1895
William T. Faircloth	1895-1900
David M. Furches	1901-1903
Walter Clark	1903-1924
William A. Hoke	1924-1925
Walter P. Stacy	1925-1951
William A. Devin	1951-1954
M. V. Barnhill	1954-1956
J. Wallace Winborne	1956-1962
Emery B. Denny	1962-1966
R. Hunt Parker	1966-

ASSOCIATE JUSTICES

John Hall	1819-1832
Leonard Henderson	1819-1829
Archibald D. Murphey***	
John D. Toomer	1829-1829
Thomas Ruffin	1829-1833
Joseph J. Daniel****	1832-1848
William Gaston	1833-1844
Frederick Nash	1844-1852
William H. Battle	1848-1848
Richmond M. Pearson	1848-1858
William H. Battle	1852-1868
Thomas Ruffin	1858-1860
Matthias E. Manly	1860-1865
Edwin G. Reade	1865-1868
Edwin G. Reade	1868-1879
William B. Rodman	1869-1878
Robert P. Dick	1869-1872

Thomas Settle	1869-1871
Nathaniel Boyden	1871-1873
Thomas Settle	1872-1876
William P. Bynum	1873-1879
William T. Faircloth	1876-1879
Thomas S. Ashe	1879-1887
John H. Dillard	1879-1881
Thomas Ruffin, Jr.	1881-1883
Augustus S. Merrimon	1883-1889
Joseph J. Davis	1887-1892
James E. Shepherd	1889-1892
Alphonso C. Avery	1889-1897
Walter Clark	1889-1903
James C. McRae	1892-1895
Armistead Burwell	1892-1895
David M. Furches	1895-1901
Walter A. Montgomery	1895-1905
Robert M. Douglas	1897-1905
Charles A. Cook	1901-1903
Henry Groves Connor	1903-1909
Platt D. Walker	1903-1923
George H. Brown	1905-1921
William A. Hoke	1905-1924
James S. Manning	1909-1911
William R. Allen	1911-1921
Walter P. Stacy	1921-1925
William J. Adams	1921-1934
Heriot Clarkson	1923-1942
George W. Connor	1924-1938
L. R. Varser	1925-1925
Willis J. Brogden	1926-1935
Michael Schenck	1934-1948
William A. Devin	1935-1951
M. V. Barnhill	1937-1954
J. Wallace Winborne	1937-1956
A. A. F. Seawell	1938-1950
Emery B. Denny	1942-1962
S. J. Ervin, Jr.	1948-1954
Murray James	1950-1950
Jeff. D. Johnson, Jr.	1950-1959
Itimous T. Valentine	1951-1952
R. Hunt Parker	1952-1966
William B. Rodman, Jr.	1956-1965
Clifton L. Moore	1959-1966
J. Will Pless, Jr.	1966-1968

PRESENT MEMBERS OF THE COURT

R. Hunt Parker, *Chief Justice* 1966-
William H. Bobbitt 1954-
Carlisle W. Higgins 1954-
Susie M. Sharp 1962-
I. Beverly Lake 1965-
Joseph Branch 1966-
J. Frank Huskins 1968-

*John Louis Taylor was elected Chief Justice of the Supreme Court by his Associates when the Court was organized; therefore Taylor never served as an Associate Justice.

**William N. H. Smith, upon the death of Chief Justice Pearson, was appointed from the bar by Governor Vance as Chief Justice. Consequently he was never an Associate Justice.

***Archibald D. Murphey was commissioned pursuant to a provision in the Act creating the Supreme Court, authorizing the Governor to commission someone to sit in lieu of any member of the Court who might be disqualified to sit by reason of having been counsel in any cause pending before the Court. Judge Henderson was elected to the Superior Court in 1808 and resigned in 1816. His resignation was the result of his need for additional income for the support of his family and the education of his children. Judge Henderson was the only member of the first Court who was engaged in the practice of law at the time of his appointment. Taylor had been a Superior Court Judge continuously since 1798 and Hall since 1800. Murphey was a Superior Court Judge and was commissioned to sit in a number of cases in lieu of Judge Henderson during 1819 and 1820.

****Joseph J. Daniel was commissioned to sit in a number of cases in lieu of Judge Henderson during the May Term, 1819. Daniel was a Superior Court Judge from 1816 until 1832, when he was elected to the Supreme Court as successor to Judge Hall who resigned in December, 1832, and died in January, 1833.

The members of the Supreme Court were designated as the Chief Justice and Judges of the Supreme Court from the creation of the Court until the adoption of our present Constitution, in 1868, in which instrument the members of the Court are designated as the Chief Justice and Associate Justices of the Supreme Court.

Address of Honorable Thomas H. Leath in Presenting the Portrait of the Honorable George Whitfield Connor, an Associate Justice of the Supreme Court From 1924 to 1938, to the Superior Court of Wilson County on 4 February 1952.

When a portrait of George Whitfield Connor was presented to the Supreme Court of North Carolina in 1940, his beloved widow in her extreme modesty decreed there should be no formal presentation. She was content for his life to speak for itself. In accepting the invitation of the Wilson County Bar to present another portrait, his two daughters have consented that we may now review his life and labors and appraise them. They have bestowed upon me, one of his devoted sons-in-law, the high privilege of drawing for you a word portrait of their father. It has been my almost invariable custom first to submit to the discerning eyes and sensitive ears of my wife my every writing or utterance. On this occasion I dare depart from custom because her own inherent modesty would have denied for me the opportunity to give full expression to my thoughts about our subject. Hence my remarks come to you unexpurgated. Any seeming lack of becoming modesty on my part you will no doubt forgive in view of my unbounded love and admiration for this man who was my preceptor, my ideal of a man and a judge.

> "May this courthouse ever be in fact as well as in name a temple of justice, where all men may have redress for their wrongs, and protection of their rights, under the law, wisely and justly and mercifully administered."

Thus spake George Whitfield Connor 26 years ago at the dedication of this beautiful temple of justice in which we have gathered today. I feel as though I stand on hallowed ground. There was something prophetic in the coming to Wilson in 1855 of David Connor and his wife, Mary Catherine Groves Connor. The establishment of his family in Wilson might be said to be "like a tree planted by the rivers of water that bringeth forth his fruit in his season; his leaf also shall not wither; but whatsoever he doeth shall prosper." He came to help build the first courthouse for the new

County of Wilson, the building in which and the spot upon which his descendants were destined to play an important role:

1. His son, Henry Groves Connor, was to preside over the Court as a Superior Court Judge and to hold the last term of court as a Federal Judge before the old building was taken down in 1924 to give way to the present handsome structure.

2. His grandson, George Whitfield Connor, was to preside over the Superior Court in the old building and to return on 1 February 1926 as an Associate Justice of the Supreme Court to deliver an address in the acceptance of the new building on behalf of the county at its dedication ceremonies.

3. His grandson, Henry Groves Connor, Jr., was to appear as counsel in litigation in both the old and the new building.

4. His great-grandson, Henry Groves Connor, III, was to appear as counsel in litigation in the new building and to uphold the gloriously high tradition of his illustrious forebears.

The subject of our tribute today was born on 24 October 1872 in the old Billie Simms' house on Greene Street in Wilson, North Carolina, the first born child of Henry Groves and Kate Whitfield Connor, when his father was barely 20 years of age. He began his formal education under Mrs. E. B. Adams at the school of the saintly Professor J. B. Brewer, who in his latter years became my esteemed Sunday School teacher in Rockingham. When the blue-back speller was concluded, he entered the school of Elder Sylvester Hassell, and completed his early education in the Wilson Graded School. He learned much from Miss Mag Hearne and Dr. Collier Cobb and received special coaching from his Episcopal Rector, Dr. Bronson of St. Timothy's. He is reported to have been a youth of serious purpose but not lacking affairs of the heart. It was in his early teens that he won the love of Bessie Hadley, which he retained and cherished forever after. He entered the University of North Carolina in 1888 at the tender age of 15 years. In spite of his youth, he immediately demonstrated his qualities of leadership and won many honors, such as presidency of historic Phi Society, the Representative's Medal as the prize award for his commencement oration, editorship of the Carolina Magazine, the debator's medal in the Phi Society, and he was one of the senior speakers. His college roommate, Bishop Howard E. Ronthaler, reports that the two of them were candidates for the Willie P. Mangum Medal; that after he mastered his own oration he lent a helping hand to George Connor who in turn defeated him for the coveted medal. Lastly, he was a member of the S. A. E. Fraternity. He was grad-

uated *cum laude* in the Class of 1892. He was honored by the University in 1928 when it bestowed upon him the honorary degree of L. L. D. In 1929 he became a member of Vance Inn of the Phi Delta Phi legal Fraternity.

Like so many great lawyers and public leaders of his day, he began his career by entering the educational field. Forthwith upon his graduation and when he was only 19 years of age, he was elected principal of the Goldsboro Graded School, where he had as one of his pupils the late W. J. Brogden, who served with distinction with him as an Associate Justice of the Supreme Court. Two years later he was made Superintendent of the Wilson Schools, which position he held for three and one-half years until he resigned to become a partner in the mercantile firm of Hadley-Harris & Company. His interest in education never wavered. He served 5 years as Chairman of the Wilson County Board of Education and at the time of his death he was on the Board of Trustees of St. Mary's College and St. Augustine's College in Raleigh. He was also a member of the Vestry of the Church of the Good Shepherd in Raleigh. In the meantime, in 1894, he married Bessie Hadley, which accomplishment he cherished to the end of his life as the greatest of all. How right he was because she was an inspiration and a blessing to him and to all who were privileged to know her.

All the while he felt the urge to prepare himself for the law because of the unequalled opportunity it offered for leadership and public service. He could but hear the "one clear call" of his legal ancestry. Thus he worked by day and studied law by night to provide a living for his family and to meet the demands of the jealous mistress of the law until his self-training enabled him to pass the bar examinations in 1899. He practiced his chosen profession alone until 1902 when he formed a partnership with his brother, Henry Groves Connor, better known as "Tobe" Connor, and practiced under the firm name of Connor & Connor until 1913. He soon attracted public attention by the ability which he evidenced in his chosen profession, by the fine citizenship he exemplified, and by the quality of his state-craft. He represented his native county in the legislature for three successive terms, 1909, 1911 and 1913, where from the beginning he assumed an influential position as a legislator. He was chairman of the education committee during his first term and of the judiciary committee during his second term. The crowning achievement of his legislative career came in his elevation to the speakership of the House in 1913. His administration of this important office was reported by the press as nothing short of brilliant. Perhaps the most noteworthy legislation of that term was the child labor act in which he became so interested that he left the speak-

er's chair during the debate to deliver a stirring speech which was so convincing that it helped bring about the adoption of this humane and progressive act.

So profound was the impression which he had made as a man, a lawyer, a legislator, such was his popularity, and so eminently was he fitted for judicial office that when the new second judicial district was created, Governor Locke Craig appointed him Superior Court Judge on 20 March 1913. Although his appointment seems to have been a forgone conclusion due to his pre-eminence, his supporters, nevertheless, saw to it that the Governor was made fully aware of his qualifications and the demand for his services, pointing out that by heredity, environment and training, it would be easy for him to take his place among the leaders of the field of jurisprudence. It is noteworthy that before he mounted the bench, he disposed of all of his business interests and invested in a farm, so that he could never be influenced in the administration of justice because of his personal business interests.

Thus another Connor had been launched upon a judicial career which was to bring added glory to an already famous name, new blessings to the legal profession and to the people as a whole. On the day of the appointment his father, then on the Federal Court, penned the following letter which was to be his guiding star unto eternity:

> "My dear George, I will not attempt to tell you how much your appointment means to me and how deeply I feel in regard to it . . . That *you* are to fill the honorable position of a North Carolina Judge, a position which filled my highest aspiration, . . . is a crowning measure of happiness to me. Let me commend to you the words of one who by his precept and example has been an inspiration to me: 'to administer justice, to expound and apply the laws for the advancement of right and the suppression of wrong, is an enobling and indeed a holy office, and the exercise of its function, while it raises my mind above the mists of earth, above cares and passions into a pure and serene atmosphere, always seemed to impart fresh vigor to my understanding and a better temper to my whole soul.' As this Judge who wrote these words to his child, not for publication, and illustrated their truth in his life, it was said without dissent that 'he was a great man and a good judge.' Among the essential qualities of a judge are open-mindedness — patience — firmness — courage — courtesy — these with *industry* and an abiding *love of justice* — will make of you a great and good judge."

The records clearly indicate that George Whitfield Connor, as a Superior Court Judge, fully measured up to the standards set for him by his father. He soon won a reputation from the mountains to the sea as a great *nisi prius* jurist, having held court throughout the state. In words of R. C. Lawrence, an eminent lawyer and biographer of Lumberton,

> "He possessed not only a deep knowledge of his science, but also in a superlative degree that first requisite in a great judge — judicial temperment — along with great personal charm and magnetism of manner; patience in dealing with mediocrity; and a passionate devotion to the cause of equity, for he had an intense desire to accord to every man his legal due . . . No man ever left the court of Connor, even when his cause had been decided against him, without the knowledge that he had been accorded a fair, patient and courteous trial by a great lawyer, even though he might not agree with the result."

It has been stated by a contemporary that his charges to grand juries furnished the best evidence of the qualities of his statesmanship, the loftiness and breadth of his vision, the caliber of his citizenship. When it was known that he was to charge a grand jury, the people flocked in to hear him, and no man could leave his court room without feeling that he was a better citizen after hearing his charge. This is evidenced by a brief memorandum in an unidentified handwriting evidently handed to him in Superior Court: "Your charge was magnificent. The only one equal to it I ever heard was from your father years ago."

He did not fall short of the prophesy of F. D. Swindell in an article entitled "Who's Who in Wilson" which appeared in the Wilson Daily Times of 16 May 1913:

> "With an unusual amount of natural ability, a great father to pattern after, a splendid and charming wife to advise him and help him, a frank, witty and outspoken brother to give him speech direct, if necessary, and the good wishes of the entire community to urge him on, we can safely prophesy big things for Honorable George Whitfield Connor."

Upon the death of Chief Justice Walter Clark and the elevation of William A. Hoke to the Chief Justiceship, there was practically unanimous demand that Judge Connor be named an Associate Justice. There was only one obstacle which caused concern to his friends, and that was of a purely political nature. The Connors had not supported Cameron Morrison in his successful primary campaign for the governorship. So outstanding were the qualifications of the man for this exhalted position that Governor Morrison

rose completely above partisan politics and tendered the appointment to Judge Connor on 17 June 1924. Following the expiration of his term as Governor, Cameron Morrison on 22 January 1925, in reply to a letter he had received from Judge Connor on the 14th, wrote:

> "Your letter alone would establish that I made no mistake in placing you on the Supreme Court bench. A man who can write as fine a letter as this is worthy of anything . . . I was proud to give you the honor . . . I hear only good things about you on the Supreme Court bench, and it may be gratifying to you to know that from almost every hand I am congratulated upon your appointment."

Judge Connor served as an Associate Justice of the Supreme Court of North Carolina until his untimely death on 23 April 1938, leaving an unfinished opinion behind him. His opinions, pronounced by his associates to have been "always forceful and to the point" are to be found in 26 volumes of the North Carolina Reports, beginning with the 188th and ending with the 213th. Time does not permit comment upon his monumental opinions. Suffice it to use the legal maxim, *res ipsa loquitur,* the thing speaks for itself. The resolution adopted by the Supreme Court upon his death included among other tributes the following statement:

> "The law of the state has been enriched by his labors, as both bench and bar will attest. He devoted himself wholeheartedly to the task of writing just judgments into the book of the law of a great people. His was a philosophy of constructive thinking ever in pursuit of the ideal. This gave him a well-poised mind. All of his powers were spent in hammering out a competent and solid piece of work, which he made first-rate and left it unadvertised. It will stand as his monument."

Attorney General Seawell, who was soon to fill the vacancy on the court caused by his death made this succinct appraisal of him: "He held all that was best in the past, brightest in the present, and most hopeful for the future."

Mr. R. C. Lawrence said of him in his article appearing in the State Magazine of 10 July 1943:

> "He brought to his court the learning of a Blackstone, the dignity of a Mansfield, the character of a Hale . . . His opinions (are) clothed in language noted for its classic clarity . . . No judge has ever enjoyed the confidence, respect and admiration of the public, and of the bench and bar to a greater extent than did Judge Connor. He lived a life which approached

the scriptures: 'What doth the Lord require of thee but that thou deal justly, love mercy, and walk humbly with thy God'."

The parallel between the achievements of father and son, Judges Henry Groves Connor and George Whitfield Connor, is so striking that it should not go unnoticed. Neither attended law school except to teach therein during summer months at Chapel Hill. Each represented Wilson County in the legislature for three terms. Each served as Speaker of the House of Representatives. The father served as President of Branch Banking Company while his son served at one time as Vice-President and counsel of that institution, having declined to be elected President in 1913. Each served upon both the Superior Court and the Supreme Court of North Carolina. Judge Henry Groves Connor alone served upon the Federal bench. In the aggregate of the 54 years served upon the bench, neither of them ever cited a single person for contempt of court. Each of them ever inspired reverence and respect, never contempt.

The marriage of George Whitfield Connor and Bessie Hadley Connor was blessed with four children:

John Hadley Connor, who died in infancy.

Henry Groves Connor, who met accidental death at the age of about 10 years.

Mary Hadley Connor Leath, the wife of the speaker.

Elizabeth Connor Harrelson, the wife of Colonel J. W. Harrelson, Chancellor of North Carolina State College.

Mrs. Connor survived her distinguished husband but went on to her reward on 9 January 1947.

The public came to know Judge Connor in the legislative halls and in the court rooms. It was my rare opportunity to know him more intimately in the privacy of his home, where he was even more preeminent as a charming host and conversationalist, a devoted husband and father. It was here that I learned of his unquenchable thirst for knowledge even to the end, and of his conviction that education was a never-ending process. He loved to delve into the classics, religion, history and biographies of great men, as well as into all fields of jurisprudence. He possessed the uncanny faculty of lifting others to his own lofty plane and of keeping them there throughout the visit, at the end of which each person left with a sense of stimulation and elevation not only in his mind but also in his heart and soul. Although he was a man of great dignity, he possessed a keen sense of humor. His friendship was truly warm. I cherish every hour spent with him in his home.

I shall never forget the occasions when two of his brothers, Mr. Tobe Connor, a brilliant lawyer, and Dr. R. D. W. Connor, a peerless historian and author, and the first United States Archivist, would visit him and I had the opportunity to hear them discuss matters of history, government, public affairs, and their visions of things to come. As an adjunct to the Connor family I marveled at what I heard and each time reached the inescapable conclusion that I was in the presence of three of the greatest brains and most outstanding men of our day, men whose devotion to public service knew no end, men who thought and acted as true scholars and statesmen. The record of these three noble sons as well as that of their father is writ large in the legal, legislative, judicial and educational history of North Carolina in the first half of this century.

However much I would like to present my own appraisal of this man, I am hesitant to do so because my intimacy with him and my knowledge of his inner-self might lead me to seeming extravagance in his praise; to understate my estimate would fail to do him justice. In view of these circumstances it is perhaps best to leave the appraisal to the pen of a renowned reporter, the late Tom Bost, as his editorial appeared in the Greensboro News on 24 April 1938:

"LOOKED, ACTED AND WAS A JUDGE"

"North Carolinians had a habit of saying that Lee S. Overman looked like a senator, that Judge Henry G. Connor and William A. Hoke looked like judges, and that Bishop Joseph Blount Cheshire looked like a bishop.

"That meant that whether Senator Overman ever reached the senate or not, people thought he should go there; that no matter what Henry G. Connor and William A. Hoke chose to do, they should have been judges; that Joseph Blount Cheshire put on the very apostolicity which belonged to a bishop.

"In Raleigh Saturday morning George Whitfield Connor, associate justice of the North Carolina Supreme Court died. Nobody ever saw him on class at the University of North Carolina, in the general assembly as freshman member or speaker, in the courthouse as attorney, or on the superior court bench as judge, who did not think he should climax his life with a long tenure of the Supreme Court bench. No man ever looked at him anywhere without associating him with the highest judicial traditions.

"Law always appeared to have more sense when he interpreted it; always looked more the servant and less the master of men; and judges always were less terrifying when Mr.

Justice Connor got in action. He never asked any attorney appearing for a client in the high court a question which did not have meaning. No litigant ever got the opinion that he interrogated for any other purpose than to seek the light of the law. And there never was a juster man on the bench of the realm.

"And there never was a period in North Carolina history which would have denied him Supreme Court membership on any ground other than seniority. He might have had to stand aside in the era of his own father, the day that produced Clark, Connor, Hoke, Walker and Brown. But he would have been considered for the vacancy caused by the retirement of any man among them, by any governor who regarded the Supreme Court above the control of spoilsmen. Judge Connor happened not to have supported Governor Cameron Morrison for governor in the 1920 primary, but Mr. Morrison named him to his high bench at the first opportunity which timed with geography. And Mr. Morrison believed right energetically in promoting his friends. There was no way to wipe Connor out. He belonged to the bench.

"He suspected months ago that he would not live long, but he had a profound philosophy that death generally happens at the right time. He never could quite harmonize that thesis with the tragic death of his only son 30 years ago. He never recovered from that devastating blow, but in his heart he knew it made him a better judge. He had religious faith enough to know that his Maker suffers no losses.

"Off and on the bench during the present spring term, following a facial paralysis, he was at work this week and against the councils of doctors, chief and associate justices, he sought assignment of opinions. He was denied that joy and there will be some unfinished decisions which he would have made. Good people say there is a Great Judge elsewhere than on this planet. If there is, when Judge George Connor's "case" is presented to that Majestic Jurist, the judgment will be

'NO ERROR'."

As I reflect upon his character, his love of his fellowman, his noble bearing, and his achievements, I am reminded of the admonition of the grandmother of Edward Bok as he departed his native country to establish his home in America, "Make you the world a bit better or more beautiful because you have lived in it." It is my humble opinion that Judge Connor did just this as his mind, his heart and his soul dwelt among the loftiest peaks while his feet were solidly planted upon the earth, he marched side by

side with his fellowman, leading him ever onward to a better and nobler life.

The mortal remains of George Whitfield Connor have rested in his native Wilson soil for nearly fourteen years among the people who made it possible for him to serve his country and state. Through the skill of a charming artist, Miss Irene Price, of Winston-Salem, his benigh countenance and something of his immortal being have been recreated and placed upon canvas so that we may feel that he is with us yet. It is my fervent prayer as he looks from his honored position on the wall of his beloved county courthouse and shoulder to shoulder with some of his esteemed associates, he will inspire us all to finer and nobler deeds. As young lawyers gaze upon his kindly, sympathetic, understanding, intelligent face, it is hoped that they will find encouragement for the tasks which lie ahead, and that they, too, through knowledge of his exemplary life, will attain true distinction in service to their fellowmen and to the Supreme Judge who rules on high.

Your honor, it is my distinct privilege, on behalf of his daughters, to present to this Court and to the people of Wilson County the portrait of Justice George Whitfield Connor.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e. g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

ADMINISTRATIVE LAW.

§ 3. Duties and Authority of Administrative Boards and Agencies in General.

Legislature may confer on an administrative agency only judicial powers reasonably necessary to the accomplishment of the purposes for which the agency was created. *Lanier v. Vines*, 486.

APPEAL AND ERROR.

§ 1. Jurisdiction in General.

When the Supreme Court grants certiorari to review a decision of the Court of Appeals, only the decision of that Court is presented for review. *S. v. Williams*, 328.

Appeal as a matter of right from the Court of Appeals to the Supreme Court is allowable where a substantial constitutional question is involved. *S. v. Colson*, 295.

§ 3. Review of Constitutional Questions.

Where appellant has alleged and shown the involvement of a substantial constitutional question in an appeal from the Court of Appeals, the Supreme Court may pass upon any or all assignments of error, constitutional or otherwise. *S. v. Colson*, 295.

Contention that the levy of additional property tax for supplementing teachers' salaries without vote of the people as authorized by G.S. 115-80(a) violates Article VII, § 6 of the State Constitution presents a substantial constitutional question authorizing an appeal of right from the Court of Appeals. *Harris v. Board of Comrs.*, 343.

Appellant seeking to appeal to Supreme Court from decision of the Court of Appeals as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. *S. v. Cavallaro*, 480.

Supreme Court will determine constitutionality of a statute only on the grounds on which it was attacked in the pleadings. *Sykes v. Clayton*, 398.

Contention that statute violates specified provision of State Constitution is deemed abandoned on appeal where no reason or argument is stated or authority cited in the brief with reference to such constitutional provision. *Ibid.*

§ 4. Theory of Trial in Lower Court.

A litigant may not acquiesce in the trial of his case in the Superior Court on one theory and complain on appeal that it should have been tried upon another. *Builders Supply v. Midyette*, 264.

§ 24. Form of Objections, Exceptions and Assignments of Error.

Exceptions relating to a single question of law are properly grouped under one assignment of error. *Potts v. Howser*, 49.

APPEAL AND ERROR—Continued.

§ 26. Exceptions and Assignments of Error to Signing of Judgment.

Assignment of error to the signing of the judgment presents the face of the record proper for review. *Fishing Pier v. Carolina Beach*, 362.

§ 31. Exceptions and Assignments of Error to Charge.

Assignments of error based on failure of the court to charge should set out appellant's contentions as to what the court should have charged. *Waden v. McGhee*, 174.

Assignment of error that the court failed to explain and apply the law to the evidence as required by G.S. 1-180 is broadside. *Builders Supply v. Midyette*, 264.

An assignment based on failure to charge should set out the appellant's contention as to what the court should have charged. *Ibid.*

§ 39. Time of Docketing the Record.

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§ 40. Necessary Parts of Record Proper.

The appellate court must have in the record before it a complete account of the action by the trial court of which appellant complains. *S. v. Williams*, 328.

§ 47. Harmless and Prejudicial Error in General.

Error by court in defendant's favor does not entitle plaintiff to similar benefits. *Potts v. Howser*, 49.

ARREST AND BAIL.

§ 3. Right of Officer to Arrest Without Warrant.

Evidence is sufficient to authorize defendant's arrest without warrant for the offense of rape. *S. v. Peele*, 106.

ASSAULT AND BATTERY.

§ 3. Actions for Civil Assault.

Allegations held sufficient to support award of punitive damages in assault and battery action. *Clemmons v. Ins. Co.*, 416.

§ 11. Indictment and Warrant.

Indictment for malicious secret assault and battery based on G.S. 14-31 which contains no allegations of serious injury to the victim is insufficient to support a conviction for felonious assault under G.S. 14-32. *S. v. Lewis*, 438.

AUTOMOBILES.

§ 2. Grounds and Procedures for Suspension or Revocation of Drivers' Licenses.

Discretionary revocation of driver's license is reviewable in Superior Court, but mandatory revocation is not. *Underwood v. Howland*, 473.

Driving while license is suspended is a moving violation for which revoca-

AUTOMOBILES—Continued.

tion is mandatory under G.S. 20-28.1 even though the effective date of the new revocation occurs after the initial term of suspension has expired. *Ibid.*

§ 9. Turning and Turning Signals.

When the surrounding circumstances afford a motorist reasonable grounds to conclude that his left turn might affect the operation of another vehicle, the duty to give the statutory signal is imposed upon him. *Clarke v. Holman*, 425.

One is not required to give a left turn signal to a motorist who has not yet appeared on the horizon. *Ibid.*

§ 44. Presumptions and Burden of Proof of Negligent Operation of Automobile.

Res ipsa loquitur is applicable to raise inference of driver's negligence in allowing his automobile to leave the highway. *Greene v. Nichols*, 18.

§ 58. Nonsuit — Turning and Hitting Turning Vehicles.

Defendant's failure to give the left-turn signal required by G.S. 20-154 is held not to have been a proximate cause of the collision resulting in plaintiff's injury. *Clarke v. Holman*, 425.

§ 66. Sufficiency of Evidence of Identity of Driver of Vehicle.

The identity of the driver of an automobile may be established by circumstantial evidence. *Greene v. Nichols*, 18.

§ 93. Right of Guest or Passenger to Sue Jointly or Severally Tort-feasors Causing Injury.

In railroad crossing accident, where the passenger's evidence tended to show negligence both by driver of automobile and by the railroad, the action against the railroad may not be nonsuited unless the total proximate cause of the injury is attributable to another defendant. *Price v. Railroad*, 32.

§ 108. Family Purpose Doctrine.

Contributory negligence of the wife while driving her husband's family purpose automobile bars the husband's right to recover against a third person for expenses incurred in the necessary treatment of his unemancipated children injured in the collision. *Price v. R. R.*, 32.

Wife's contributory negligence while driving her husband's car bars husband's right to recover against third person for damages to car. *Ibid.*

BROKERS AND FACTORS.

§ 2. Revocation and Termination of Agreement.

When no time is specified in his contract, if a broker fails to find a purchaser or to make the sale within a reasonable time, his contract of employment is at an end. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 243.

§ 6. Right to Commissions.

The term "procuring cause" defined. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 243.

The broker is the procuring cause of a sale if the sale is the direct and proximate result of his efforts or services. *Ibid.*

In an action by a realty corporation to recover a commission of 5 percent of the purchase price of realty allegedly sold on behalf of the corporate defendant, there is sufficient evidence of an oral contract of employment between the

parties to sell the realty at a stated price to withstand defendant's motion for nonsuit; however, there is error in the trial court's failure to instruct the jury that plaintiff was entitled to recover, if at all, only the reasonable value of services rendered. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 1. Elements of Offense of Burglary.

In burglary prosecution the jury must find felonious intent in the mind of the intruder at the time he forced entrance into the house. *S. v. Thorpe*, 457.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of felonious breaking and entering is properly submitted to the jury where there is testimony that amount and denominations of money found in defendant's possession were identical to amount and denominations of bills stolen from a home. *S. v. Jackson*, 594.

Evidence held sufficient to support verdict of guilty of first degree burglary. *S. v. Lipscomb*, 436.

§ 6. Instructions.

In first degree burglary prosecution upon indictment charging breaking and entering with intent to commit rape, the court erred in failing to instruct the jury that they must find an intent to commit the felony designated in the indictment. *S. v. Thorpe*, 457.

In order for jury to infer defendant's guilt of felonious breaking and entering from his unexplained possession of stolen money, jury must find that the money in defendant's possession is identical to the money taken from the home broken into. *S. v. Jackson*, 594.

§ 7. Verdict and Instructions as to Possible Verdicts.

In first degree burglary prosecution, the court erred in failing to submit question of defendant's guilt of nonfelonious breaking. *S. v. Thorpe*, 457.

CONSTITUTIONAL LAW.

§ 5. Separation of Governmental Powers.

State statute attempting to confer upon an administrative officer legislative or jurisdictional powers violates no prohibition of the Federal Constitution. *Lanier v. Vines*, 486.

§ 6. Legislative Powers in General.

Legislative authority is the authority to make or enact laws. *Lanier v. Vines*, 486.

The General Assembly is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. *Sykes v. Clayton*, 398.

§ 7. Delegation of Powers by General Assembly.

Power granted to Commissioner of Insurance under G.S. 58-44.6 to impose a civil penalty is not a delegation of legislative power to the Commissioner. *Lanier v. Vines*, 486.

Statute authorizing Mecklenburg County to impose a one per cent sales and use tax is not a surrender by the General Assembly of its powers of taxation. *Sykes v. Clayton*, 398.

CONSTITUTIONAL LAW—Continued.

§ 10. Judicial Powers.

Absent a legislative declaration as to the competency of divorced spouse to testify for the State, the Supreme Court may declare the public policy relating thereto. *S. v. Alford*, 125.

The granting of judicial power to the Commissioner of Insurance to revoke the license of an insurance agent is constitutional. *Lanier v. Vines*, 486.

Attempted grant to the Commissioner of Insurance of judicial power to impose a civil penalty upon an insurance agent violates N. C. Constitution, Art. IV, § 3. *Ibid.*

§ 20. Equal Protection of Laws.

Defendant who received severer sentence on retrial may not claim violation of the equal protection clause on ground that those who are tried de novo assume the risk of increased sentence while those who never attack their sentence do not. *S. v. Stafford*, 519.

The Constitution does not require that the same rules apply to incompatible classes. *Ibid.*

Practice of State TB hospital of charging all patients the same rate but collecting from each according to his ability to pay is not an unconstitutional discrimination between citizens who are patients at the hospital. *Graham v. Ins. Co.*, 115.

§ 21. Right to Security in Person and Property.

The right of private property is an inalienable right. *Fishing Pier v. Carolina Beach*, 362.

No search warrant is required where the contraband matter is in plain view and no search is required. *S. v. Colson*, 295.

§ 23. Scope of Protection of Due Process.

Due process provisions of the Federal and State Constitutions are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under G.S. 105-21 to the transfer of property within the State. *Rigby v. Clayton*, 465.

§ 29. Right to Indictment and Trial by Duly Constituted Jury.

A defendant is entitled to a jury trial as to every essential element of the crime charged, including the question as to his identity. *S. v. Lewis*, 438.

In *Witherspoon v. Illinois*, 391 U.S. 510, the United States Supreme Court held that a sentence of death may not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *S. v. Spence*, 536.

Defendants convicted of first-degree murder and sentenced to death by jury from which were excluded veniremen who voiced general objections to the death penalty are entitled to new trials as to both guilt and penalty. *Ibid.*

Conviction of a Negro cannot stand if it is based upon indictment returned by a grand jury from which Negroes were excluded by reason of their race. *S. v. Ray*, 556.

The statute setting the punishment for rape as death unless the jury recommends life imprisonment, and the statute allowing defendant to plead guilty to a charge of rape, do not place an unconstitutional burden on the right of defendant to plead not guilty and to demand a jury trial. *S. v. Peele*, 106.

In a prosecution for rape, defendant's rights to plead not guilty and to demand a jury trial were not deterred by a fear of the death penalty, where

CONSTITUTIONAL LAW—Continued.

defendant entered a plea of not guilty and was tried by a jury which found him guilty as charged with a recommendation of life imprisonment. *Ibid.*

§ 30. Due Process in Trial in General.

North Carolina has fully recognized its obligation to protect every right guaranteed by the state and federal constitution to those it accuses of crime. *S. v. White*, 220.

Defendant was not denied the right of a speedy trial where the State was granted a continuance to the next term due to the illness of a witness. *S. v. Cavallaro*, 480.

§ 31. Right of Confrontation and Access to Evidence.

The Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the States by the Fourteenth Amendment. *S. v. Fox*, 277.

The admission in a joint trial of nontestifying defendant's confession which implicates his codefendant is a violation of the codefendant's right of cross-examination. *Ibid.*

§ 32. Right to Counsel.

Confrontation for identification is a "critical stage" of pretrial proceedings requiring the presence of counsel unless waived. *S. v. Wright*, 84.

Indigent defendant's failure to request counsel during in-custody questioning is not a waiver of the right to counsel where law officers fail to explain to defendant that he was entitled to counsel during the interrogation. *S. v. Thorpe*, 457.

Evidence is sufficient to show that defendant understandingly consented to stand in police lineup without counsel and that lineup was not inherently unfair to defendant. *S. v. Williams*, 328.

§ 33. Self-Incrimination.

Privilege against self-incrimination not violated by the seizure and chemical analysis of defendant's clothing. *S. v. Colson*, 295.

§ 37. Waiver of Constitutional Guaranties.

Mental capacity of the defendant, whether or not he is in custody, the presence or absence of mental coercion without physical torture or threats, are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights. *S. v. Wright*, 84.

Courts indulge every reasonable presumption against a waiver of constitutional rights. *S. v. Stokes*, 409.

Waiver of constitutional rights may be made orally and without advice of counsel. *Ibid.*

Defendant's consent to a search of his home dispensed with the necessity of a search warrant. *S. v. Colson*, 295.

One may voluntarily waive his right to counsel at a police lineup. *S. v. Williams*, 328.

CONTRACTS.

§ 1. Nature and Essentials of Contracts in General.

Laws in force at the time of execution of a contract become a part thereof. *Pike v. Trust Co.*, 1.

CONTRACTS—Continued.

§ 6. Contracts Against Public Policy, Generally.

When an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in G.S. 87-1, he may not recover for the owner's breach of contract, but the innocent owner may maintain an action for breach of the contract by the unlicensed contractor. *Builders Supply v. Midyette*, 264.

§ 12. Construction and Operation of Contracts, Generally.

The heart of a contract is the intention of the parties. *Pike v. Trust Co.*, 1.

§ 29. Measure of Damages for Breach of Contract.

Plaintiff could recover only nominal damages in action for breach of agreement that he would be given opportunity to purchase property at a judicial resale. *Pike v. Trust Co.*, 1.

Proof of breach of a contract entitles plaintiff to nominal damages at least. *Builders Supply v. Midyette*, 264.

CORONERS.

In homicide prosecution, the court properly refused to instruct on the statutory duties of coroners as set forth in G.S. 152-7. *S. v. Colson*, 295.

CORPORATIONS.

§ 4. Authority and Duties of Stockholders and Directors; Meetings and Minutes.

The minutes of a corporation are the best evidence of its acts; but where no minutes were made of a particular meeting, the proceedings may be proved by parol testimony. *Realty Agency v. Duckworth & Shelton*, 243.

§ 12. Transactions Between Corporation and its Officers and Agents.

Contract between corporation and adversely interested directors may be validated by a majority of the voting shares. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 243.

An officer of a corporation has no right to compensation for services rendered the corporation in the absence of a specific contract to pay for them. *Ibid.*

§ 27. Liability of Corporation for Torts.

Punitive damages may be awarded against a corporate employer for wilful and malicious assault by an employee acting in the course of his employment. *Clemmons v. Ins. Co.*, 416.

COUNTIES.

§ 1. Nature and Function and Legislative Control and Supervision.

Counties possess only such powers and delegated authority as the General Assembly may confer upon them. *Harris v. Board of Comrs.*, 343.

§ 2. Governmental and Private Powers.

In levying an additional tax to supplement teachers' salaries pursuant to G.S. 115-80(a), the county acts as an administrative agency of the State. *Harris v. Board of Comrs.*, 343.

§ 3. County Commissioners, Duties and Authority.

G.S. 115-80(a) authorizes a board of commissioners to levy a tax on property to supplement teachers' salaries without approval of the electorate. *Harris v. Board of Comrs.*, 343.

CRIME AGAINST NATURE.

§ 2. Prosecutions.

An indictment for a crime against nature must state with exactitude the name of the person with whom or against whom the offense was committed. *S. v. Stokes*, 409.

CRIMINAL LAW.

§ 4. Distinction Between Crimes, Misdemeanors and Penalties.

Punishment is not an ingredient of the offense. *S. v. Stafford*, 519.

§ 5. Mental Capacity in General.

The test of mental responsibility is the capacity of defendant to distinguish between right and wrong. *S. v. Propst*, 62.

§ 6. Mental Capacity as Affected by Intoxicants.

Involuntary drunkenness is not a legal excuse for crime but it may negative the existence of a specific intent or premeditation. *S. v. Propst*, 62.

§ 13. Jurisdiction in General.

A valid warrant or indictment is an essential of jurisdiction. *S. v. Stokes*, 409.

§ 15. Venue.

Trial court properly denies Negro defendant's motion for change of venue where there is no showing that jurors formed an opinion as to defendant's guilt or innocence of rape because of widespread pretrial publicity. *S. v. Ray*, 556.

§ 23. Plea of Guilty.

A plea of guilty standing alone does not waive a jurisdictional defect. *S. v. Stokes*, 409.

§ 24. Plea of Not Guilty.

A plea of not guilty puts in issue every essential element of the crime charged, including the identity of the person on trial as the person named in the indictment. *S. v. Lewis*, 438.

§ 25. Plea of Nolo Contendere.

A plea of nolo contendere waives all defenses except the sufficiency of the indictment. *S. v. Stokes*, 409.

§ 26. Plea of Former Jeopardy.

Fifth Amendment protection against double jeopardy has no application to increased punishment in a second trial resulting from defendant's successful attack upon his first conviction. *S. v. Stafford*, 519.

§ 29. Suggestion of Mental Incapacity to Plead.

The trial court has the duty to conduct a hearing into defendant's capacity to stand trial upon his counsel's suggestion that defendant is mentally incompetent to plead to the indictment or assist in his defense. *S. v. Propst*, 62.

The practice of submitting to the jury an issue as to the present mental capacity of defendant simultaneously with the issue of his guilt or innocence of the offense charged is expressly disapproved by the Supreme Court. *Ibid.*

§ 33. Facts in Issue and Relevant to Issues in General.

In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. *S. v. Sneeden*, 498.

CRIMINAL LAW—Continued.

§ 40. Evidence and Record at Former Trial or Proceeding.

Where defendant's plea of guilty in a homicide prosecution is set aside in a post-conviction hearing on the ground that defendant did not knowingly and understandingly enter the plea, testimony in a subsequent trial relating to such void plea is incompetent for any purpose, and it is prejudicial error to permit the solicitor to cross-examine defendant, for purposes of impeachment, as to his plea of guilty in the first trial. *S. v. Alford*, 125.

Findings in a habeas corpus proceeding that defendant is in fact the person named in the indictment is not res judicata as to that question upon defendant's retrial, and the court's refusal to admit defendant's evidence that he is not the person named in the indictment is error. *S. v. Lewis*, 438.

§ 42. Articles and Clothing Connected With the Crime.

Clothing, handwriting samples, fingerprints, etc. are identifying characteristics and may be introduced into evidence. *S. v. Wright*, 84; *S. v. Peele*, 106.

Clothing taken by officers from the person of defendant as an incident to a lawful arrest is not gained by an unlawful search and seizure, and the clothing and testimony of the results of a chemical analysis of bloodstains found thereon are properly admitted into evidence. *Ibid.*

The admission of clothing worn by defendants when arrested and expert testimony as to the results of an examination of the clothing is held proper. *S. v. Shedd*, 95.

In rape prosecution defendant's bloodstained sweater was properly admitted into evidence. *S. v. Ray*, 556.

Privilege against self-incrimination is not violated by the seizure and chemical analysis of defendant's clothing. *S. v. Colson*, 295.

In rape prosecution, a rifle found in defendant's possession is properly admitted into evidence where it is shown to have been used in connection with the crime charged. *S. v. Sneeden*, 498.

§ 50. Expert and Opinion Testimony in General.

In this prosecution for first degree murder, a coroner-mortician was a competent witness to testify as to cause of death of the victim. *S. v. Howard*, 186.

§ 58. Evidence in Regard to Handwriting.

Clothing, handwriting samples, fingerprints, etc. are identifying characteristics and may be introduced into evidence. *S. v. Peele*, 106; *S. v. Wright*, 84.

§ 60. Evidence in Regard to Fingerprints.

Clothing, handwriting samples, fingerprints, etc. are identifying characteristics and may be introduced into evidence. *S. v. Peele*, 106; *S. v. Wright*, 84.

To warrant a conviction, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed under such circumstances that they could only have been impressed at the time the crime was committed. *S. v. Smith*, 159.

§ 66. Evidence of Identity by Sight.

Confrontation for identification is a "critical stage" of pretrial proceedings requiring the presence of counsel unless waived. *S. v. Wright*, 84.

Testimony that defendant was identified by the prosecuting witness at a police lineup is competent and properly admissible, there being no showing that defendant's constitutional rights were violated. *S. v. Williams*, 328.

Failure of trial judge to hold voir dire hearing and to make specific findings of fact concerning the conduct of a police identification lineup and de-

fendant's waiver of counsel thereat, while not approved, will be deemed harmless error in this robbery prosecution. *Ibid.*

§ 68. Other Evidence of Identity.

In prosecution of Negro for rape, admission of testimony that hair possessing Negro characteristics was found in prosecutrix' automobile where offense took place is proper. *S. v. Ray*, 556.

§ 71. Shorthand Statement of Facts.

Testimony by prosecutrix that defendant "raped" her is held competent as a shorthand statement of fact. *S. v. Sneeden*, 498.

§ 73. Hearsay Testimony in General.

Statements of an accomplice made in defendant's presence are incompetent as hearsay where defendant verbally assented thereto and told officers all the facts included in such statements. *S. v. Lewis*, 438.

§ 74. Confessions.

Miranda v. Arizona, 384 U.S. 436, is not applicable to a trial begun prior to 13 June 1966. *S. v. Vickers*, 311.

§ 75. Tests of Voluntariness of Confessions; Admissibility in General.

Admissions to police officers are not rendered incompetent solely because defendant was under arrest when they were made. *S. v. Vickers*, 311.

A general objection is sufficient to challenge the admissibility of a confession. *Ibid.*

Error in admission of unlawfully obtained confession is cured by defendant's testimony as to the same facts where the State produced sufficient competent evidence, outside the confession, to submit case to jury. *S. v. McDaniel*, 574.

Confessions obtained by police officer's suggestion of hope of favorable treatment are inadmissible. *S. v. Fox*, 277.

In prosecution begun after the decision in *Escobedo v. Illinois*, 378 U.S. 478, but before the decision in *Miranda v. Arizona*, 384 U.S. 436, if the defendant, after requesting an attorney, was not given an opportunity to confer with him prior to making his confession, the confession is inadmissible in evidence against him. *Ibid.*

Miranda v. Arizona does not apply to confessions obtained prior to 13 June 1966 when offered at trial or retrial beginning thereafter where law enforcement officers relied upon and complied with constitutional standards applicable at the time the confessions were made. *S. v. Lewis*, 438.

A general objection is sufficient to challenge admission of a proffered confession if timely made. *S. v. Edwards*, 431.

Confession obtained during in-custody interrogation is rendered incompetent where officers did not advise indigent, uneducated defendant of his right to counsel during the interrogation. *S. v. Thorpe*, 457.

The confession or incriminating statements of a defendant are admissible in evidence when *Miranda v. Arizona* has been complied with. *S. v. Shedd*, 95.

Statements by defendants at crime scene are admissible where *Miranda* warnings given and statements did not result from in-custody interrogation. *Ibid.*

§ 76. Determination and Effect of Admissibility of Confession.

Courts are no longer permitted to presume that a confession is voluntary unless the contrary is shown. *S. v. Thorpe*, 457.

CRIMINAL LAW—Continued.

Upon defendant's general objection to the admission of a confession, the trial court must excuse the jury and hear evidence as to the voluntariness of the confession. *S. v. Edwards*, 431.

Mental capacity of the defendant, whether or not he is in custody, the presence or absence of mental coercion without physical torture, or threats, are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights. *S. v. Wright*, 84.

Whether conduct of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law reviewable on appeal. *S. v. Fox*, 277.

Where the evidence of the State and the defendant upon the voir dire was sharply conflicting as to whether defendant had requested an attorney before or after making a confession, the failure of the trial judge to make a finding of fact with respect to this material point is error and warrants a new trial. *Ibid.*

§ 79. Acts and Declarations of Companions and Coconspirators.

Statements of an accomplice made in defendant's presence are incompetent as hearsay where defendant verbally assented thereto and told officers all the facts included in such statements. *S. v. Lewis*, 438.

§ 83. Competency of Husband or Wife to Testify for or Against Spouse.

Where former spouse is prosecuted for a felony, the divorced spouse is a competent witness to testify for the State as to defendant's conduct during the marriage when the alleged felony was being committed. *S. v. Alford*, 125.

§ 84. Evidence Obtained by Unlawful Means.

A prisoner may not attack his conviction in a post-conviction proceeding upon the asserted ground that the trial court admitted evidence which was obtained by unconstitutional search and seizure. *S. v. White*, 220.

A key taken from the pocket of one defendant after his arrest at the scene of a storebreaking and attempted safecracking which unlocked an automobile parked nearby was properly admitted into evidence. *S. v. Shedd*, 95.

Articles found in defendant's automobile 100 yards from crime scene were seized as incident to lawful arrest. *Ibid.*

"Poison tree" doctrine applies to in-court admission which is "fruit" of unconstitutionally obtained and erroneously admitted evidence. *S. v. McDaniel*, 574.

Where prosecutrix' out-of-court identification of the defendant was made during a "critical stage" of the proceedings under circumstances whereby defendant was denied the right to counsel, her in-court identification of the defendant is incompetent unless it can be shown to have had an origin independent of the illegal confrontation. *S. v. Wright*, 84.

Even if lineup had deprived defendant of his constitutional rights, the in-court identification of defendant was admissible when such identification was based on circumstances independent of the lineup. *S. v. Williams*, 328.

Defendant's evidence is not rendered incompetent by G.S. 15-27 unless it was obtained in the course of a search under conditions requiring a search warrant and without a legal search warrant. *S. v. Colson*, 295.

Where defendant voluntarily revealed to officers his bloody underclothing, the officers lawfully seized the clothing without a warrant and the clothing was properly admitted in evidence. *Ibid.*

CRIMINAL LAW—Continued.

Where seizure of defendant's bloodstained sweater is lawful, the sweater is properly admitted. *S. v. Ray*, 556.

Defendant's bloody shirt worn on the day of the homicide is properly admitted into evidence where the shirt was seized while in plain view of the officer. *S. v. Howard*, 186.

Clothing taken by officers from the person of defendant as an incident to a lawful arrest is not gained by an unlawful search and seizure, and the clothing and testimony of the results of a chemical analysis of bloodstains found thereon are properly admitted into evidence. *S. v. Peele*, 106.

§ 86. Credibility of Defendant.

Defendant may not be impeached by a void plea of guilty entered in the first trial. *S. v. Alford*, 125.

§ 91. Time of Trial and Continuance.

Defendant was not denied the right to a speedy trial where the State was granted a continuance to the next term due to the illness of a witness. *S. v. Cavallaro*, 480.

§ 92. Consolidation and Severance of Counts.

It has been a general rule in this State that whether defendants jointly indicted would be tried jointly or separately was in the sound discretion of the trial court. *S. v. Fox*, 277.

§ 95. Admission of Evidence Competent for Restricted Purpose.

Under the decision in *Bruton v. United States*, the admission in a joint trial of nontestifying defendant's confession which implicates his codefendant is a violation of the codefendant's right of cross-examination. *S. v. Fox*, 277.

§ 99. Expression of Opinion on Evidence by Court.

The questions asked witnesses by the court in this homicide prosecution *are held* not to constitute an expression of opinion by the judge, the questions serving only to clarify and promote a proper understanding of the testimony. *S. v. Colson*, 295.

§ 102. Argument and Conduct of Counsel or Solicitor.

The trial judge has the discretion to control the argument of counsel to the jury. *S. v. Peele*, 106.

§ 104. Consideration of Evidence on Motion for Nonsuit.

Consideration of evidence on motion for nonsuit. *S. v. Lipscomb*, 436.

Where each defendant in a consolidated action offers evidence, the court must consider all of the evidence in passing upon the motions for nonsuit, and each defendant's motion must be considered in the light of that offered by his co-defendant. *S. v. Howard*, 186.

§ 111. Form and Sufficiency of Instructions in General.

Defendant is not prejudiced by trial judge's inquiry to counsel at the end of the charge if there was "anything further gentlemen." *S. v. Howard*, 186.

§ 119. Requests for Instructions.

Even if a defendant is entitled to request an instruction, the court is not required to give it verbatim, it being sufficient if given in substance. *S. v. Howard*, 186.

CRIMINAL LAW—Continued.

§ 127. Arrest of Judgment.

Defendant may file in Supreme Court a motion in arrest of judgment of Superior Court. *S. v. Stokes*, 409.

Motion in arrest of judgment must be based on matters appearing on the face of the record proper or on matters which should, but do not, appear. *Ibid.*

§ 130. New Trial for Misconduct of or Affecting Jury.

Motion for a mistrial or a new trial based on misconduct affecting the jury is addressed to the discretion of the trial judge. *S. v. Sneeden*, 498.

A criminal verdict will not be disturbed because of a conversation between a juror and a third person when it does not appear that defendant was prejudiced thereby. *Ibid.*

Mistrial was properly denied where bailiff informed jury foreman that possibility of parole had nothing to do with the evidence. *Ibid.*

Making and use of trial notes by jury is not misconduct. *Ibid.*

Record held not to disclose facts requiring mistrial as a matter of law on the ground that a State's witness discussed the case within hearing of the jury. *S. v. Shedd*, 95.

§ 135. Judgment and Sentence in Capital Cases.

In *Witherspoon v. Illinois*, 391 U.S. 510, the United States Supreme Court held that a sentence of death may not be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *S. v. Spence*, 536.

Defendants sentenced to death by a jury from which veniremen were excluded for cause because they voiced general objection to the death penalty are entitled to new trial as to guilt and penalty. *Ibid.*

U. S. v. Jackson, 390 U.S. 570, is not authority for holding that capital punishment may not be imposed under any circumstances in this State. *Ibid.*

The statute setting the punishment for rape as death unless the jury recommends life imprisonment, and the statute allowing defendant to plead guilty to a charge of rape, do not place an unconstitutional burden on the right of defendant to plead not guilty and to demand a jury trial. *S. v. Peele*, 106.

In a prosecution for rape, defendant's rights to plead not guilty and to demand a jury trial were not deterred by a fear of the death penalty, where defendant entered a plea of not guilty and was tried by a jury which found him guilty as charged with a recommendation of life imprisonment. *Ibid.*

§ 138. Severity of Sentence and Determination Thereof.

Upon retrial and conviction of an accused whose earlier conviction for same offense was set aside because of a constitutional defect in the first trial, the trial court may impose a sentence severer than the one vacated; however, defendant must be given due credit for all time served under the previous sentence. *S. v. Stafford*, 519.

Severer sentence upon retrial violates neither equal protection clause nor provision against double jeopardy. *Ibid.*

In determining sentence to be imposed upon defendant, any evidence bearing upon his conduct, character and propensities should be considered. *Ibid.*

Trial court may consolidate for judgment two or more counts charging distinct offenses and pronounce one sentence, but the court is not authorized to enter a judgment in gross in excess of the greatest statutory penalty applicable to any of the counts. *Ibid.*

CRIMINAL LAW—Continued.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases.

When the Supreme Court grants certiorari to review a decision of the Court of Appeals, only the decision of that Court is presented for review, and inquiry is restricted to rulings of the Court of Appeals specifically assigned as error. *S. v. Williams*, 328.

Appeal as a matter of right from the Court of Appeals to the Supreme Court is allowable where a substantial constitutional question is involved. *S. v. Colson*, 295.

Upon appeal, the Supreme Court will not pass upon a constitutional question not raised and passed upon in the Court of Appeals, but where appellant has alleged and shown the involvement of a substantial constitutional question, the Supreme Court may pass upon any or all assignments of error, constitutional or otherwise. *Ibid.*

Appellant seeking to appeal to the Supreme Court from a decision of the Court of Appeals as a matter of right on the ground that a constitutional question is involved must allege and show the involvement of such question or suffer dismissal. *S. v. Cavallaro*, 480.

Assignments of error alleged in the Court of Appeals which are not brought forward and argued before the Supreme Court are deemed abandoned. *Ibid; S. v. Wright*, 380.

§ 147. Motions in Supreme Court.

A defendant has a right to file in the Supreme Court a written motion in arrest of judgment on the ground of insufficiency of the indictment. *S. v. Stokes*, 409.

§ 150. Right of Defendant to Appeal.

In this State an aggrieved party has the absolute and unfettered right to appeal, and the Supreme Court has been alert to protect this right. *S. v. Stafford*, 519.

Defendant should not be penalized for exercising a constitutional right or his right of appeal. *Ibid.*

§ 156. Certiorari.

The State, as well as a prisoner, may petition for certiorari to review a post-conviction judgment. *S. v. White*, 220.

§ 157. Necessary Parts of Record Proper.

The appellate court must have in the record before it a complete account of the action by the trial court of which appellant complains. *S. v. Williams*, 328.

The evidence in a case is not part of the record proper. *S. v. Stokes*, 409.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted.

An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court. *S. v. Williams*, 328.

There is a presumption that the trial judge acted fairly and impartially, and defendant has the burden to overcome this presumption. *S. v. Stafford*, 519.

Solicitor may not repudiate accuracy of agreed case on appeal by letter to Supreme Court. *S. v. Shedd*, 95.

CRIMINAL LAW—Continued.

§ 161. Form and Requisites of Exceptions and Assignments of Error.

Assignments of error not supported by an exception will not be considered by the Supreme Court. *S. v. Colson*, 295.

§ 162. Objections, Exceptions, and Assignments of Error to Evidence, and Motions to Strike.

Rules relating to admission of incompetent testimony not objected to and to a motion to strike such testimony when its incompetency becomes apparent. *S. v. Williams*, 328.

Ordinarily an objection must be interposed when evidence is offered and received. *S. v. Edwards*, 431.

§ 165. Exceptions and Assignments of Error to Remarks of Court and Argument of Solicitor During Trial.

Objection to portions of the State's argument to the jury should be made before the case is submitted to the jury. *S. v. Peele*, 106.

§ 166. The Brief.

Exceptions not brought forward in an assignment of error and discussed in the brief are deemed abandoned. *S. v. Ray*, 556; *S. v. Peele*, 106.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence.

The rule that an objection to the admission of testimony is waived when like evidence is thereafter admitted without objection or is subsequently offered by the objecting party himself is not applicable where the objecting party offers the evidence for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question. *S. v. Williams*, 328.

Error in admission of unconstitutionally obtained evidence in homicide prosecution is rendered harmless by defendant's testimony as to the same facts where the State introduces sufficient competent evidence to permit jury to find defendant guilty of homicide. *S. v. McDaniel*, 574.

§ 175. Review of Findings.

Findings of fact by the trial judge are binding upon appeal if supported by evidence. *S. v. Wright*, 380.

§ 181. Post-Conviction Hearing.

Alleged errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time or reasserted in post-conviction proceedings. *S. v. White*, 220.

The State, as well as a prisoner, may petition for certiorari to review a post-conviction judgment. *Ibid.*

A convicted defendant may appeal and assert violation of his constitutional rights in post-conviction proceeding, or he may accept his sentence and rely upon protection from double jeopardy. *S. v. Stafford*, 519.

DAMAGES.

§ 1. Nominal Damages.

Nominal damages defined. *Potts v. Howser*, 49.

§ 2. Compensatory Damages in General.

Plaintiff could recover only nominal damages in his action for breach of

DAMAGES—Continued.

an agreement that he would be given opportunity to purchase at a judicial resale. *Pike v. Trust Co.*, 1.

Proof of the breach of an implied contract entitles plaintiff to nominal damages at least. *Builders Supply v. Midyette*, 264.

§ 3. Compensatory Damages for Injury to Person.

Evidence tending to show that defendant's negligence aggravated plaintiff's pre-existing infirmity renders defendant liable only to the extent that his wrongful act proximately aggravated plaintiff's condition. *Potts v. Howser*, 49.

§ 11. Punitive Damages.

Punitive damages may not be awarded unless otherwise a cause of action exists. *Clemmons v. Ins. Co.*, 416.

To recover punitive damages the complaint must allege facts showing the aggravating circumstances which would justify the award. *Ibid.*

§ 12. Necessity for and Sufficiency of Pleading of Damages.

Exclusion of evidence relating to the insured's loss of wages is proper in the absence of allegations as to such loss. *Perkins v. Ins. Co.*, 134.

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages.

Competency and relevancy of evidence as to plaintiff's injuries ruled upon. *Potts v. Howser*, 49.

§ 16. Instruction on Measure of Damages.

Evidence tending to show that the injuries received by plaintiff in the accident aggravated plaintiff's pre-existing infirmity of fibrositis is a substantial feature of the case, and the court should have instructed the jury as to the legal significance of defendant's negligent acts which aggravated the pre-existing condition. *Potts v. Howser*, 49.

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

The Wrongful Death Act does not provide for the recovery of punitive or nominal damages but limits recovery to the pecuniary loss resulting from the death. *Stetson v. Easterling*, 152.

Complaint alleging that death of an infant born alive was caused by prenatal injury is subject to demurrer for failure to allege that the child's death resulted in pecuniary loss to its estate. *Stetson v. Easterling*, 152.

The statutory action for wrongful death vests in the personal representative of the deceased. *Ibid.*

§ 7. Determination of Damages.

In wrongful death action plaintiff must show that decedent's estate suffered a net pecuniary loss. *Greene v. Nichols*, 18.

EJECTMENT.

§ 7. Presumptions, Burden of Proof, and Pleadings.

Allegations of the complaint held to state a cause of action in ejectment. *Jones v. Warren*, 166.

EMINENT DOMAIN.

§ 1. Nature and Extent of Power.

The constitutional prohibition against taking the private property of a citizen for public use without payment of just compensation is self-executing and is not subject to impairment by legislation. *Fishing Pier v. Carolina Beach*, 362.

Landowner affected by municipality's construction of a beach erosion seawall is not barred under local statute from asserting claim against the municipality for a taking of his property. *Ibid.*

§ 13. Actions by Owner for Compensation or Damages.

A citizen may sue the State or one of its subdivisions, namely, a municipality, for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy. *Fishing Pier v. Carolina Beach*, 362.

EVIDENCE.

§ 33. Hearsay Evidence.

Testimony relating to a medical report on plaintiff's injuries is incompetent as hearsay to prove the truth of the report. *Potts v. Howser*, 49.

§ 44. Nonexpert Opinion Evidence as to Physical Ability and Health.

Testimony of plaintiff's former wife concerning plaintiff's physical condition and his complaints as to matters of health prior to an accident is competent. *Potts v. Howser*, 50.

§ 50. Medical Testimony.

Evidence of plaintiff's pre-existing injuries having a causal relation to his present injuries is admissible. *Potts v. Howser*, 49.

EXECUTORS AND ADMINISTRATORS.

§ 6. Title and Control of Assets.

Title to land of decedents does not vest in their executors but vests in their heirs at law or devisees. *Wells v. Dickens*, 203.

GRAND JURY.

§ 3. Challenge to Composition of Grand Jury.

Defendant has burden to establish racial discrimination in selection of grand jury, but once prima facie case is made, burden shifts to the State. *S. v. Wright*, 380; *S. v. Ray*, 556.

The State may rely upon witnesses called by defendant to rebut defendant's prima facie case. *S. v. Wright*, 380.

Defendant's evidence that sources used in compiling jury list designated names of persons named therein is insufficient to make prima facie showing of racial discrimination. *S. v. Wright*, 380; *S. v. Ray*, 556.

A jury list is not discriminatory merely because it is made from a tax list. *S. v. Ray*, 556.

Jury list containing the names of over half the population of the county is some evidence in itself that there was no discrimination in preparing the list. *Ibid.*

Any inference of designed exclusion of Negroes from grand jury list was rebutted by defendant's evidence that those who compiled jury list endeavored

GRAND JURY—Continued.

to take names of white and Negro persons from the source material in approximate proportion to the number of each race on the tax books. *S. v. Wright*, 380.

Refusal to permit defendant to examine scrolls in jury box to determine race of each person named therein is within court's discretion. *Ibid.*

GUARDIAN AND WARD.

§ 4. Sale of Ward's Lands.

The guardian may take no action toward the sale of the ward's property without order and approval of the court. *Pike v. Trust Co.*, 1.

§ 7. Action by or Against Guardian or Ward.

Guardian held not personally liable on an agreement that his ward's property would be resold under a judicial sale. *Pike v. Trust Co.*, 1.

HABEAS CORPUS.

§ 2. Determination of Legality of Restraint.

Sole question for determination upon habeas corpus hearing for alleged unlawful imprisonment is whether petitioner is then being unlawfully deprived of his liberty. *S. v. Lewis*, 438.

§ 4. Review.

No appeal lies from a habeas corpus judgment. *S. v. Lewis*, 438.

HOMICIDE.

§ 4. Murder in the First Degree.

A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and the intentional use of a deadly weapon as a weapon is necessary to give rise to presumptions of unlawfulness and of malice. *S. v. Propst*, 62.

§ 14. Presumptions and Burden of Proof.

When defendant pleads not guilty to first degree murder, the State must satisfy the jury that defendant unlawfully killed deceased with malice and in execution of a specific intent to kill formed after premeditation and deliberation. *S. v. Propst*, 62.

Defendant's plea of not guilty puts in issue every essential element of the crime of first degree murder. *Ibid.*

§ 15. Relevancy and Competency of Evidence in General.

The opinion of a nonmedical witness as to the cause of death in a homicide prosecution is admissible. *S. v. Howard*, 186.

§ 21. Sufficiency of Evidence and Nonsuit.

In this consolidated prosecution of two defendants for first-degree murder arising out of the perpetration of a robbery, there is sufficient evidence to withstand defendants' motion for nonsuit. *S. v. Howard*, 186.

§ 25. Instructions on First Degree Murder.

Evidence that defendant was intoxicated at the time of killing deceased should have been submitted to the jury, with instructions as to the law arising

HOMICIDE—Continued.

thereon, since it related to the issue of whether defendant was so intoxicated as to negative the existence of a specific intent to kill. *S. v. Propst*, 62.

Trial judge's instruction in homicide prosecution held not to have assumed that the facts surrounding the proximate cause of death were proven. *S. v. Howard*, 186.

§ 29. Instruction on Right of Jury to Recommend Life Imprisonment.

In prosecution for murder in the first degree, trial judge properly instructed jury on their right to recommend life imprisonment. *S. v. Howard*, 186.

INDICTMENT AND WARRANT.

§ 2. Return of Indictment by Duly Constituted Grand Jury.

An indictment returned by a grand jury not legally constituted is not a valid indictment. *S. v. Ray*, 556.

§ 13. Bill of Particulars.

A bill of particulars cannot cure a defective indictment. *S. v. Stokes*, 409.

INFANTS.

§ 4. Right of Infant to Recover for Torts.

A child born alive has a right of action to recover for prenatal injuries negligently inflicted upon him. *Stetson v. Easterling*, 152.

INSANE PERSONS.

§ 4. Control, Management and Sale of Estate by Guardian.

Guardian must seek court's approval in order to sell the property of his ward. *Pike v. Trust Co.*, 1.

The guardian of an incompetent cannot make an election on behalf of the ward to take under or against a will without the direction and approval of a judge of the Superior Court. *Wells v. Dickens*, 203.

§ 7. Liability of Guardian.

Guardian held not personally liable upon promise that ward's property would be resold under judicial sale. *Pike v. Trust Co.*, 1.

§ 10. Actions Against Insane Persons and Validity of Judgment.

The doctrine of election can be enforced against persons under disability. *Wells v. Dickens*, 203.

INSURANCE.

§ 1. Control and Regulation in General.

Institution of an action to collect a civil penalty imposed by the Commissioner of Insurance under G.S. 58-44.6 in the name of the State on the relation of the Commissioner does not vitiate the proceeding. *Lanier v. Vines*, 486.

Commissioner of Insurance may be given only such judicial powers as may be reasonably necessary to accomplish the purpose for which the Department of Insurance was created. *Ibid.*

§ 2. Control and Regulation of Brokers and Agents.

The granting of judicial power to the Commissioner of Insurance to re-

INSURANCE—Continued.

voke the license of an insurance agent is constitutional; however, the attempted grant to the Commissioner of judicial power to impose a civil penalty violates N. C. Constitution Art. IV, § 3. *Lanier v. Vines*, 486.

§ 43.1. Hospital and Surgical Insurance.

A hospital expense policy in which the insurer agrees to pay "expense actually incurred" contemplates expenses for which the insured has become legally liable. *Graham v. Ins. Co.*, 115.

Where the insuring clause provides that the insurer will pay the insured for certain items of hospital expense actually incurred, notations on the back of the policy and on the top of the first page that the policy provides benefits for "loss due to hospital confinement" do not change the contract from one of insurance against liability to one of indemnity for expenses actually paid. *Ibid.*

§ 44. Actions to Recover Benefits.

Insured is allowed recovery on hospital expense policy for TB treatment in a State hospital. *Graham v. Ins. Co.*, 115.

§ 80. Compulsory Insurance; Vehicle Financial Responsibility Act.

The manifest purpose of the 1957 Vehicle Responsibility Act is to provide protection to persons injured or damaged by the negligent operation of a motor vehicle by requiring that every motorist maintain continuously proof of financial responsibility. *Perkins v. Ins. Co.*, 134.

§ 95. Cancellation—Vehicle Financial Responsibility Act.

Failure of insurer to give insured 15 days notice of termination of policy continues the policy in force, since there was no evidence that the insured rejected the offer of renewal. *Perkins v. Ins. Co.*, 134.

Where insured has constituted the premium finance company his attorney-in-fact to cancel the policy, mailing by the finance company of notice requesting immediately cancellation is equivalent to cancellation by the insured and effected cancellation ipso facto. *Hayes v. Indemnity Co.*, 73.

Purpose of the notice and warning required by G.S. 20-310(a) is to confront the insured with the fact that operation of a car without maintaining proof of financial responsibility is a misdemeanor. *Perkins v. Ins. Co.*, 134.

JOINT VENTURES.

A joint adventure is in the nature of a partnership and is governed by substantially the same rules as a partnership. *Pike v. Trust Co.*, 1.

Each member of a joint adventure is both an agent for his co-adventurer and a principal for himself. *Ibid.*

An agreement between owners of a one-half undivided interest in realty and the guardian of the incompetent owner of the other one-half interest to sell the property does not create a joint adventure so that in an action against all the parties to the agreement evidence admissible against one defendant may be considered against the others. *Ibid.*

JUDGMENTS.

§ 15. Form and Effect of Default Judgment.

Plaintiff has a right to recover at least nominal damages on a judgment by default and inquiry and the trial court should have instructed the jury with reference thereto. *Potts v. Howser*, 49.

JUDGMENTS—Continued.

§ 27. Setting Aside Judgment for Fraud.

To sustain collateral attack on a judgment for fraud, the complaint must allege facts constituting extrinsic or collateral fraud in the procurement of the judgment. *Scott v. Cooperative Exchange*, 179.

An action to set aside a judgment procured by intrinsic fraud must be by motion in the cause in which the judgment was rendered. *Ibid.*

Independent action may not be maintained to set aside judgment allegedly procured by use of a false statement of account which did not give plaintiff credit for payments. *Ibid.*

§ 35. Conclusiveness of Judgments and Bar in General.

Determination of the legality of the jury box in the case of one defendant is not res judicata against a defendant charged in another indictment. *S. v. Wright*, 380.

§ 37. Matters Concluded in General.

Findings in a habeas corpus proceeding that defendant is in fact the person named in the indictment is not res judicata as to that question at defendant's trial. *S. v. Lewis*, 438.

JURY.

§ 1. Right to Trial by Jury.

The statute setting the punishment for rape as death unless the jury recommends life imprisonment, and the statute allowing defendant to plead guilty to a charge of rape, do not place an unconstitutional burden on the right of defendant to plead not guilty and to demand a jury trial. *S. v. Peele*, 106.

§ 7. Challenges.

A defendant on trial has the right to reject any juror for cause or within the limits of his peremptory challenges before the panel is completed. *S. v. Ray*, 556.

The State is entitled to challenge for cause prospective jurors who state they have moral and religious scruples against capital punishment which would make it impossible for them to return a death sentence. *S. v. Peele*, 106.

Where defendant did not challenge for cause or otherwise any jurors on the panel that tried him and did not exhaust his peremptory challenges, objection to the jury is not properly raised on appeal. *Ibid.*

Veniremen in capital case may not be excluded for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction. *S. v. Spence*, 536.

LARCENY.

§ 5. Presumptions and Burden of Proof.

In order for inference of guilt resulting from stolen property to arise, the possession should be so close in point of time to the theft as to render it unlikely that the possessor could have acquired the property honestly. *S. v. Jackson*, 594.

§ 7. Sufficiency of Evidence and Nonsuit.

Circumstantial evidence that defendant stole money from the purse of the prosecutrix is insufficient to support a finding of defendant's guilt of larceny on a previous occasion. *S. v. Smith*, 159.

LARCENY—Continued.

Evidence of defendant's guilt of felonious larceny is properly submitted to the jury upon testimony that money found in defendant's possession was identical to money stolen. *S. v. Jackson*, 594.

§ 8. Instructions.

Failure of trial court to instruct that money in defendant's possession must be identical to money stolen from home before inference of any guilt could arise from the unexplained possession of the money, held error. *S. v. Jackson*, 594.

LIMITATION OF ACTIONS.

§ 1. Nature and Construction of Statute of Limitation.

A statute of limitations should not be applied to cases not clearly within its provisions. *Fishing Pier v. Carolina Beach*, 362.

MASTER AND SERVANT.

§ 34. Scope of Employment in Action for Liability of Employer for Injuries to Third Persons.

An employer is generally liable for an assault committed by an employee as an incident to the employee's duties in the collection of accounts. *Clemmons v. Ins. Co.*, 416.

Allegations are held sufficient to state a cause of action against an insurance company for an assault committed by defendant's employee in the collection of premiums due on a policy issued by defendant. *Ibid.*

It is not necessary in order to hold an employer liable for assault to allege and prove that the employer authorized the assault. *Ibid.*

§ 79. Persons Entitled to Payment Under Compensation Act.

The words "dependent upon the deceased" in G.S. 97-2(12) refer to a legal, not an actual, dependency. *Hewett v. Garrett*, 356.

Where the deceased employee acknowledged the paternity of an illegitimate child, his discontinuance of support for the child did not work a forfeiture of the child's right to participate in benefits under the Compensation Act resulting from the death of the employee-father. *Ibid.*

MORTGAGES AND DEEDS OF TRUST.

§ 32. Deficiency Judgment and Personal Liability.

G.S. 45-21.38, which bars recovery of deficiency judgment on purchase-money notes secured by a mortgage or deed of trust, is applicable only to mortgages given by the vendee to the vendor and not to a note and deed of trust securing a third party lender. *Childers v. Parker's Inc.*, 256.

MUNICIPAL CORPORATIONS.

§ 4. Powers of Municipality in General.

A municipal redevelopment commission is a municipal corporation for the purpose of tax exemption. *Redevelopment Comm. v. Guilford County*, 585.

§ 43. Claims and Actions Against Municipality for Trespass and Damages to Lands.

Landowner affected by municipality's construction of a beach erosion seawall is not barred under local statute from asserting claim against the municipality for a taking of his property. *Fishing Pier v. Carolina Beach*, 362.

NEGLIGENCE.

§ 6. Res Ipsa Loquitur.

Res ipsa loquitur doctrine now applies to automobile cases. *Greene v. Nichols*, 18.

§ 8. Proximate Cause.

Where plaintiff passenger's evidence tends to show negligence by the driver of the automobile and by the railroad as proximate causes of the injuries complained of, nonsuit of the railroad is improper, since it may be exonerated from liability only if the total proximate cause of the accident is attributable to another. *Price v. R. R.*, 32.

§ 9. Foreseeability.

Reasonable foreseeability is an essential element of proximate cause. *Clarke v. Holman*, 425.

§ 27. Competency and Relevancy of Evidence.

The making of repairs to prevent future injuries is inadmissible to show antecedent negligence. *Price v. R. R.*, 32.

§ 29. Sufficiency of Evidence of Negligence.

Negligence need not be established by direct evidence, but may be inferred from the attendant facts and circumstances. *Greene v. Nichols*, 18.

PARENT AND CHILD.

§ 5. Right of Parent to Recover for Injuries to Child.

The right to recover for medical expenses incurred in the necessary treatment of his minor unemancipated child lies in the parent and not the child. *Price v. R. R.*, 32.

Contributory negligence of the wife while driving husband's family purpose automobile bars husband's right to recover against a third person for expenses incurred in the necessary treatment of his unemancipated children injured in the collision. *Ibid.*

PARTIES.

§ 2. Parties Plaintiff.

Where a cause of action is created by a statute which also provides who is to bring the action, only the persons so designated may sue. *Lanier v. Vines*, 486.

An action instituted in the name of the State on the relation of the party entitled to bring the action does not vitiate the proceeding. *Ibid.*

§ 3. Parties Defendant.

Testatrix' executors are not proper parties to an action to establish a trust in lands allegedly devised to defendant in breach of testatrix' contract to devise the property to plaintiff. *Wells v. Dickens*, 203.

PARTNERSHIP.

§ 1. Nature, Requisites and Distinctions.

A partnership is an association of two or more persons to carry on as coowners a business for profit, and may be formed by oral agreement. *Campbell v. Miller*, 143.

PARTNERSHIP—Continued.

A partnership is a partnership at will unless some agreement to the contrary can be proved. *Ibid.*

A joint adventure is in the nature of a partnership. *Pike v. Trust Co.*, 1.

§ 3. Rights, Duties and Liabilities of Partners Among Themselves.

Evidence reveals that the parties created a partnership at will which may be terminated by either party without subjecting himself to liability for breach of contract. *Campbell v. Miller*, 143.

§ 9. Dissolution of Partnership and Accounting.

Upon dissolution of a partnership, it continues until the winding up of its affairs is completed. *Campbell v. Miller*, 143.

PLEADINGS.

§ 19. Office and Effect of Demurrer Generally.

Office and effect of demurrer. *Clemmons v. Ins. Co.*, 416; *Redevelopment Comm. v. Guilford County*, 584.

§ 26. Demurrer for Failure of Complaint to State a Cause of Action.

A demurrer is properly sustained when plaintiff fails to allege facts stating a cause of action. *Scott v. Cooperative Exchange*, 179.

§ 29. Judgment on Demurrer.

When a demurrer is sustained, the action will be dismissed only if the allegations of the complaint affirmatively disclose a defective cause of action. *Harris v. Board of Comrs.*, 343.

§ 32. Motion to Amend Pleading.

Pleading may not be amended as matter of right after time for answering has expired. *Scott v. Cooperative Exchange*, 179.

Trial court may deny plaintiff's motion to amend the complaint. *Perkins v. Ins. Co.*, 134.

§ 38. Motion for Judgment on Pleadings.

Where the pleadings raise an issue of fact on any single material proposition, the motion for judgment on the pleadings is properly denied. *Jones v. Warren*, 166.

PROFESSIONS AND OCCUPATIONS.

The purpose of the statute prohibiting any contractor who has not passed an examination and secured a license from undertaking to construct a building costing $20,000 or more is to protect the public from incompetent builders. *Builders Supply v. Midyette*, 264.

QUASI CONTRACTS

§ 2. Action to Recover on Implied Contract.

Proof of the breach of an implied contract entitles plaintiff to nominal damages at least. *Builders Supply v. Midyette*, 264.

An unlicensed contractor who enters a construction contract in violation of G.S. 87-1 et. seq. may not recover the value of work and services furnished under the contract on the theory of quantum meruit, but such contractor may offset, as a defense against damages due the owner, any sums which the owner otherwise owes him. *Ibid.*

RAILROADS.

§ 5. Crossing Accidents.

A railroad grade crossing is in itself a warning of danger. *Price v. R. R.*, 32.

A railroad is under a duty to exercise reasonable care to maintain its crossings over public highways in a reasonably safe condition. *Ibid.*

A railroad company is under a duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety. *Ibid.*

Though a traveler and the railroad have equal rights to cross at a grade crossing, the traveler must yield the right of way to the railway company in the ordinary course of its business. *Ibid.*

Plaintiff's evidence that her automobile stalled on defendant railroad's grade crossing when it ran into a hole in the asphalt between the tracks and was struck by defendant's train *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in maintaining its crossing. *Ibid.*

Allegations that after the accident the railroad repaired holes in the crossing and removed an embankment which obstructed the view of defendant's tracks are properly stricken upon the defendant's motion. *Ibid.*

§ 6. Warning or Protective Devices at Crossings.

Allegation that there were no electrically controlled signals at the crossing is properly stricken upon defendant's motion where there is no showing that the crossing was so dangerous that persons could not use it with safety unless extraordinary protective means were used. *Price v. R. R.*, 32.

An allegation that there were no stop signs at the railroad track is properly stricken upon defendant's motion where there is no allegation that the road governing body has designated the grade crossing in question as a place where vehicles are required to stop pursuant to G.S. 20-143. *Ibid.*

§ 7. Injuries to Passengers in Automobiles at Crossing.

Negligence of driver ordinarily will not be imputed to passenger injured in grade crossing accident. *Price v. Railroad*, 32.

RAPE.

§ 1. Nature and Elements of Offense.

Rape is the carnal knowledge of a female forcibly and against her will. *S. v. Sneeden*, 498.

§ 4. Relevancy and Competency of Evidence.

Testimony by the prosecutrix that defendant "raped" her is held competent as a shorthand statement of fact. *S. v. Sneeden*, 498.

Weapon shown to have been used by defendant in connection with the crime of rape is held properly admitted. *Ibid.*

In rape prosecution, defendant's bloodstained sweater was properly admitted into evidence. *S. v. Ray*, 556.

§ 7. Verdict and Judgment.

The statute setting the punishment for rape at death unless the jury recommends life imprisonment, and the statute allowing defendant to plead guilty to a charge of rape, do not place an unconstitutional burden on the right of defendant to plead not guilty and to demand a jury trial. *S. v. Peele*, 106.

In a prosecution for rape, defendant's rights to plead not guilty and to

RAPE—Continued.

demand a jury trial were not deterred by a fear of the death penalty where defendant entered a plea of not guilty and was tried by a jury which found him guilty as charged with a recommendation of life imprisonment. *Ibid.*

REGISTRATION.

§ 3. Registration as Notice.

Registration is not constructive notice as to provisions not coming within the purview of the registration statutes. *Fishing Pier v. Carolina Beach*, 362.

SCHOOLS.

§ 1. Establishment, Maintenance, and Supervision in General.

The constitutional mandate requiring the General Assembly to provide for a general and uniform system of public schools contemplates a system of public schools sufficient to meet, within the bounds of available sources, the educational needs of the people of the State. *Harris v. Board of Comrs.*, 343.

§ 7. Taxation, Bonds and Allocation of Proceeds.

In action to restrain county commissioners from levying additional property tax to supplement teachers' salaries without approval of the electorate, findings supported by evidence that no funds derived from taxation would be used to supplement teachers' salaries constitute sufficient ground for denying temporary restraining order. *Harris v. Board of Comrs.*, 343.

Provisions of G.S. 115-80(a) authorizing commissioners to levy additional property tax to supplement teachers' salaries without vote of the people is held constitutional. *Ibid.*

SEARCHES AND SEIZURES.

§ 1. Search Without Warrant.

When defendant was arrested at a building with safecracking tools, officers had a right to search defendant's automobile, parked some 100 yards from the building, without a search warrant as incident to a lawful arrest. *S. v. Shedd*, 95.

Cigarettes which constituted evidence of the crime for which defendant was charged were not obtained as a result of an unlawful search and seizure where defendant's friend brought the cigarettes to the police to be given to defendant. *S. v. Ray*, 556.

In rape prosecution, seizure by officers of defendant's bloodstained sweater allegedly worn at the time of the offense was not unlawful where the owner of the home in which defendant was permitted to sleep rent-free voluntarily handed over the sweater to the officers. *Ibid.*

Clothing voluntarily exhibited to officers by defendant is lawfully seized without a warrant and is properly admitted into evidence. *S. v. Colson*, 295.

The Fourth Amendment secures from unreasonable search and seizure "mere evidence" as well as fruits or instrumentalities of the crime. *S. v. Howard*, 186.

Seizure of defendant's bloody shirt, worn on the day of the homicide, by an officer without search warrant is reasonable where the shirt was in plain view. *Ibid.*

The limits of reasonableness which are placed upon searches are equally applicable to seizures, and whether a search or seizure is reasonable is to be determined on the facts of the individual case. *Ibid.*

SEARCHES AND SEIZURES—Continued.

§ 2. Consent to Search Without Warrant.

Defendant's consent to a search of his home dispensed with the necessity of a search warrant. *S. v. Colson*, 295.

STATUTES.

§ 4. Construction in Regard to Constitutionality.

Every presumption is to be indulged in favor of the validity of a statute. *Sykes v. Clayton*, 398.

§ 5. General Rules of Construction.

Where a strict interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control. *Underwood v. Howland*, 473.

Words of a statute must be given their common and ordinary meaning unless another is apparent from the context or unless they have acquired a technical significance. *Duke Power Co. v. Clayton*, 505.

The Supreme Court will not follow an administrative interpretation of a statute which, in its opinion, is in conflict with the clear intent and purpose of the statute. *Ibid.*

Where two statutes are not irreconcilable, the court must give effect to both. *Ibid.*

When the meaning of an act is at all doubtful, the title or caption thereof should be considered as a legislative declaration of the tenor and object of the act. *Sykes v. Clayton*, 398.

Parts of the same statute dealing with the same subject are to be considered and interpreted as a whole. *Fishing Pier v. Carolina Beach*, 362.

§ 7. Construction of Amendments.

Rules relating to the construction of amendments to statutes. *Childers v. Parker's*, 256.

TAXATION.

§ 2. Uniform Rule and Discrimination.

Due process provisions of the Federal and State Constitutions are not violated by use of the value of decedent's entire estate, wherever located, to determine the rate of inheritance tax to be applied under G.S. 105-21 to the transfer of property within the State. *Rigby v. Clayton*, 465.

The equality and uniformity required by the State Constitution in property taxation do not apply to inheritance or succession taxation. *Ibid.*

The Legislature is given the widest latitude in making the distinctions which are bases for tax classifications. *Ibid.*

§ 5. County and Municipal Finance Acts.

Statute authorizing Mecklenburg County to impose a one percent sales and use tax is held constitutional. *Sykes v. Clayton*, 398.

§ 6. Necessary Expenses and Necessity for Vote.

Provisions of G.S. 115-80(a) authorizing county commissioners to levy additional property tax for the purpose of supplementing salaries of school personnel without a vote of the people are held constitutional. *Harris v. Board of Comrs.*, 343.

TAXATION—Continued.

§ 15. Sales and Use Taxes.

Statute authorizing Mecklenburg County to impose a one percent sales and use tax is held constitutional. *Sykes v. Clayton*, 398.

The sales tax imposed by G.S. 105-164.4 and the use tax imposed by G.S. 105-164.6 are distinguishable from property taxes. *Ibid.*

§ 17. Inheritance and Succession Taxes.

G.S. 105-21, which levies an inheritance tax upon the transfer of property within the State at a rate which considers decedent's entire estate wherever situated, is a valid exercise of the legislative powers. *Rigby v. Clayton*, 465.

The transfer of property, as that term is used in G.S. 105-2, contemplates both the legal power to transmit property at death and the privilege of receiving property. *Ibid.*

§ 19. Exemption from Taxation Generally.

Constitutional provision exempting from taxation property belonging to the State and to municipal corporations is self-executing. *Redevelopment Comm. v. Guilford County*, 585.

§ 21. Exemption from Taxation of Property of State and Political Subdivisions.

A municipal redevelopment commission is a municipal corporation for the purpose of tax exemption. *Redevelopment Comm. v. Guilford County*, 585.

Property of a State or municipality must be held for a public or governmental purpose to be tax exempt. *Ibid.*

Property held by a municipal redevelopment commission under a definitely evolved plan to use the property for the public is exempt from taxation notwithstanding income is incidentally derived from the property. *Ibid.*

§ 31. Liability for Sales and Use Taxes.

Precipitator installed by plaintiff power company prior to 1 July 1961 for the purpose of preventing air pollution is exempt from retail sales and use taxes under G.S. 105-164.13(12) as an accessory to machinery used by plaintiff in the manufacture or generation of electricity. *Duke Power Co. v. Clayton*, 505.

Coal purchased by plaintiff power company from corporations which mined coal, then cleaned and crushed it, is exempt from sales and use taxes as a product of the mine in its original form or unmanufactured state. *Ibid.*

Sales of coal to a power company were made by the producers of the coal within the meaning of G.S. 105-164.13(3), notwithstanding the producers utilized sales agents in making such sales. *Ibid.*

§ 36. Suit by Taxpayer to Restrain Issuance of Bonds or Levy of Tax.

Injunction will lie to restrain the collection of a tax which is itself illegal or invalid. *Redevelopment Comm. v. Guilford County*, 585.

Complaint alleging property held by municipal redevelopment commission is held for public purpose and that income derived from it is incidental and secondary to the dominant public use is held to state a cause of action for an injunction to prevent collection of ad valorem taxes levied on the property. *Ibid.*

In action to restrain county commissioners from levying additional property tax to supplement teachers' salaries without approval of the county electorate, finding that no funds derived from taxation would be used to supplement teachers salaries constitutes sufficient ground for denying application for a temporary restraining order. *Harris v. Board of Comrs.*, 343.

TORTS.

§ 7. Release from Liability and Covenants Not to Sue.

Prior to the effective date of the Uniform Contribution Among Tort-Feasors Act, G.S. 1B-1, *et seq.*, a valid release of one of several joint tort-feasors released all and was a bar to a suit against any of them for the same injury. *Waden v. McGhee*, 174.

While a covenant not to sue one tort-feasor does not extinguish the cause of action against the remaining tort-feasors, they are entitled to have the amount paid for the covenant credited on any judgment thereafter obtained against them by the injured party. *Ibid.*

The preferred method of crediting one tort-feasor with the amount another has paid the plaintiff as consideration for a covenant not to sue is for the trial judge to deduct the amount after the jury has assessed the full amount of plaintiff's damages, and all evidence of the payment and covenant should be excluded at the trial. *Ibid.*

Where evidence of the amount paid by one tort-feasor to the plaintiff for a covenant not to sue is admitted without objection, the trial court must instruct the jury (1) to determine the full amount of the plaintiff's damages and then deduct the payment or (2) to determine the full amount of the plaintiff's damages without reference to the payment and to leave it to the court to allow the credit. *Ibid.*

TRIAL.

§ 21. Consideration of Evidence on Motion to Nonsuit.

Consideration of evidence on motion to nonsuit. *Clarke v. Holman*, 425.

§ 33. Statement of Evidence and Application of Law Thereto in Instructions.

Instructions which fail to apply the law to the evidence are error. G.S. 1-180. *Realty Agency v. Duckworth & Shelton, Inc.*, 243.

TRUSTS.

§ 5. Construction and Operation of Trusts for Private Beneficiaries.

A settlor's intention is always paramount to the wishes of a beneficiary. *Campbell v. Jordan*, 233.

§ 6. Duties and Authority of Trustee and Right to Convey.

Provision of a will giving trustee authority to convey to a beneficiary any part or all of the beneficiary's share of the trust corpus if the trustee deems it necessary or best for the beneficiary and consistent with the welfare of testator's family and estate, does not give the trustee unbridled discretion to convey trust assets to a beneficiary, but the beneficiary must show substantial economic need. *Campbell v. Jordan*, 233.

§ 10. Duration and Termination of Trusts and Distribution of Corpus.

Where a portion of the trust corpus vested in children of deceased income beneficiary in fee simple, the remaining income beneficiaries may not object to an agreement whereby the trustee continues to administer such interest as if it remained a part of the trust corpus absent a showing of injury. *Campbell v. Jordan*, 233.

Where the income beneficiary of a trust is given a general power of appointment to dispose of the *corpus* of the trust by her will as if she owned the *corpus* free of the trust, she may devise the property to her own estate or to any persons or institutions of her choice. *Wells v. Dickens*, 203.

TRUSTS—Continued.

§ 13. Creation of Resulting Trusts.

Where the grantee in a deed promises to hold the property conveyed for the benefit of a third person, a valid express trust is thereby created. *Wells v. Dickens.* 203.

VENUE.

§ 5. Actions Involving Title to or Right to Possession of Property.

An action to recover the amount paid toward the purchase price of real property for breach of covenants against encumbrances and for fraudulent misrepresentations as to the lack of restrictions on the property is not an action involving the title to real estate and may not be removed as of right under G.S. 1-76(1). *Owens v. Boling,* 374.

WILLS.

§ 2. Contracts to Devise or Bequeath.

An agreement that a third party beneficiary shall have land at the death of the promisor implies his promise to devise or convey the property to such beneficiary. *Wells v. Dickens,* 203.

§ 10. Probate of Holographic Will.

Unprobated words below a probated will are susceptible to probate as a codicil of the will, and therefore a purchaser from a beneficiary of the will is placed on notice that the beneficiary in the codicil has an interest in the estate. *Jones v. Warren,* 166.

§ 27. Effect of Judgment Setting Aside Will and Rights of Purchasers from Devisees.

Where a later will or a codicil to an earlier will is probated after the probate of the earlier will, beneficiaries or devisees under the codicil or second will have no rights or remedies against one who, in good faith, for a valuable consideration and without actual or constructive notice of the later will or codicil, has purchased property from a beneficiary under the earlier will. *Jones v. Warren,* 166.

§ 29. Construction of Codicils.

Unprobated words below a probated will are susceptible to probate as a codicil of the will, and therefore a purchaser from a beneficiary of the will is placed on notice that the beneficiary in the codicil has an interest in the estate. *Jones v. Warren,* 166.

§ 40. Devisees With Power of Distribution.

Where the income beneficiary of a trust is given a general power of appointment to dispose of the corpus of the trust by her will as if she owned the corpus free of the trust, she may devise the property to her own estate or to any persons or institutions of her choice. *Wells v. Dickens,* 203.

§ 60. Renunciation, Forfeiture and Acceleration.

There is a rebuttable presumption that legatee has accepted a beneficial devise. *Jones v. Warren,* 166.

§ 64. Whether Beneficiary is Put to His Election.

Where testatrix devised to third persons specific property which she allegedly held in trust for plaintiff and which she allegedly contracted to devise

to plaintiff, and testatrix exercised a general power of appointment in devising to plaintiff a fee in other property in which plaintiff would have taken an equitable life estate under a trust if testatrix had not exercised her power of appointment, testatrix' will required plaintiff to elect between the property devised to him and the property testatrix had contracted to devise to him. *Wells v. Dickens*, 208.

An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own which is attempted to be disposed of in favor of a third party by the same paper. *Ibid.*

The doctrine of equitable election applies when a testator purports to devise specific property not owned by him to a person other than the true owner and provides other benefit for the owner of such specific property. *Ibid.*

The guardian of an incompetent cannot make an election on behalf of the ward to take under or against a will without the direction and approval of a judge of the Superior Court. *Ibid.*

When a beneficiary is required to elect between a devise and property devised to third persons to which he has an unadjudicated claim, the devisee-claimant is not required to elect until his claim has been adjudicated in his favor, but the obtaining of a judgment establishing title in the claimant constitutes an election to take the property for which he sued. *Ibid.*

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