NORTH CAROLINA SUPREME COURT REPORTS

VOLUME 275

FALL TERM 1968
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1970

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275 N.C.

In Memoriam

Robert Hunt Parker

1892 - 1969

CHIEF JUSTICE
1966 - 1969

ASSOCIATE JUSTICE
1952 - 1966

THE SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

R. HUNT PARKER[1]

Associate Justices

WILLIAM H. BOBBITT[2] — I. BEVERLY LAKE
CARLISLE W. HIGGINS — JOSEPH BRANCH
SUSIE SHARP — J. FRANK HUSKINS
DAN K. MOORE[3]

Emergency Justices

EMERY B. DENNY — WILLIAM B. RODMAN, JR.
J. WILL PLESS, JR.

Clerk

ADRIAN J. NEWTON

Marshal and Librarian

RAYMOND M. TAYLOR

ADMINISTRATIVE OFFICE OF THE COURTS

Director

BERT M. MONTAGUE

Assistant Director and Administrative Assistant to the Chief Justice

FRANK W. BULLOCK, JR.

APPELLATE DIVISION REPORTERS

WILSON B. PARTIN, JR.
RALPH A. WHITE, JR.[4]

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[1]Died 10 November 1969.

[2]Appointed Chief Justice by Gov. Robert W. Scott 13 November 1969 and took office 17 November 1969.

[3]Appointed Associate Justice by Gov. Robert W. Scott 20 November 1969 and took office 1 December 1969.

[4]Appointed Reporter by Supreme Court effective 1 July 1969.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	WALTER W. COHOON	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	WILLIAM J. BUNDY	Greenville
4	HOWARD H. HUBBARD	Clinton
5	RUDOLPH I. MINTZ[1]	Wilmington
5	BRADFORD TILLERY[2]	Wilmington
6	JOSEPH W. PARKER	Windsor
7	GEORGE M. FOUNTAIN	Tarboro
8	ALBERT W. COWPER	Kinston

Second Division

9	HAMILTON H. HOBGOOD	Louisburg
10	WILLIAM Y. BICKETT	Raleigh
10	JAMES H. POU BAILEY	Raleigh
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
12	COY E. BREWER	Fayetteville
13	EDWARD B. CLARK	Elizabethtown
14	CLARENCE W. HALL	Durham
15	LEO CARR	Burlington
16	HENRY A. MCKINNON, JR.	Lumberton

Third Division

17	ALLEN H. GWYN[3]	Reidsville
18	WALTER E. CRISSMAN	High Point
18	EUGENE G. SHAW[4]	Greensboro
18	JAMES G. EXUM, JR.	Greensboro
19	FRANK M. ARMSTRONG	Troy
19	THOMAS W. SEAY, JR.	Spencer
20	JOHN D. MCCONNELL	Southern Pines
21	WALTER E. JOHNSTON, JR.	Winston-Salem
21	HARVEY A. LUPTON	Winston-Salem
22	R. A. COLLIER, JR.	Statesville
23	ROBERT M. GAMBILL	North Wilkesboro

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	W. E. ANGLIN	Burnsville
25	SAM J. ERVIN, III	Morganton
26	WILLIAM T. GRIST	Charlotte
26	FRED H. HASTY	Charlotte
26	FRANK W. SNEPP, JR.	Charlotte
27	P. C. FRONEBERGER	Gastonia
27	B. T. FALLS, JR.	Shelby
28	W. K. MCLEAN	Asheville
28	HARRY C. MARTIN	Asheville
29	J. W. JACKSON	Hendersonville
30	T. D. BRYSON	Bryson City

SPECIAL JUDGES

FATE J. BEAL	Lenoir
JAMES C. BOWMAN	Southport
J. WILLIAM COPELAND	Murfreesboro
A. PILSTON GODWIN	Raleigh
ROBERT M. MARTIN	High Point
HUBERT E. MAY	Nashville
GEORGE R. RAGSDALE	Raleigh
LACY H. THORNBURG	Webster

EMERGENCY JUDGES

WALTER J. BONE	Nashville
W. H. S. BURGWYN	Woodland
FRANCIS O. CLARKSON	Charlotte
CHESTER R. MORRIS	Coinjock
ZEB V. NETTLES	Asheville
HUBERT E. OLIVE	Lexington
GEORGE B. PATTON	Franklin
F. DONALD PHILLIPS	Rockingham
HENRY L. STEVENS, JR.	Warsaw

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[1]Died 2 February 1970.
[2]Appointed effective 1 January 1970.
[3]Died 16 December 1969. Succeeded by Charles M. Neaves, Elkin, 19 January 1970.
[4]Resigned effective 1 November 1969. Succeeded by Charles T. Kivett, Greensboro, 1 November 1969.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	FENTRESS HORNER (Chief)	Elizabeth City
	WILLIAM S. PRIVOTT	Edenton
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	J. W. H. ROBERTS (Chief)	Greenville
	CHARLES H. WHEDBEE	Greenville
	HERBERT O. PHILLIPS, III	Morehead City
	ROBERT D. WHEELER	Grifton
4	HARVEY BONEY (Chief)	Jacksonville
	PAUL M. CRUMPLER	Clinton
	RUSSELL J. LANIER	Beulaville
	WALTER P. HENDERSON	Trenton
5	H. WINFIELD SMITH (Chief)	Wilmington
	N. B. BAREFOOT[1]	Wilmington
	GILBERT H. BURNETT	Wilmington
6	J. T. MADDREY (Chief)	Weldon
	JOSEPH D. BLYTHE	Harrellsville
	BALLARD S. GAY	Jackson
7	J. PHIL CARLTON (Chief)	Pinetops
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	CHARLES P. GAYLOR (Chief)	Goldsboro
	HERBERT W. HARDY	Maury
	EMMETT R. WOOTEN	Kinston
	LESTER W. PATE	Kinston
9	JULIUS BANZET (Chief)	Warrenton
	CLAUDE W. ALLEN, JR.	Oxford
	LINWOOD T. PEOPLES	Henderson
10	GEORGE F. BASON (Chief)	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	N. F. RANSDELL	Fuquay-Varina
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WILLIAM I. GODWIN	Selma
	WOODROW HILL	Dunn
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	DARIUS B. HERRING, JR.	Fayetteville
	GEORGE Z. STUHL	Fayetteville
13	RAY H. WALTON (Chief)	Southport
	GILES R. CLARK	Elizabethtown
14	E. LAWSON MOORE (Chief)	Durham
	THOMAS H. LEE	Durham
	SAMUEL O. RILEY	Durham

DISTRICT	JUDGES	ADDRESS
15	HARRY HORTON (Chief)	Pittsboro
	STANLEY PEELE[2]	Chapel Hill
	D. MARSH MCLELLAND	Burlington
	COLEMAN CATES	Burlington
16	ROBERT F. FLOYD (Chief)	Fairmont
	SAMUEL E. BRITT	Lumberton
	JOHN S. GARDNER	Lumberton
18	E. D. KUYKENDALL, JR. (Chief)	Greensboro
	HERMAN G. ENOCHS, JR.	Greensboro
	BYRON HAWORTH	High Point
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	KENNETH M. CARRINGTON[3]	Greensboro
	EDWARD K. WASHINGTON	Jamestown
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	A. A. WEBB	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	BUFORD T. HENDERSON	Winston-Salem
	RHODA B. BILLINGS	Winston-Salem
	JOHN CLIFFORD	Winston-Salem
	A. LINCOLN SHERK	Winston-Salem
24	J. RAY BRASWELL (Chief)	Newland
	J. E. HOLSHOUSER, SR.	Boone
25	MARY GAITHER WHITENER (Chief)	Hickory
	JOE H. EVANS	Hickory
	LIVINGSTON VERNON[4]	Morganton
	BENJAMIN BEACH[5]	Lenoir
26	WILLARD I. GATLING (Chief)	Charlotte
	WILLIAM H. ABERNATHY	Charlotte
	HOWARD B. ARBUCKLE	Charlotte
	J. EDWARD STUKES	Charlotte
	CLAUDIA E. WATKINS	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	CLIFTON JOHNSON[6]	Charlotte
27	LEWIS BULWINKLE (Chief)	Gastonia
	OSCAR F. MASON, JR.	Gastonia
	JOE F. MULL	Shelby
	JOHN R. FRIDAY	Lincolnton
	WILLIAM A. MASON	Belmont
29	FORREST I. ROBERTSON (Chief)	Rutherfordton
	ROBERT T. GASH	Brevard
	WADE B. MATHENY	Forest City
30	F. E. ALLEY, JR. (Chief)	Waynesville
	ROBERT J. LEATHERWOOD, III	Bryson City

[1]Appointed effective 1 January 1970 to succeed Bradford Tillery.
[2]Appointed effective 21 October 1969 to succeed L. J. Phipps who died 1 October 1969.
[3]Appointed effective 31 July 1969.
[4]Appointed effective 1 August 1969 to succeed Keith S. Snyder who resigned 18 July 1969.
[5]Appointed effective 1 October 1969.
[6]Appointed effective 13 August 1969.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

ROBERT MORGAN

Deputy Attorneys General

HARRY W. MCGALLIARD — HARRISON LEWIS

RALPH MOODY — JAMES F. BULLOCK

JEAN A. BENOY[1]

Assistant Attorneys General

PARKS H. ICENHOUR — MILLARD R. RICH, JR.

ANDREW H. MCDANIEL — HENRY T. ROSSER

WILLIAM W. MELVIN — MYRON C. BANKS

BERNARD A. HARRELL — ANDREW A. VANORE, JR.[2]

SIDNEY S. EAGLES, JR.[3]

SOLICITORS OF SUPERIOR COURT

DISTRICT	SOLICITORS	ADDRESS
1	HERBERT SMALL	Elizabeth City
2	ROY R. HOLDFORD, JR.	Wilson
3	W. H. S. BURGWYN, JR.	Woodland
4	ARCHIE TAYLOR	Lillington
5	LUTHER HAMILTON, JR.	Morehead City
6	WALTER T. BRITT	Clinton
7	WILLIAM G. RANSDELL, JR.	Raleigh
8	WILLIAM ALLEN COBB	Wilmington
9	DORAN J. BERRY	Fayetteville
9A	JOHN B. REGAN	St. Pauls
10	DAN K. EDWARDS	Durham
10A	THOMAS D. COOPER, JR.	Burlington
11	THOMAS W. MOORE, JR.	Winston-Salem
12	W. DOUGLAS ALBRIGHT[4]	Greensboro
13	M. G. BOYETTE	Carthage
14	HENRY M. WHITESIDES	Gastonia
14A	ELLIOTT M. SCHWARTZ	Charlotte
15	ZEB A. MORRIS	Concord
16	W. HAMPTON CHILDS, JR.	Lincolnton
17	J. ALLIE HAYES	North Wilkesboro
18	LEONARD LOWE	Caroleen
19	CLYDE M. ROBERTS	Marshall
20	MARCELLUS BUCHANAN	Sylva
21	ALLAN DENNY IVEY, JR.[5]	Eden

[1]Appointed effctive 1 February 1969.
[2]Appointed effective 25 November 1969.
[3]Appointed effective 25 November 1969.
[4]Appointed effective 1 November 1969 to succeed Charles T. Kivett.
[5]Appointed effective 19 January 1970 to succeed Charles M. Neaves.

SUPERIOR COURT, FALL SESSIONS, 1969

FIRST DIVISION

First District — Judge Mintz.
Camden—Sept. 22; Dec. 8†.
Chowan—Sept. 8*; Nov. 24.
Currituck—Sept. 1; Dec. 1†.
Dare—Oct. 20.
Gates—Oct. 13.
Pasquotank—Sept. 15†; Oct. 6†; Nov. 3† (A); Nov. 10*(2).
Perquimans—Oct. 27.

Second District — Judge Parker.
Beaufort—Aug. 11†; Aug. 18*(2); Sept. 15*; Oct. 13†(2); Nov. 3†; Dec. 1*; Dec. 15.
Hyde—Oct. 6; Oct. 27†(A).
Martin—Sept. 22*; Nov. 17†(2); Dec. 8.
Tyrrell—Sept. 29.
Washington—Sept. 8; Nov. 10†.

Third District—Judge Fountain.
Carteret—Aug. 4†(2); Oct. 13†; Nov. 3; Nov. 24†(A).
Craven—Sept. 1(2); Sept. 29†(2); Nov. 10; Nov. 24†(2); Dec. 15*.
Pamlico—Oct. 20.
Pitt—Aug. 18(2); Sept. 15†(2); Oct. 6 (A); Oct. 27(A); Nov. 17; Dec. 8.

Fourth District — Judge Cowper.
Duplin—Aug. 25; Sept. 29†; Oct. 6; Nov. 3*; Dec. 1†(A).
Jones—Sept. 22; Oct. 27†; Nov. 24.
Onslow—July 14(A); July 28†(2); Sept. 22(A)(2); Oct. 20†(A); Nov. 10†; Nov. 17* (A); Dec. 1; Dec. 8†(2).
Sampson—Aug. 4*(A); Aug. 11; Sept. 1† (2); Oct. 13*; Nov. 17†; Nov. 24(A).

Fifth District — Judge Cohoon.
New Hanover—July 7†(A)(2); July 21* (A)(2); Aug. 4*(2); Aug. 18†(2); Sept. 1† (A); Sept. 8†(2); Sept. 22†(A); Sept. 29* (A)(2); Oct. 13†(2); Oct. 27*(2); Nov. 10† (3); Dec. 1*(2); Dec. 15†.
Pender—Sept. 1†; Sept. 22; Sept. 29†; Nov. 10(A).

Sixth District — Judge Peel.
Bertie—Sept. 15; Nov. 17(2).
Halifax—Aug. 11(2); Sept. 29†(2); Oct. 20*; Dec. 15.
Hertford—July 21(A); Oct. 13; Dec. 1† (2).
Northampton—Aug. 4; Oct. 27(2).

Seventh District — Judge Bundy.
Edgecombe—Aug. 11*; Sept. 1†(A); Sept. 29*(A); Oct. 27†(2); Nov. 10*; Dec. 15*.
Nash—Aug. 4†(A); Aug. 18*; Sept. 8† (2); Oct. 6*; Oct. 13†; Nov. 17*(A)(2); Dec. 8†.
Wilson—July 14*; Aug. 25*(2); Sept. 22† (2); Oct. 13*(A)(2); Nov. 17†(2); Dec. 1*.

Eighth District — Judge Hubbard.
Greene—Oct. 6†; Oct. 13*(A); Dec. 1.
Lenoir—Aug. 4†(A)(2); Aug. 18*(A); Sept. 1(A); Sept. 8†(2); Oct. 13†; Oct. 20 *(2); Nov. 24†; Dec. 8.
Wayne—July 28*(3); Aug. 25†(2); Sept. 22†(2); Nov. 3*(2); Nov. 17†(A); Dec. 15*.

SECOND DIVISION

Ninth District — Judge Hall.
Franklin—Sept. 15(2); Oct. 31*; Nov. 24†.
Granville—July 14; Oct. 6†(A); Nov. 10(2).
Person—Sept. 8; Sept. 29†(A); Oct. 27; Dec. 1†.
Vance—Sept 29*; Nov. 3†; Dec. 8*; Dec. 15†.
Warren—Sept. 1*; Oct. 20†.

Tenth District — Wake.
Schedule "A" — Judge Bailey.
July 7†(2); Aug. 4†(A)(2); Aug. 18*(2); Sept. 1†(2); Sept. 15†(2); Sept. 29*(2); Oct. 20†(2); Nov. 3*(2); Nov. 17†(2); Dec. 1*(3).

Schedule "B" — Judge Carr.
July 7*(A)(2); Aug. 4*(2); Aug. 18†(2); Sept. 1*(2); Sept. 15*(2); Oct. 6†(2); Oct. 20*(2); Nov. 3†(2); Nov. 17*(2); Dec. 1†(3).

Eleventh District — Judge McKinnon.
Harnett—Aug. 11†(A); Aug. 25*(A); Sept. 1†; Oct. 6†(2); Nov. 3*(2); Dec. 15†.
Johnston—Aug. 11†; Aug. 18; Sept. 22† (2); Oct. 20(A); Nov. 17†; Dec. 1(2).
Lee—July 28†; Aug. 4*; Sept. 8†(2); Oct. 6†(A); Oct. 27*; Nov. 24†.

Twelfth District.
Schedule "A" — Judge Hobgood.
Cumberland—Aug. 25†(2); Sept. 8†(2); Sept. 22(2); Oct. 13*(2); Oct. 27†(2); Nov. 24†(2).
Hoke—Aug. 18; Nov. 17.
Schedule "B" — Judge Bickett.
Cumberland—Aug. 11*; Aug. 25*(2); Sept. 22*(2); Nov. 3*(2); Nov. 24*(2); Dec. 8*(2).

Thirteenth District — Judge Canaday.
Bladen—Aug. 18; Oct. 13*; Nov. 10†.
Brunswick—Aug. 25†; Sept. 15; Dec. 1†(2).
Columbus—Sept. 1*(2); Sept. 22†(2); Oct. 6*; Oct. 27†(2); Nov. 17*(2); Dec. 15†.

Fourteenth District — Judge Braswell.
Durham—July 7*(2); Aug. 18*(3); Sept. 8†(2); Sept. 22*(A); Sept. 29*(2); Oct. 13†(2); Oct. 27*(2); Nov. 10†(2); Nov. 24 *(2); Dec. 8*; Dec. 15†.

Fifteenth District — Judge Brewer.
Alamance—July 28†; Aug. 11*(2); Sept. 8†(2); Oct. 13*(2); Nov. 10†; Dec. 1*.
Chatham—Aug. 25†; Sept. 1; Oct. 27† (2); Nov. 24.
Orange—Aug. 4*(A); Sept. 15*(A); Sept. 22†(2); Nov. 3*(A); Nov. 17†; Dec. 8.

Sixteenth District — Judge Clark.
Robeson—July 7*(2); Aug. 11*; Sept. 1*(2); Sept. 15†(2); Oct. 6*; Oct. 13†; Oct. 20*(2); Nov. 10†; Nov. 17*(2).
Scotland—July 21†; Aug. 18(A); Nov. 3†; Dec. 1.

THIRD DIVISION

Seventeenth District — Judge Johnston.
Caswell—Oct. 27; Dec. 1†.
Rockingham—July 21†(A)(2); Aug. 18*(2); Sept. 15†(2); Oct. 13(A)(2); Nov. 17†(2); Dec. 8*(2).
Stokes—Sept. 29; Oct. 6(A).
Surry—Aug. 4*(2); Sept. 1†(2); Oct. 6†(2); Nov. 3*(2); Dec. 1(A).

Eighteenth District.
Schedule "A" — Judge Collier.
Greensboro—July 7*(2); Sept. 8†(3); Sept. 29*(2); Oct. 13*(2); Oct. 27*(2); Nov. 10(A); Nov. 17*(2); Dec. 8†(2).
High Point—Dec. 1†.
Schedule "B" — Judge Gambill.
Greensboro—Aug. 25*(2); Sept. 29†(3); Nov. 17†(2); Dec. 1*(3).
High Point—July 14*; Aug. 18†; Sept. 8†(2); Sept. 22*; Oct. 20†; Oct. 27*(A); Nov. 3†(2).
Schedule "C" — Judge Gwyn.
Greensboro—July 7†(2); Aug. 11*; Aug. 25†(2); Sept. 8*(2); Oct. 6; Oct. 27†(2).
High Point—Nov. 17*; Dec. 8*.

Nineteenth District
Schedule "A" — Judge Shaw.
Cabarrus—Sept. 8†(2); Oct. 6(2); Nov. 3†(2).
Randolph—July 14*; Sept. 22†(2); Nov. 24*; Dec. 1†.
Rowan—Oct. 20†(2); Dec. 8*.
Schedule "B" — Judge Lupton.
Cabarrus—Aug. 4†(A); Aug. 18*; Aug. 25†; Nov. 17*; Dec. 8†; Dec. 15*.
Montgomery—July 7; Aug. 11†(A); Oct. 6.
Randolph—July 21†(A)(2); Sept. 1*; Oct. 20†(3); Nov. 10*.
Rowan—July 14†; Sept. 8(2); Sept. 22†(2); Nov. 24†(2).

Twentieth District — Judge Crissman.
Anson—Sept. 15*; Sept. 22†; Nov. 17†.
Moore—Aug. 11*; Sept. 1†(2); Nov. 10.
Richmond—July 14†(A); July 21*(A); Sept. 29†; Oct. 6*; Dec. 1†(2).
Stanly—July 7; Oct. 13†; Nov. 24.
Union—Aug. 18†; Aug. 25; Oct. 27(2).

Twenty-First District — Forsyth
Schedule "A" — Judge Exum.
July 7†(2); July 28(A)(3); Sept. 1†(3); Sept. 22(3); Oct. 20†(2); Nov. 3†(2); Nov. 24(2); Dec. 8†(2).
Schedule "B" — Judge Seay.
July 28†(2); Aug. 25(3); Sept. 22†(2); Oct. 6†(2); Oct. 27(3); Nov. 17†(3); Dec. 8(2).

Twenty-Second District—Judge Armstrong.
Alexander—Sept. 22.
Davidson—July 7†(A)(2); Aug. 18; Sept. 8†(2); Sept. 22(A)(2); Oct. 6†; Oct. 20†(A)(2); Nov. 3(2); Dec. 1†(A); Dec. 8†(2).
Davie—Aug. 4; Sept. 29†; Nov. 3(A).
Iredell—Aug. 11†; Aug. 25; Sept. 1†; Oct. 13†(A); Oct. 20(2); Nov. 17†(3); Dec. 15(A).

Twenty-Third District — Judge McConnell.
Alleghaney—Aug. 25; Sept. 29.
Ashe—July 14(A); Sept. 8†; Oct. 27.
Wilkes—Aug. 11(2); Sept. 15†(2); Oct. 6; Nov. 3†(2); Dec. 8.
Yadkin—Sept. 1*; Nov. 17†(2); Dec. 1.

FOURTH DIVISION

Twenty-Fourth District — Judge Martin.
Avery—Oct. 13(2).
Madison—Aug. 25†(2); Sept. 29*; Oct. 27†; Dec. 1*.
Mitchell—July 28(A); Sept. 8(2).
Watauga—Sept. 22; Nov. 10†.
Yancey—Aug. 4; Aug. 11†(2); Nov. 24.

Twenty-Fifth District — Judge Jackson.
Burke—Aug. 11; Sept. 29; Oct. 13; Nov. 17(2); Dec. 15(A).
Caldwell—Aug. 18(2); Sept. 15†(2); Oct. 6*(A); Oct. 20†(2); Dec. 1(2).
Catawba—July 21(A)(2); Aug. 4; Sept. 1†(2); Sept. 15(A); Nov. 3(2); Dec. 15.

Twenty-Sixth District — Mecklenburg.
Schedule "A" — Judge Bryson.
July 7†; Aug. 4*(2); Sept. 1†(2); Sept. 15†(2); Sept. 29*(2); Oct. 20†(2); Nov. 3*(2); Nov. 17†(2); Dec. 1*(3).
Schedule "B" — Judge Anglin.
July 7*(2); Aug. 4†(A); Sept. 1†(2); Sept. 15*(2); Sept. 29†(2); Oct. 13†(2); Oct. 27*(2); Nov. 10†(A); Nov. 17*(2); Dec. 1†(3).
Schedule "C" — Judge Falls.
July 7*(A)(2); Aug. 4*(2); Sept. 1†(3); Sept. 29*(2); Oct. 13†; Oct. 20*(2); Nov. 3†(2); Nov. 17†(2); Dec. 1*(3).
Schedule "D" — Judge to be assigned.
Sept. 1*(A)(2); Sept. 29†(A)(2); Oct. 27†(A)(2); Nov. 17*(A)(2); Dec. 1†(A)(3).

Twenty-Seventh District
Schedule "A" — Judge Ervin.
Cleveland—Oct. 20*(2); Nov. 24†(2); Dec. 8*.
Gaston—July 7†(2); July 21*(2); Sept. 1*(2); Sept. 15†(2); Sept. 29*(2); Nov. 3*; Nov. 10†(2).
Schedule "B" — Judge Hasty.
Cleveland—July 7(2); Aug. 18(A)(2); Sept. 22†(2).
Gaston—July 21*(2); Aug. 11†(A); Sept. 1*; Oct. 6*; Oct. 13†(2); Oct. 27*(2); Nov. 24*(2); Dec. 8†(2).
Lincoln—Sept. 8(2).

Twenty-Eighth District — Buncombe
Schedule "A" — Judge Grist.
July 7†(3); July 28†(A); Aug. 4#(A); Aug. 11*(A)(2); Aug. 25*(2); Sept. 8†#; Sept. 15†(2); Sept. 29*(2); Oct. 20†(2); Nov. 3†(2); Nov. 17†#; Nov. 24†(2); Dec. 8†(2).
Schedule "B" — Judge Snepp.
July 7*(2); July 21*(A)(2); Aug. 4†(A)(2); Aug. 18†(A)(2); Sept. 1†(2); Sept. 15*(2); Oct. 6†#; Oct. 13†; Oct. 20*(2); Nov. 3*(2); Nov. 17†(2); Dec. 1*(3).

Twenty-Ninth District—Judge Froneberger.
Henderson—Aug. 11†(2); Oct. 13(A); Dec. 15.
McDowell—Sept. 1(2); Sept. 29†(2).
Polk—Aug. 25(A).
Rutherford—Aug. 11*†(A)(2); Sept. 15†*(2); Nov. 3*†(2).
Transylvania—July 7(2); Oct. 20(2).

Thirtieth District — Judge McLean.
Cherokee—July 28; Nov. 3(2).
Clay—Sept. 29.
Graham—Sept. 8.
Haywood—July 7(2); Sept. 15†(2); Nov. 17(A)(2).
Jackson—Oct. 6(2).
Macon—Aug. 4; Dec. 1(A)(2).
Swain—July 21; Oct. 20.

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.

CASES REPORTED

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GRAHAM CALDER MULLEN.....Gastonia
ROBERT FOSTER PAGE.....Raleigh
EDWIN BROWNRIGG BORDEN PARKER.....Goldsboro
JOHN HILL PARKER.....Lexington
SARAH ELIZABETH PARKER.....Charlotte
ROY HANDY PATTON, JR.....Canton
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GAYLE EDWARD RAMSEY.....Brevard
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ROBERT LEWIS RAY.....Winston-Salem
WILLIAM JUDSON READY.....Raleigh
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MICHAEL SMITH SCOFIELD.....Asheville
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STEVE BRYANT SETTLEMYER.....Mooresville
GERALD EDWIN SHAW.....Broadway
JOHN LEWIS SHAW.....Jonesville
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HENRY BASCOM SHORE.....East Bend
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THOMAS CLARKSON WORTH, JR. ..... Raleigh
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This is to further certify that the following named individuals were admitted by comity at its meeting on October 25, 1969 and were granted interim certificates to practice law with formal certificates to be issued in August, 1970:

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WILLIAM LAWRENCE LAMBERT ..... Whiteville
WILLIAM EWING SCOTT, JR. ..... Whittier
JOSEPH FRANCIS TURPEN, JR. ..... Charlotte

Given over my hand and the seal of the Board of Law Examiners, this 8th day of December, 1969.

B. E. JAMES, *Secretary*
The Board of Law Examiners of
The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1968

S. S. KRESGE COMPANY v. TRAVIS H. TOMLINSON, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, EARL H. HOSTETLER, SEBY B. JONES, WILLIAM M. LAW, CLARENCE E. LIGHTNER, WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL FOR THE CITY OF RALEIGH, NORTH CAROLINA, AND THOMAS W. DAVIS, CHIEF OF POLICE OF THE CITY OF RALEIGH, NORTH CAROLINA

AND

ARLAN'S DEPT. STORE OF RALEIGH, INC. v. TRAVIS H. TOMLINSON, MAYOR OF THE CITY OF RALEIGH, NORTH CAROLINA, AND GEORGE B. CHERRY, EARL H. HOSTETLER, SEBY B. JONES, WILLIAM M. LAW, CLARENCE E. LIGHTNER, WILLIAM H. WORTH, MEMBERS OF THE CITY COUNCIL FOR THE CITY OF RALEIGH, NORTH CAROLINA, AND THOMAS W. DAVIS, CHIEF OF POLICE OF THE CITY OF RALEIGH, NORTH CAROLINA

No. 524

(Filed 21 January 1969)

1. Constitutional Law § 4; Injunctions § 5— action to restrain enforcement of ordinance — constitutional issues

Notwithstanding the general rule that the constitutionality of a criminal statute or ordinance may not be challenged in an action to enjoin its enforcement, a well-established exception permits such action when injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise irremediable.

2. Constitutional Law § 11— legislative exercise of the police power

The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people.

3. Constitutional Law § 14; Sundays and Holidays— police power — Sunday observance law

Sunday observance statutes and municipal ordinances derive their validity from the police power of the State.

4. Municipal Corporations § 32— Raleigh Sunday observance ordinance

Legislative authority for the adoption of the City of Raleigh Sunday observance ordinance is conferred by G.S. 160-52 and G.S. 160-200(6), (7), and (10), and by "The Charter of the City of Raleigh," Session Laws of 1949, Chapter 1184, §§ 21 and 22.

5. Constitutional Law § 14; Municipal Corporations § 32; Sundays and Holidays— Sunday observance ordinance — constitutionality

Municipal ordinance prohibiting the sale of merchandise within the city on Sunday but exempting from the ordinance merchants selling certain commodities having a relationship to the public health and welfare and the observance of Sunday as a day of rest and recreation *is held* not violative of Article I, Section 17, of the Constitution of North Carolina, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6. Constitutional Law § 14; Municipal Corporations § 32— Sunday observance law — reasonableness of classification

In municipal ordinance prohibiting the sale of merchandise within the city on Sunday and exempting from the ordinance merchants selling certain commodities relating to observance of Sunday as a day of rest and recreation, classification which prohibits the sale on Sunday of "sporting goods and toys" but which authorizes the sale of live bait is not unreasonable, arbitrary or discriminatory.

7. Constitutional Law § 22— religious liberty

The First Amendment, as made applicable to the states by the Fourteenth, commands that a state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

8. Constitutional Law § 22; Municipal Corporations § 32— establishment of religion — Sunday observance ordinance

Municipal ordinance prohibiting the sale of goods in the city on Sunday is not unconstitutional as violative of the "Establishment Clause" of the First Amendment of the U. S. Constitution on the ground that the ordinance permits, *inter alia*, the sale of "Christmas greenery" on Sunday during the month of December, since the decorations included within the term "Christmas greenery" are used indiscriminately by all segments of the community without reference to religious affiliation.

9. Constitutional Law § 22; Municipal Corporations § 32— establishment of religion — Sunday observance ordinance

The fact that municipal Sunday observance ordinance which prohibits generally the sale of goods in the city on Sunday does allow grocery stores and fruit stands to remain open on Sunday except for the hours between 10:00 a.m. and 12:00 noon does not constitute sufficient basis for declar-

ing the ordinance unconstitutional as violative of the "Establishment Clause" of the First Amendment of the U. S. Constitution, since the aid, if any, to the Christian religion resulting from the enforcement of the two-hour closing provision would seem minimal and remote.

10. Municipal Corporations § 8— construction of ordinance — motives of city council

The courts will not inquire into the motives which prompted a city council to enact an ordinance valid on its face.

11. Injunctions § 5— standing to enjoin enforcement of ordinance

Where retailers' own stores are operated on Sunday between the hours of 1:00 p.m. and 7:00 p.m., retailers may not attack Sunday observance ordinance on the ground that one provision of the ordinance requires grocery stores and fruit stands to cease operations between 10:00 a.m. and 12:00 noon on Sunday.

12. Constitutional Law § 22; Municipal Corporations § 32— establishment of religion — Sunday observance ordinance

The fact that municipal Sunday observance ordinances may contain traces of language suggestive of a relationship between the ordinance and the Christian religion does not constitute sufficient ground to declare the ordinance unconstitutional as violative of the "Establishment Clause" of the First Amendment to the U. S. Constitution.

APPEALS by plaintiffs from judgments entered in chambers by *Bailey, Resident Judge,* on July 19, 1968, in actions pending in WAKE Superior Court, certified, pursuant to G.S. 7A-31, for review by the Supreme Court before determination by the Court of Appeals.

Plaintiffs, S. S. Kresge Company, a Michigan corporation, and Arlan's Dept. Store of Raleigh, Inc., a North Carolina corporation, instituted these separate actions to enjoin the enforcement of the ordinance adopted by the City Council of Raleigh, North Carolina, on June 3, 1968, now Section 15-43 of the Code of the City of Raleigh, which provides:

"AN ORDINANCE TO PROVIDE FOR THE DUE OBSERVANCE OF SUNDAY.

"WHEREAS, the power to enact ordinances requiring the observance of Sunday as a day of rest has been delegated to the City of Raleigh by G.S. 160-52, G.S. 160-200(6), (7) and (10); and by subsection 17 of the section 22 of its Charter, (Chapter 1184, Session Laws of North Carolina 1949); and

"WHEREAS, the City Council of the City of Raleigh hereby finds and declares that the carrying on of unrestricted business activities on Sunday in the City of Raleigh does not result in the due observance of Sunday as a day of rest, and is contrary to the public health, the general welfare, safety, and morals of the citizens, and

"WHEREAS, the City Council of the City of Raleigh hereby finds and declares that there exists a clear and present need to restrict the carrying on of business activities on Sunday in the City of Raleigh in order to provide for the due observance of Sunday as a day of rest, and to protect and promote the public health, the general welfare, safety and morals of the citizens.

"NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF RALEIGH, NORTH CAROLINA:

"Section 1. Section 15-43 of the Code of the City of Raleigh, North Carolina, is hereby amended by rewriting said Section to read as follows:

Section 15-43.

"(a) It shall be unlawful for any person to sell, offer or expose for sale any goods, wares or merchandise in the city on Sunday, (nor shall any store, shop, warehouse or any other place of business in which goods, wares or merchandise are kept for sale, be kept open between 12:00 midnight Saturday and 12:00 midnight Sunday,) unless such store, shop, warehouse or other place of business is expressly allowed to open and sell goods under the provisions of this chapter; provided, however, that notwithstanding any other provisions of this chapter, on Sunday no such store, shop, warehouse or other place of business shall sell, offer or expose for sale to the general public any of the following:

(1) Clothing and wearing apparel;

(2) Clothing accessories;

(3) Furniture, housewares, home, business, or office furnishings;

(4) Household, business or office appliances;

(5) Hardware, tools, paints, building and lumber supply materials;

(6) Jewelry, silverware, watches, clocks, luggage, musical instruments or recordings.

(7) Sporting goods and toys.

"(b) Each separate sale or offer to sell shall constitute a separate offense.

"(c) Bootblacks. Bootblack stands may keep open on Sundays.

"(d) Sale of Christmas greenery. During the month of December of each year, Christmas greenery may be sold on Sunday within the city.

"(e) Cigar and tobacco stores and newsstands. Cigar and tobacco stores or stands and newsstands may keep open on Sunday for the sale of tobacco, tobacco products, papers and periodicals and accessories, together with soft drinks, ice cream, candy and cakes.

"(f) Drug Stores. Drug stores having a licensed pharmacist may keep open on Sunday for all purposes, except items enumerated in Section 15-43(a), including the operation of soda fountains located therein.

"(g) Exhibition of games, sports, moving pictures, etc.

(1) Except as otherwise provided in this section, it shall be unlawful for any person to engage in or present on Sunday any exhibition of play, game, sport or any moving picture or theatrical exhibition for which any admission is charged the witnessing public.

(2) It shall be lawful for any person to engage in or present any exhibition of moving pictures, baseball, football, basketball, golf, tennis, or dog and horse shows on Sundays, between the hours of 12:00 noon and 12:00 midnight for which any admission is charged the witnessing public. It shall also be lawful to continue to its conclusion a sports event or motion picture commenced before twelve midnight on Saturday night. No tickets shall be sold or taken up on Sunday during the prohibited hours for any such exhibition.

(3) Peanuts, popcorn, chewing gum, soft drinks, ice cream, candy, cakes, wrapped sandwiches and tobacco may be sold on Sundays at all lawful exhibitions allowed by Subsection (2) immediately above.

"(h) Sale of fruits and melons. Stands for the sale of fruits and melons may remain open on Sundays during the hours of 7:00 to 10:00 a.m. and from 12:00 noon to 12:00 midnight and such establishments shall remain closed on Sunday except during these hours.

"(i) Garages and filling stations. Public garages and filling stations may be kept open for the hiring and storage of automobiles and for the sale of gasoline, oils, parts and accessories, soft drinks, ice cream, candy, cakes and tobaccos at all hours.

"(j) Grocery stores and curb markets. Grocery stores and curb markets may remain open on Sunday during the hours of 7:00 to 10:00 a.m. and from 12:00 noon to 12:00 midnight, for the sale of any items not otherwise prohibited by law. All such establishments, including those selling confectionery items, shall remain closed on Sunday except during these hours.

"(k) Hotels, boardinghouses, restaurants, etc.

(1) Hotels, boardinghouses, cafes, restaurants, confectioneries and weiner stands are permitted to keep open on Sundays for their usual business, including the sale of food, cigars, cigarettes, tobacco and soft drinks.

(2) It shall be unlawful for any person to conduct or keep open any restaurant or cafe within the city on Sunday, except such as are also conducted as restaurants or cafes on other days of the week.

(3) A confectionery, as used in this section, shall mean a place where sweets are sold, such as ice cream, candies, cakes, soft drinks, doughnuts and wrapped sandwiches.

"(l) Ice manufactures and dealers.

(1) Manufactures and dealers of ice alone may keep open for the sale of ice at all times, but delivery of ice other than at the plant or premises of such manufacturer or dealer is hereby forbidden, except as hereinafter stated.

(2) Ice may be delivered to any hospital at any time, or to ice refrigerated railroad cars containing perishable fruits or other perishable products.

(3) Ice may be delivered to dwellings or apartments on Sunday under the following conditions only.

(a) A special order for the amount desired is made by the customer for each delivery.

(b) Drivers of vehicles delivering such special orders shall not accept orders while en route, and shall not peddle, sell or deliver ice to any person, unless the person has first made the special order at the office or plant of the ice dealer. Deliveries shall be made quietly without ringing of bells or other unnecessary noise.

(4) Any person delivering ice on Sunday, except in accordance with this section shall be guilty of a violation of this code.

"(m) Ice Cream manufacturers, dairies and creameries. Manufacturers of ice cream, dairies and creameries may keep open on Sunday and at all times for the sale of ice cream, milk, butter and frozen dairy products.

"(n) Newspapers and magazines. Nothing in this chapter shall be construed to prohibit the publication of newspapers or the sale of newspapers or magazines by newsstands or newsboys in and about the streets.

"(o) The sale of live bait such as worms, minnows, crickets and shrimp may be sold on Sunday.

"(p) Barbershops. It shall be unlawful for any barbershop in the city to open for business on Sunday.

"(q) If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance and each section, subsection, clause, and phrase thereof, irrespective of the fact that any one (1) or more sections, subsections, sentences, clauses, or phrases be declared invalid.

"(r) All ordinances or parts thereof in conflict with the provisions of this ordinance are hereby repealed. Sections 15-44 and 15-45 of the Code are expressly repealed.

"(s) This ordinance shall become effective July 1, 1968."

In each case, defendants are the Mayor, the members of the City Council, and the Chief of Police, of the City of Raleigh.

In Paragraph IV of its complaint, plaintiff Kresge alleged: "That the plaintiff operates a retail store in the City of Raleigh, North Carolina, selling clothing and wearing apparel, clothing accessories, furniture, housewares, home and office furnishings, household and office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, sporting goods, toys, 'Christmas greenery,' tobacco products, newspapers and periodicals, soft drinks, ice cream, candies, cakes, doughnuts, wrapped sandwiches, *fruits, melons and general grocery items.*" Paragraph IV of plaintiff Arlan's complaint is identical with this exception: The italicized words are omitted. In lieu thereof the paragraph closes with the words, "and other food items."

Kresge alleged it opened its store in the City of Raleigh during the month of August, 1964. Arlan alleged it opened its store in the City of Raleigh during the month of August, 1967. Each alleged that, since the opening date, it "has operated its store during the hours of 10:00 a.m. until 10:00 p.m. on Monday through Saturday, and during the hours of 1:00 p.m. through 7:00 p.m. on Sunday."

Except as noted, the allegations of the complaints, including the prayers for relief, are identical or substantially the same.

Plaintiffs alleged that, for reasons considered in the opinion, the challenged ordinance is unconstitutional and therefore void; that

enforcement of its provisions would cause plaintiffs to suffer "substantial direct economic injury"; that plaintiffs have no adequate remedy at law; and that, unless defendants are restrained, plaintiffs will suffer irreparable injury and damage.

Simultaneously with the institution of these actions, Judge Bailey issued a temporary restraining order and an order to show cause returnable before him on July 19, 1968. At the hearing on July 19, 1968, defendants demurred *ore tenus* to each complaint. The grounds of demurrer are set forth in detail in Judge Bailey's judgments. Being of the opinion the demurrers should be sustained, Judge Bailey, in each case, entered a judgment providing: "IT IS ORDERED, ADJUDGED AND DECREED that said demurrer be and the same is hereby sustained, the action dismissed and the temporary restraining order issued in this cause is hereby dissolved, effective 22 July, 1968." In each case, the plaintiff excepted to the judgment and appealed therefrom; and, upon appeal, each plaintiff assigns as error the court's ruling and judgment.

Jordan, Morris & Hoke and Eugene Hafer for plaintiff appellants.

Donald L. Smith for defendant appellees.

BOBBITT, J.

Plaintiffs alleged the ordinance prohibits the sale of the great majority of the items of merchandise they would otherwise sell during the period they operate their stores on Sunday, namely, from 1:00 p.m. through 7:00 p.m. Their factual allegations, which are admitted for the purpose of testing the sufficiency of the complaints, are deemed sufficient to support their conclusion that enforcement of the ordinance would cause them to suffer "substantial direct economic injury."

[1] Notwithstanding the *general* rule that the constitutionality of a statute or ordinance purporting to create a criminal offense may not be challenged in an action to enjoin its enforcement, a well-established exception permits such action when injunctive relief is essential to the protection of property rights and the rights of persons against injuries otherwise irremediable. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 214, 125 S.E. 2d 764, 770; *Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 653, 142 S.E. 2d 697, 700.

[2-4] The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. Sunday observance stat-

utes and municipal ordinances derive their validity from this sphere of legislative power. *State v. McGee,* 237 N.C. 633, 75 S.E. 2d 783, and cases cited; *State v. Chestnutt,* 241 N.C. 401, 85 S.E. 2d 297; *Surplus Co. v. Pleasants, Sheriff, supra.* Legislative authority for the adoption of the ordinance *sub judice* was conferred by the general statutes codified as G.S. 160-52 and G.S. 160-200(6), (7) and (10), and by "The Charter of the City of Raleigh," Session Laws of 1949, Chapter 1184, Sections 21 and 22.

The question presented by this appeal is whether the ordinance is *unconstitutional* on the grounds on which plaintiffs attack it. *Hudson v. R. R.,* 242 N.C. 650, 667, 89 S.E. 2d 441, 453; *Surplus Store, Inc. v. Hunter, supra; Sykes v. Clayton, Comr. of Revenue,* 274 N.C. 398, 402, 163 S.E. 2d 775, 778.

The Raleigh ordinance is similar to the Charlotte ordinance considered in *Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364, and is identical, except in the respects noted below, to the Winston-Salem ordinance considered in *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370. The validity of the Charlotte and Winston-Salem ordinances was upheld by this Court when attacked as violative of the law of the land provision of Article I, Section 17, of the Constitution of North Carolina, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

[5, 6] The Raleigh ordinance differs from the Winston-Salem ordinance considered in *Charles Stores v. Tucker, supra,* in that, in addition to its comprehensive prohibitions, it includes the sale of "Sporting goods and toys." Section 15-43(a), Subsection 7, in the list of specifically prohibited items, and in Section 15-43(o), it specifically authorizes the sale on Sunday "of *live* bait such as worms, minnows, crickets and shrimp." (Our italics.) These differences, to which attention is called in plaintiffs' briefs, do not bear significantly on the constitutionality of the ordinance. The classification of "Sporting goods and toys" as prohibited items and of *live* bait as permitted items cannot be considered unreasonable, arbitrary or discriminatory. Hence, on authority of *Clark's Charlotte, Inc. v. Hunter, supra,* and *Charles Stores v. Tucker, supra,* we hold the provisions of the Raleigh ordinance are not unreasonable, arbitrary, or discriminatory as applied to plaintiffs. The reasons underlying decision in these authoritative cases are set forth respectively in the opinions of Parker, C.J., and of Sharp, J. Repetition is unnecessary and would be inappropriate. Hence, the validity of the ordinance is sustained as against plaintiffs' attack thereon as violative of Article I, Sec-

tion 17, of the Constitution of North Carolina, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs assert, as their primary ground of attack, that the Raleigh ordinance is unconstitutional as violative of the First Amendment to the Constitution of the United States.

[7] "The First Amendment, as made applicable to the States by the Fourteenth, *Murdock v. Pennsylvania,* 319 U.S. 105, 87 L. ed 1292, 63 S. Ct. 870, 882, 891, 146 A.L.R. 81, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .' " *Everson v. Board of Education,* 330 U.S. 1, 91 L. ed. 711, 67 S. Ct. 504, 168 A.L.R. 1392. Accord: *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 92 L. ed. 649, 68 S. Ct. 461, 2 A.L.R. 2d 1338; *In re Williams,* 269 N.C. 68, 78, 152 S.E. 2d 317, 325, and cases there cited.

The two quoted clauses of the First Amendment are referred to generally as the "Establishment Clause," and the "Free Exercise Clause," respectively. Plaintiffs base their attack solely on the "Establishment Clause."

In *McGowan v. Maryland,* 366 U.S. 420, 6 L. ed. 2d 393, 81 S. Ct. 1101, the Supreme Court of the United States affirmed the Court of Appeals of Maryland which, in *McGowan v. State,* 220 Md. 117, 151 A. 2d 156, had affirmed the conviction of employees of a discount department store for making sales on a Sunday in violation of the Maryland Sunday closing laws. The Maryland statutes were attacked on the ground, *inter alia,* they violated "the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment." 366 U.S. at 430, 6 L. ed. 2d at 401, 81 S. Ct. at 1107. Since enforcement thereof caused the defendants to suffer "direct economic injury," it was held that the defendants had "standing to complain that the statutes are laws respecting an establishment of religion," 366 U.S. at 431, 6 L. ed. 2d at 402, 81 S. Ct. at 1108, but that the challenged Maryland Sunday closing laws were not invalid as violative of the "Establishment Clause" or otherwise. Accord: *Two Guys v. McGinley,* 366 U.S. 582, 6 L. ed. 2d 551, 81 S. Ct. 1135, reh. den. 368 U.S. 869, 7 L. ed. 2d 69, 82 S. Ct. 21.

In the present action, defendants concede plaintiffs have sufficient standing to challenge the Raleigh ordinance as violative of the "Establishment Clause." However, defendants contend that plain-

tiffs' challenge of the Raleigh ordinance as violative of the "Establishment Clause" is without merit.

In *McGowan,* Mr. Chief Justice Warren quotes with approval this excerpt from the opinion of Mr. Justice Black in *Everson:* "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " 366 U.S. at 443, 6 L. ed. 2d at 409, 81 S. Ct. at 1114.

[8, 9] Plaintiffs' attack on the Raleigh ordinance as violative of the "Establishment Clause" is based on the allegations of Paragraphs VIII and IX of the complaints, *viz.:*

"VIII. That the said ordinance permits the sale of 'Christmas greenery' during the month of December, which is the month in which the Christmas holiday is celebrated by persons of the Christian religion; that at all other times of the year 'Christmas greenery' may not be sold on Sunday by plaintiff and others similarly situated; that this requirement has no relationship to the setting aside of Sunday as a day of rest but was enacted to aid the observance of a Christian tradition.

"IX. *That plaintiff and others similarly situated may operate a grocery store and stand for the sale of fruits and melons* on Sunday except during the hours of 10:00 a.m. until 12:00 noon, which are hours traditionally and generally set aside for worship services by persons of the Christian religion; that the requirement for closing during these hours has no relationship to the setting aside of Sunday as a day of rest but was enacted to aid the observance of Sunday as a day of Christian worship." (Our italics.) (Quoted from Kresge's complaint. Paragraph IX of Arlan's complaint is the same with this exception: In lieu of the italicized words, Arlan alleged:

"That the ordinance complained of specifically allows certain sales and activities . . .")

The City Council, in the preamble, declares the Raleigh ordinance was adopted because there existed "a clear and present need to restrict the carrying on of business activities on Sunday in the City of Raleigh in order to provide for the due observance of Sunday as a day of rest, and to protect and promote the public health, the general welfare, safety and morals of the citizens." In general, the Raleigh ordinance, like the Winston-Salem ordinance, exempts "those businesses rendering essential services or furnishing products considered as necessary for health or as contributing to the recreational aspect of Sunday." *Charles Stores v. Tucker, supra.*

Although recognizing *the predecessors* of the Maryland Sunday laws under consideration were "undeniably religious in origin," Mr. Chief Justice Warren, in *McGowan,* states:

"In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular consideration, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

"Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." 366 U.S. at 444-445, 6 L. ed. 2d at 410, 81 S. Ct. at 1115.

[10] In *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5, involving a Greenville Sunday ordinance identical in all material respects to the ordinance considered in *Charles Stores v. Tucker, supra,* it was held that the courts, in respect of an ordinance valid on its face, will not inquire into the motives which prompted the city council to enact it. Plaintiffs contend the Raleigh ordinance, notwithstanding the *declared* purpose for which the City Council enacted it, discloses on its face "a use of the State's coercive power to aid religion, namely, the Christian religion." The contention is based upon two incidental and secondary features of the ordinance, to wit: (1) That "Christmas greenery" may not be sold on Sunday except during the month of December; and (2) that grocery stores and stands for the sale of fruits and melons may be operated during *all hours* on Sunday except between 10:00 a.m. and 12:00 noon.

[8] The first feature to which plaintiffs call our attention is the permitted sale of "Christmas greenery" on Sunday during the month of December. Apparently, the term "Christmas greenery" is intended to identify evergreen trees, holly, mistletoe, and other recently cut and perishable trees and shrubs, which are used as decorations on streets, in stores, in homes, and generally throughout the community during the Christmas season. Obviously, such greenery would be offered for sale only during the month of December. While the word "Christmas," standing alone, has a distinctive religious connotation, the decorations included within the term "Christmas greenery" are used indiscriminately by all segments of the community — especially merchants — without reference to a specific religious affiliation or any religious affiliation. Suffice to say, this small particular cannot be considered a sufficient basis for declaring the ordinance unconstitutional as violative of the "Establishment Clause" of the First Amendment to the Constitution of the United States.

[9, 11] The second feature to which plaintiffs call our attention, namely, the provision purporting to require grocery stores and stands for the sale of fruits and melons to cease operations between 10:00 a.m. and 12:00 noon, appears to have been brought forward from earlier ordinances. These, previously considered and upheld by this Court, were not attacked as violative of the "Establishment Clause," *e.g.,* the Winston-Salem ordinance considered in *Charles Stores v. Tucker, supra.* At the outset we note that the complaints disclose plaintiffs would suffer no economic injury on account of the enforcement of this provision. Since their stores are operated on Sunday between the hours of 1:00 p.m. and 7:00 p.m., this provision imposes no restraint on plaintiffs and is not presently subject

to attack by plaintiffs in an action to obtain injunctive relief. *Charles Stores v. Tucker, supra,* 263 N.C. at 717, 140 S.E. 2d at 375, and cases cited.

[12] The aid, if any, to the Christian religion resulting from the enforcement of the two-hour closing provision referred to in the preceding paragraph would seem minimal and remote. As Mr. Chief Justice Warren said in *Two Guys v. McGinley, supra,* with reference to the Pennsylvania statutes, which contained provisions having greater religious connotations than any in the Raleigh ordinance: "It would seem that those traces that have remained (that is, language with religious connotations) are simply the result of legislative oversight in failing to remove them." *Id.* at 366 U.S. at 594, 6 L. ed. 2d at 559, 81 S. Ct. at 1141.

In the opinion in *McGowan,* Mr. Chief Justice Warren stated: "The title of the major series of sections of the Maryland Code dealing with Sunday closing — Art. 27, §§ 492-534C — is 'Sabbath Breaking'; § 492 proscribes work or bodily labor on the 'Lord's day,' and forbids persons to 'profane the Lord's day' by gaming, fishing et cetera; § 522 refers to Sunday as the 'Sabbath day.' As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect." 366 U.S. at 445, 6 L. ed. 2d at 410, 81 S. Ct. at 1115. Suffice to say, the Maryland statutes which were upheld in *McGowan* against attack as violative of the "Establishment Clause" contain more provisions than the Raleigh ordinance suggestive of a relationship between the Sunday closing laws and the Christian religion.

In accord with *McGowan* and *Two Guys,* we hold that "neither the statute's (ordinance's) purpose nor its effect is religious." *Two Guys v. McGinley, supra,* 366 U.S. at 598, 6 L. ed. 2d at 561, 81 S. Ct. at 1143.

The demurrers were properly sustained; and, since the ordinance, which is incorporated in the complaints, discloses that plaintiffs have no cause of action for injunctive relief on the grounds alleged, the actions were properly dismissed.

Affirmed.

IN THE MATTER OF: A FILING MADE BY THE NORTH CAROLINA FIRE INSURANCE RATING BUREAU FOR A REVIEW OF EXPERIENCE OF FIRE INSURANCE

No. 525

(Filed 21 January 1969)

1. Insurance §§ 113, 131— fire insurance — standard policy — payment for loss

The standard fire insurance policy in effect in this State requires the insurer to pay losses not to exceed the amount specified in the policy to the extent of the cash value of the property at the time of the loss, but not exceeding the amount it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss. G.S. 58-176.

2. Insurance § 116— uniform fire insurance rates

The statutes governing premium rates upon fire insurance policies covering risks in this State contemplate a uniform premium rate schedule for all companies operating in the State. G.S. Ch. 58, Art. 13.

3. Insurance § 116— fire insurance rates — Rating Bureau

For rate making purposes, the North Carolina Fire Insurance Rating Bureau is regarded as if it were the only insurance company operating in North Carolina and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation.

4. Insurance § 116— proposed rates by Rating Bureau — burden of proof

There is no presumption that a rate filing by the Fire Insurance Rating Bureau is correct and proper, the burden being upon the Bureau to show that the proposed rate schedule is "fair and reasonable" and that it does not discriminate unfairly between risks.

5. Insurance § 116— fire insurance rates — legislative power

In fixing by law the fire insurance premium rate, it is the legislative power of the State which is being exercised.

6. Insurance § 116— fire insurance rates — policies affected

G.S. 58-131.2 requires that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established.

7. Insurance § 116— fire insurance rates — determination of amount

The fire insurance rate maker must determine what amount, collected as premiums at the inception of the policies hereafter to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit."

8. Constitutional Law § 7; Insurance § 116— fire insurance rate statutes — constitutionality

The statutes delegating to the Commissioner of Insurance the authority to withhold approval of fire insurance rates proposed by the Rating Bureau and to fix rates which are fair and reasonable comply with the constitutional requirement that they prescribe sufficiently clear standards to control the Commissioner's discretion.

9. Insurance § 116— fire insurance rates — authority of Insurance Commissioner

The Commissioner of Insurance has no authority to prescribe or regulate premium rates except insofar as that authority has been conferred upon him by statute.

10. Insurance § 116— fire insurance rates — factors considered

In fixing premium rates that "will produce a fair and reasonable profit," G.S. 58-131.2, the Commissioner of Insurance is directed by the statute to consider all reasonable and related factors, including, but not limited to, the conflagration and catastrophe hazard, the past and prospective loss experience, the loss trend at the time of the investigation and the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

11. Insurance § 116— fire insurance rates — prospective loss experience — loss trend

As used in G.S. 58-131.2, "prospective loss experience" and present "loss trend" relate not only to the number of fires and the extent of physical destruction thereby, but also to the cost of replacement of the destroyed property.

12. Statutes § 5— statutory construction

A statute must be construed in the light of the purpose to be accomplished.

13. Insurance § 116— fire insurance rates — determination of amount

In order to accomplish the legislative purpose of the statutes governing fire insurance rates to provide for the public at reasonable cost insurance in financially responsible companies, the premium must be fixed at a level which will enable the insurance industry (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a "fair and reasonable profit" and no more.

14. Insurance § 116— fire insurance rates — fire losses

In fixing fire insurance rates, the Commissioner of Insurance must consider the losses, both in number and in cost, which will be incurred during the life of the policies issued under the rates fixed by him.

15. Insurance § 116— fire insurance rates — consideration of past experience

While the Commissioner of Insurance is directed to consider the experience of the fire insurance business during a period of not less than

five years preceding the year of the investigation, he is not limited to that experience, but may extend his consideration to the experience of still earlier years so long as such years are "reasonable and related" to an informed judgment as to the future.

16. Insurance § 116— fire insurance rates — evidence of changed conditions

Evidence that present conditions are not those which prevailed during former experience is relevant to the translation of the past experience into an informed judgment concerning the future.

17. Insurance § 116— fire insurance rates — projection into future

The use of past experience to estimate future needs involves, of necessity, a projection of known data into the unknown future.

18. Insurance § 116— fire insurance rate fixed by Commissioner — presumption of correctness

A projection by the Commissioner of Insurance of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence, G.S. 58-9.3, and if he has taken into account all of the relevant facts which he is directed by the statute to consider. G.S. 58-131.2.

19. Insurance § 116— fire insurance rates — presumption of correctness — opinion evidence as to what factors Commissioner should consider

Presumption that order of the Commissioner of Insurance is correct and proper when supported by substantial evidence does not apply where order concluding that it would not be conservative and proper for the Commissioner to consider a projection of present and past cost trend in fixing future rates is based upon expert testimony to that effect, expert opinion evidence as to what things are proper for consideration by the Commissioner not being determinative since that is a matter provided by statute.

20. Insurance § 116— fire insurance rates — projection of present and past cost trend

Otherwise competent opinion evidence as to a projection of the present and past cost trend is, as a matter of law, relevant to determination by the Commissioner of probable loss experience of the companies during the life of policies to be issued in the near future.

21. Insurance § 116— fire insurance rates — evidence of cost trends

Evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past to the present, and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future so that future costs will be higher or lower than present costs is evidence of "reasonable and related factors" which G.S. 58-131.2 requires the Commissioner to consider in making his own projection into the future.

22. Insurance § 116— fire insurance rates — use of cost trend

It is not a proper ground for the rejection of evidence of an upward

or downward cost trend into the future that such projection has never before been used in the rate making process.

23. Insurance § 116— fire insurance rates — credibility of evidence of cost trend

The credibility and weight of evidence projecting the cost trend into the future are to be determined by the Commissioner of Insurance.

24. Insurance § 116— fire insurance rate filing — rehearing

Upon the filing, within the time allowed, of a written request for a rehearing, G.S. 58-131.5 makes the holding of such rehearing mandatory and contemplates the introduction of relevant and otherwise competent evidence at such rehearing.

25. Insurance § 116— fire insurance rates — evidence competent at rehearing

At a rehearing upon a filing by the Rating Bureau for a change in fire insurance rates, evidence relevant to the issues involved in the original hearing and to the reasons stated in the petition for rehearing, if otherwise competent, is admissible.

26. Insurance § 116— fire insurance rates — rehearing — evidence originating since date of rate filing

At a rehearing upon a filing by the Rating Bureau for a change in insurance rates, the Commissioner of Insurance erred in ruling that evidence originating subsequent to the rate filing was inadmissible as a matter of law and in refusing to permit the Rating Bureau to introduce evidence of changes in the cost level since the date of the filing which tends to corroborate the Bureau's evidence at the original hearing with reference to the cost levels likely to prevail during the life of policies to be issued in the near future.

27. Insurance § 116— fire insurance rate hearing — complex statistical exhibits

It is within the discretion of the Commissioner of Insurance to require complex statistical exhibits to be made available to the adverse party prior to the hearing upon fire insurance rates, to restrict or deny the use of newly developed statistical data sprung suddenly at the hearing by either party to the surprise of the other, and to grant such recess of the hearing as he may deem necessary to permit reasonable opportunity to prepare evidence to refute it.

28. Insurance § 116— fire insurance rates — fair and reasonable profit

G.S. 58-131.2 imposes upon the Commissioner of Insurance the duty of fixing such fire insurance rates as will produce "a fair and reasonable profit" and no more.

29. Insurance § 116— fire insurance rates — reasonable profit — reasonable expenses

What constitutes a "reasonable profit" cannot be determined until there is first a determination of reasonable expenses attributable to the

business operated in this State, which figure may or may not coincide with the actual expenses paid.

30. Insurance § 116— fire insurance rates — operating expenses

The determination by insurance companies of the propriety of expenditures for operating costs is not binding upon the Commissioner of Insurance in a rate making procedure.

31. Insurance § 116— fire insurance rates — projection of operating expenses

The determination of a fair and reasonable allowance for Loss Adjustment Expense and for other operating expenses, like the determination of a fair and reasonable allowance for losses, involves a projection of past experience into the immediate future.

32. Insurance § 116— fire insurance rates — fair and reasonable profit — burden of proof

Whether the difference between gross revenues to be derived from existing premium rates, Earned Premiums, less the combination of losses and expenses is a "fair and reasonable profit" is a question of fact to be determined by the Commissioner from the evidence, and the burden of proof is upon the Rating Bureau to show that the existing premium rates are not sufficient.

33. Insurance § 116— fire insurance rates — determination of fair and reasonable profit

Whether 6% of Earned Premiums is a fair and reasonable profit, an excessive profit or an insufficient profit must be determined by the Commissioner from the evidence and involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk.

34. Insurance § 116; Judgments § 37— determination of fair and reasonable profit — res judicata

What is a "fair and reasonable profit" varies from time to time, and a determination by the Commissioner in a former case as to what percentage of Earned Premiums constitutes a fair and reasonable profit for a fire insurance company is not *res judicata* as to that question in the current investigation.

35. Insurance § 116— determination of necessity for increase in fire insurance rates — requisite findings of fact

In determining whether an increase in fire insurance premium rates is necessary in order to yield a "fair and reasonable profit" in the immediate future and, if so, how much increase is required for that purpose, the Commissioner must make specific findings of fact upon substantial evidence as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percentage of Earned Premiums which will constitute a "fair and reasonable profit" in that period.

36. Insurance § 116— approval of only part of proposed rate increase

The Commissioner of Insurance need not approve or disapprove a filing by the Rating Bureau in its entirety but may fix premium rates which allow part but not all of the increase proposed by the Bureau.

ON certiorari to the Court of Appeals.

On 21 July 1967, the North Carolina Fire Insurance Rating Bureau, hereinafter called the Bureau, filed with the Commissioner of Insurance, hereinafter called the Commissioner, its proposal, hereinafter called the filing, that premium rates on fire insurance policies thereafter to be issued in North Carolina be adjusted. The proposed adjustments included increases in certain premium rates and decreases in others, the net result being an "overall increase of 2.54 per cent," which would produce approximately $1,000,000 a year in additional premium revenue.

Following a hearing, the Commissioner entered his order denying the filing in its entirety. A rehearing was had on the Bureau's petition. The Commissioner reaffirmed the denial. The Bureau appealed to the Superior Court of Wake County which affirmed the orders of the Commissioner. The Bureau then appealed to the Court of Appeals. On 14 August 1968, that Court rendered its decision, reported in 2 N.C. App. 10, 162 S.E. 2d 671, remanding the matter for further proceedings. Both the Bureau and the Commissioner filed in this Court petitions for certiorari to review the judgment of the Court of Appeals. Both petitions were allowed.

The rates now in effect were fixed by the decision of the Commissioner upon a filing by the Bureau on 18 March 1966.

The Present Filing And Attached Exhibits

To the present filing the Bureau attached numerous statistical exhibits. These set forth, year by year, data showing the aggregates of premiums collected, premiums earned, losses paid and losses incurred by the fire insurance companies operating in North Carolina upon the risks insured by them in this State, together with various computations deemed by the Bureau appropriate to adjust such premium data to the presently effective premium rates and such loss data to current costs. The cost adjustment was made upon the basis of a Composite Current Cost Index Factor, computed from the Consumer Price Index and the Construction Cost Index published by the United States Department of Labor and the United States Department of Commerce, respectively.

By these procedures the Adjusted Earned Premiums and Adjusted Incurred Losses upon the North Carolina operations of all

companies combined were computed for each of the years 1961 to 1966, inclusive. A Loss Ratio (i.e., the ratio of such losses to such premiums) was then computed for each of those years. That is, the Loss Ratio for each such year was computed as if the current premium rates had been in effect in that year and the current cost levels, projected by computation to 30 June 1968, had also been in effect in that year.

With reference to the projection into the then future of its Composite Cost Index, the filing stated:

> "In this 1967 filing, the Bureau renews its insistence that correct ratemaking requires proper consideration of current cost trends and renews its application of a composite current cost index factor, improved and made more realistic and accurate by projecting current costs into the period for which the rates are being made. Such projection is a carrying forward into such future period of the curve of current costs established by the experience of past years."

Having so computed the Loss Ratio for each of the years, the Bureau then weighted these ratios, assigning the weight of 30% to the 1966 ratio, 25% to that of 1965, 15% to that of 1964, and 10% to that of each of the preceding three years. It thus derived a composite Weighted Loss Ratio for the six years of $49.95% which it rounded off to 50%. To this it added 3.8% for Loss Adjustment Expenses, making a total of 53.8%.

By the process described below, the Bureau determined that the Balance Point Loss Ratio was $52.3%; that is, when the Loss Ratio, including Loss Adjustment Expense, adjusted as above described, is 52.3% of the Earned Premiums, adjusted as above described, no change in premium rates is required in order to give the companies a "fair and reasonable profit" within the meaning of G.S. 58-131.2.

Dividing the so computed Loss Ratio, including Loss Adjustment Expense, of 53.8% by the Balance Point Loss Ratio of 52.3%, the Bureau derived the figure of 102.9% (i.e., the ratio of the computed Loss Ratio, including Loss Adjustment Expense, to the said Balance Point Loss Ratio) and thereby reached the conclusion that a 2.9% increase in the overall premium rate (and so in the Earned Premiums) would be "fair and reasonable" (a non-sequitur as shown below). It then proposed detailed adjustments of rates on the various classifications of risk which would yield an overall increase of 2.54%, whilch was the overall increase proposed in the filing. That is, it proposed an increase slightly less than it contends would be justified.

The Bureau computed the Balance Point Loss Ratio in the following manner:

Taking the ratio of Expense, exclusive of Loss Adjustment Expense, to Earned Premiums, adjusted as above described, as 41.7%, and the Underwriting Profit Factor as 6%, the total of these two became 47.7% of Earned Premiums. Then, by subtracting this total from 100%, the Balance Point Loss Ratio of 52.3% of Earned Premiums was derived.

That is, the filing proceeds upon the theory that when, out of each dollar of earned premiums, 41.7 cents is used to pay Expense, other than Loss Adjustment Expense, 52.3 cents is used to pay Incurred Losses, including Loss Adjustment Expense, and 6 cents is retained for Underwriting Profit, the premium rates are "in balance." Thus, the Bureau contends that premium rates yielding an Underwriting Profit of 6 cents out of each dollar of Earned Premiums are at the level contemplated by the statute.

(The fallacy in the Bureau's computation of an increase in premium rates of 2.9% as necessary to fix rates yielding a "fair and reasonable profit" is this: By its computation, including all adjustments and projections, out of each dollar of Earned Premiums, at present rates, 53.8 cents will be needed to pay reasonably anticipated losses, including Loss Adjustment Expense, 41.7 cents will be needed to pay Expense, other than Loss Adjustment Expense, leaving only 4.5 cents for Underwriting Profit, which last figure the Bureau says should be 6 cents. To increase the premium rate by 2.9%, will increase the present Earned Premium dollar to $1,029, but will not increase the amount needed to pay anticipated losses, including Loss Adjustment Expense, or the amount needed to pay other Expense. The total of these will remain at 95.5 cents, leaving for Underwriting Profit not 6 cents but 7.4 cents. If an adjustment of the Expense, other than Loss Adjustment Expense, for a resulting increase in taxes is appropriate, neither the necessity nor the amount thereof appears in the record.)

The exhibits attached to the filing do not show how the Bureau computed Expense, other than Loss Adjustment Expense. Presumably, this was derived from reports filed with the Bureau by the companies. (If it is a mere theoretical figure rather than an actual computation, a different question arises.)

The reasonableness of such ratio of Expense to Earned Premiums, that is, 41.7 cents out of each premium dollar earned, does not appear from the filing or the exhibits attached thereto. Similarly,

the derivation of the conclusion that Underwriting Profit should be 6 cents out of every premium dollar earned does not appear upon the filing or the exhibits attached thereto.

The Bureau's exhibit, upon which it computed the ratio of Expense, exclusive of Loss Adjustment Expense, to Earned Premiums, adjusted, to be 41.7% shows the computation consists of three steps. First, the ratio of certain expenses, designated in this record only by reference to certain schedules, to *Written* Premiums is computed at 28.5%. Second, the ratio of All Other Expense to *Earned* Premiums is computed at 17.0%. Third, these percentages are added together, notwithstanding the fact that one is a ratio of one part of the expenses to *Written* Premiums and the other is the ratio of another part of the expenses to *Earned* Premiums, thus deriving the figure of 45.5%. The arithmetical total of these two percentages is certainly 45.5, but obviously it is not 45.5% either of Written Premiums or of Earned Premiums. From this figure of 45.5% of something, the Bureau has subtracted its figure of 3.8% for Loss Adjustment Expense without specifying whether this is 3.8% of Written Premiums or of Earned Premiums or of something else. The result of this subtraction is the figure of 41.7% used in the Bureau's computation of the Balance Point Loss Ratio. It would appear, though not clearly, that, in computing the Balance Point, the Bureau regarded this figure as 41.7% of Earned Premiums, adjusted.

At neither the hearing nor the rehearing before the Commissioner did the Bureau offer any evidence to show any breakdown of Loss Adjustment Expense, or of other Expense, or the reasonableness of an Underwriting Profit equal to 6 cents out of every Earned Premium dollar. The ratios of these three items to Earned Premiums, adjusted, 3.8%, 41.7% and 6%, respectively, are merely stated as facts in the computation of the Balance Point Loss Ratio upon an exhibit attached to the filing. The Insurance Department offered no evidence or contention with respect to such use of these ratios. In neither order of the Commissioner is the correctness of any of these ratios, or of the resulting Balance Point Loss Ratio, found as a fact or discussed.

The First Hearing Before The Commissioner

At the first hearing before the Commissioner, the Bureau introduced in evidence the filing and the exhibits attached thereto, together with testimony of its actuary and of another expert witness. The Department of Insurance appeared in opposition to the approval of the filing and introduced the testimony of its actuary. There was no other opposition.

There was no evidence in support of or in opposition to the use by the Bureau, in its exhibit, of the above mentioned ratios to Earned Premiums, adjusted, of Loss Adjustment Expense, Expense, exclusive of Loss Adjustment Expense, and Underwriting Profit or of the resulting Balance Point.

The Department of Insurance did not attack or question the correctness of any data appearing on the exhibits of the Bureau, or of any mathematical computation thereon, or the accuracy or relevancy of the Bureau's Composite Current Cost Index Factor, as of the date of the filing, or the accuracy of either of the price indices used by the Bureau in computing it.

Likewise, the Bureau offered no evidence to substantiate, and the Department of Insurance presented neither evidence nor contention in disagreement with, the weighting process by which the yearly loss ratios, adjusted to current premium rates and current costs, were further adjusted in arriving at the composite Loss Ratio to Earned Premiums of 53.8% as of the then future date of 30 June 1968. The witness for the Bureau simply stated that these were "weights developed by actuarial judgment" (i.e., the judgment of an undesignated actuary); that the weighting process was so developed and first "recommended" by the Fire Insurance Research & Actuarial Association to the fire insurance rating bureaus of the several states in March of 1958; that "this principle is now accepted and used in the great majority of the States, including North Carolina," and that this weighting process "has helped to develop more responsive rate levels so that the future underwriting experience came closer to being at the proper point." In this instance, the weighting process resulted in a composite Loss Ratio lower than the simple arithmetical average of the Loss Ratios of the six years, adjusted to current premium rates and current costs, by reason of the fact that the Loss Ratio for 1966, so computed, was the lowest of all of such ratios for the six years.

The evidence of the Bureau is further to the effect that "attention was turned in 1964 to the question of differences in cost levels represented by the incurred losses used in the review period." That is, the evidence of the Bureau shows that, for the purpose of adjusting past loss experience to future conditions, the weighting device was first developed and put into use and some years later the cost index device was developed and put into use. The evidence of the Bureau does not show, and the evidence of the Department of Insurance does not question, the necessity or propriety of using both devices cumulatively as was done in the exhibits of the Bureau in

the present matter. Neither order of the Commissioner makes reference to the cumulative effect of these adjustments of loss experience.

The actuary for the Bureau testified that he had computed, by a method not challenged by the Department of Insurance, the cost trend curve on the basis of the above mentioned Composite Current Cost Index and had projected this trend to 30 June 1968 on the assumption that, in such then future period, the index would continue to rise on the same curve. It was upon this basis that he computed the Loss Ratio, including Loss Adjustment Expense, at the above mentioned figure of 53.8% of Earned Premiums, adjusted. He testified:

> "In each of these indices, for each of the seven years, there is an increase, a trend upward in each one. * * * What we have done, based on those seven years of experience, is to assume that for each of the months through June 30, 1968, there would be a similar increase in the Composite Current Cost Index Factor. * * *
>
> "As an expert statistician and actuary, I know that this is the current assumption among experts, and I do not know of any reliable statistical authority or economist that predicts that prices will fall in the next eighteen months."

The actuary of the Department of Insurance did not take issue with the cost trend curve as calculated and plotted by the actuary for the Bureau, or with his prediction as to the cost level to be expected for 30 June 1968. His attack was upon any use of a projection of the cost trend into the future for rate making purposes. He testified:

> "In my opinion, I do not consider the method of adjusting the incurred losses as used by the Bureau in this filing to be conservative. * * *
>
> "In my opinion, I do not consider the method used insofar as Fire Insurance rate-making in North Carolina to be proper. My reasons are that such an adjustment necessarily must be based on assumptions and conjecture and economics and political or natural events of the future could have an effect on either the Consumer Price Index or the Composite Construction Cost Index, or both. I do not feel that such a projection is proper."

The actuary for the Department of Insurance accepted and used the Bureau's Composite Current Cost Index up to the level of 31 December 1966, the end of the experience period used in the Bureau's

calculations. At that level of costs he concluded that no increase in premium rates was required. With this conclusion the actuary for the Bureau was not in disagreement. That is, the Bureau agreed that if the costs of replacing burned property were to continue at the 31 December 1966 level throughout the life of the policies to which the proposed rates were to apply, no increase in premium rates would be justified.

The First Order Of The Commissioner

The Commissioner made the following material findings of fact:

"3. The Consumer Price Index and the Construction Cost Index are reasonable measures of historical price changes.

* * *

"6. The use of the cost factor to adjust loss statistics up to the latest available data of the filing [i.e., 31 December 1966] would produce a rate indication of no change.

"7. The loss trend in North Carolina for fire insurance for the period 1961-1968 has generally [been] stable with no pronounced upward or downward trend."

The Commissioner thereupon reached the following conclusion:

"In its rate proposal the Bureau has departed from methods previously approved. It has estimated the costs of the future using a projection based on certain price indices. It is the opinion of the undersigned Commissioner of Insurance that the adjustment method used is neither conservative nor proper as it is based upon supposition and conjecture and the rate developed by the use of such an adjustment method would be unreasonable. Had the Bureau adjusted losses up to the date of the latest available statistical information in the filing, the rate-making method would have indicated no change in rates.

"The rate proposal is, therefore, denied."

The Rehearing Before The Commissioner

At the rehearing the Bureau offered in evidence statistical data, issued by the above mentioned departments of the Federal Government after the original hearing, which brought its Composite Current Cost Index up through August 1967, and also such data bringing that index up through September 1967. These data were made available to the Department of Insurance by the Bureau approximately one month prior to the rehearing.

The Bureau further offered in evidence exhibits, identical to

those made part of the filing, except that the cost level figures so derived for 31 August 1967 and 30 September 1967, respectively, were substituted, in the computations of the Loss Ratio in these new exhibits, for the projection to 30 June 1968, used in the exhibit attached to the filing and introduced at the original hearing. That is, in the exhibits offered at the rehearing, the Bureau did not use a projection of the experienced cost trend but used the actual index figures for August and September 1967, respectively. The Loss Ratio, so computed on the basis of the experienced cost level for 30 September 1967, was the same as that formerly computed on the basis of the projection of the trend to 30 June 1968. That computed on the basis of the experienced cost level for 31 August 1967 was slightly less.

The Commissioner sustained objections by the Department of Insurance to the introduction of these data, and the exhibits containing them, on the ground that such data had originated or had been developed since the date of the filing. That is, the Commissioner ruled that evidence could not be received to show changes in the cost level since the date of the filing.

There was no contention by the Department of Insurance that it was taken by surprise by the offer of such evidence and no request by it for an adjournment so as to permit it to study the new data. The actuary for the Bureau testified that with the new data he was able in approximately ten minutes to make the appropriate modifications of the exhibits originally attached to the filing. Again, the Department of Insurance did not take issue with the arithmetical correctness of the computations so made.

Second Order Of The Commissioner

On 20 December 1967, the Commissioner entered his order affirming his previous refusal to approve the filing, basing this order upon the following conclusions:

> "In this rehearing the Bureau did not present acceptable statistical data or other evidence to warrant any modification, change or recission.
>
> "The undersigned Commissioner of Insurance rejects the introductions and acceptance of newly developed evidence (that is, evidence originating subsequent to the date of the filing). The orderly consideration of a rate filing requires a reference point, in time, for the comparison of premiums, losses and expenses. To permit the continual introduction of newly developed statistical data, as the Bureau has proposed to do, would pre-

clude a careful, thoughtful analysis of the matter under review and, in the opinion of the undersigned Commissioner of Insurance would not serve the public interest."

Judicial Review

The Superior Court of Wake County affirmed the two orders of the Commissioner, the court concluding: (1) There is in the record substantial evidence to support the Commissioner's ruling that the method employed by the Bureau in its computation of the loss ratio was not proper and reasonable; and (2) the sustaining of the objections to the evidence offered by the Bureau at the rehearing was within the discretion of the Commissioner.

The Court of Appeals held: (1) It could not say that the method used by the Commissioner for weighting the loss ratios in the several years did not comply fully with the statutory requirement that the Commissioner consider the prospective loss experience based on current loss trend; but (2) the Commissioner erred in refusing to admit in evidence and consider the statistical data offered at the rehearing. It, therefore, remanded the matter for further proceedings consistent with its opinion.

The Bureau petitioned for certiorari to review the first of these rulings. The Department of Insurance petitioned for certiorari to review the second.

Attorney General Bruton and Assistant Attorney General Harrell for North Carolina Insurance Commissioner.

Joyner & Howison for North Carolina Fire Insurance Rating Bureau.

LAKE, J.

Following the decision in *United States v. Southeastern Underwriters Association,* 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, the Legislature of this State enacted the statutes under which the premium rates upon fire insurance policies covering risks in this State are governed. These are found in Chapter 58, Article 13, of the General Statutes. They have not been amended in any respect material to the present inquiry since their enactment.

In only one case, *In Re Rating Bureau,* 245 N.C. 444, 96 S.E. 2d 344, have these statutes been before this Court. The decision in that case is not determinative of the questions involved in the present litigation. The carefully prepared briefs, both of counsel for the

Bureau and of the Attorney General, advise us that counsel have found no decisions of other courts directly in point upon these questions and our own research has disclosed none. Certain fundamental principles of rate or price regulation, recognized and applied by this Court in decisions concerned with the regulation of public utility rates under Chapter 62 of the General Statutes, are applicable to this matter in a general way, but the statutory provisions governing the two rate making procedures are substantially different. Consequently, we are plowing new ground. If the process turns up a need for revision or supplementation of the existing statutes governing insurance premium regulation, a session of the Legislature is, fortunately, at hand.

The Pertinent Statutes

G.S. 58-125 provides: "There is hereby created a bureau to be known as the 'North Carolina Fire Insurance Rating Bureau.' "

G.S. 58-126 provides: "The provisions of this article shall apply to insurance against loss to property located in this State, or to any valuable interest therein, by fire, * * *"

G.S. 58-127 provides: "Under the supervision of the Commissioner of Insurance * * * insurance companies authorized to effect insurance in this State against the risk of loss by perils within the scope of this act, shall organize a rating bureau for the purpose of making rates and rules and regulations which affect or determine the price which policyholders shall pay for insurance covered by this article, on property or risks located in this State; and all companies now or hereafter authorized to transact such business in this State shall become members of such bureau.

"The government of the rating bureau shall be vested in its members * * *"

G.S. 58-130 provides: "Every insurer shall file annually with the rating bureau * * * its underwriting experience in this State in accordance with classifications approved by the Commissioner. * * *"

G.S. 58-131 provides: "The rating bureau in making rates shall not unfairly discriminate between risks involving essentially the same construction and hazards, and having substantially the same degree of protection."

G.S. 58-131.1 provides: "No rating method, schedule, class-

ification, underwriting rule, bylaw, or regulation shall become effective or be applied by the rating bureau until it shall have been first submitted to and approved by the Commissioner. * * *"

G.S. 58-131.2 provides: "The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.

"If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

"In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

"Any reduction or increase of rates ordered by the Commissioner shall be applied by the rating bureau subject to his approval within sixty (60) days and shall become effective solely to such insurance as is written having an inception date on and after the date of such approval.

"Whenever the Commissioner finds, after notice and hearing, that the bureau's application of an approved rating method, schedule, classification, underwriting rule, bylaw or regulation is unwarranted, unreasonable, improper or unfairly discriminatory he shall order the bureau to revise or alter the application of such rating method, schedule, classification, underwriting rule, bylaw or regulation in the manner and to the extent set out in the order."

G.S. 58-131.3 provides: "No insurer * * * shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. * * *"

G.S. 58-131.5 provides: "The Commissioner shall not make any rule, regulation or order under the provisions of this article without giving the rating bureau and insurers who may be affected thereby reasonable notice and a hearing if hearing is requested. * * *

"At the conclusion of such hearing, or within thirty (30) days thereafter, the Commissioner shall make such order or orders as he may deem necessary in accordance with his finding. Within thirty (30) days after receiving written notice of any such order or finding any person affected thereby may request a rehearing or review thereon before the Commissioner by filing a written request setting forth a summary of the reasons therefor. Upon receipt of such request, the Commissioner shall set a date for rehearing. Such application for rehearing shall act as a stay of the provisions of such order. The Commissioner may modify, change or rescind such order if he finds that the facts shown at the rehearing warrant such modification, change or rescission. * * *"

G.S. 58-131.8 provides: "A review of any order made by the Commissioner in accordance with the provisions of this article, shall be by appeal to the Superior Court of Wake County in accordance with the provisions of § 58-9.3."

G.S. 58-9.3 provides: "(a) Any order or decision made, issued or executed by the Commissioner * * * shall be subject to review in the superior court of Wake County * * *

"(b) * * * The order or decision of the Commissioner if supported by substantial evidence shall be presumed to be correct and proper. * * *

"* * * The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. * * *

"(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof.

"(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Commissioner may be taken to the Supreme Court of North Carolina by any party to the action as in other civil cases. * * *"

[1] G.S. 58-176 prescribes the terms of the standard fire insurance policy to be issued in this State and, among other things, pro-

vides that such policy shall state: "[T]his Company * * * does insure [the policyholder] and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss * * *" not to exceed the amount specified in the policy.

[2-4] It is readily apparent that this statutory plan contemplates a uniform premium rate schedule for all companies operating in the State. For rate making purposes, the Bureau is to be regarded as if it were the only insurance company operating in North Carolina and as if it had an earned premium experience, an incurred loss experience and an operating expense experience equivalent to the composite of those of the companies actually in operation. There is no presumption that a rate filing by the Bureau is correct and proper. *In Re Rating Bureau, supra.* The burden is upon the Bureau to show that the rate schedule proposed by it is "fair and reasonable" and that it does not discriminate unfairly between risks. *In Re Rating Bureau, supra.*

The Relevancy Of The Cost Trend Projection

[5, 6] In fixing by law the premium rate, it is the legislative power of the State which is being exercised. It is not only impractical to fix premium rates retroactively, it is expressly required by G.S. 58-131.2 that premium rates fixed in accordance with the statutory plan be applied only to policies issued after the rates are so established. Consequently, the entire procedure contemplates a looking to the future.

[7] The policy contracts fix in advance the premiums to be charged therefor by the issuing company. For the premiums so fixed at the inception of the policy, the company contracts that it will pay, within the maximum limit stated in the policy, the cost of replacing property destroyed by fire occurring in the then future. Thus, the amount which the company is obligated to pay is measured not by the cost of such replacement at the inception of the policy but by the cost of such replacement at the time of the fire. G.S. 58-176. Consequently, the problem for the rate maker is to determine what amount, collected as premiums at the inception of the policies hereafter to be issued, will enable the company (1) to pay losses to be incurred during the life of such policies, at replacement costs prevailing at the time of such losses, (2) to pay other proper operating expenses of the company, and (3) to retain a "fair and reasonable profit."

Fire insurance is an economic necessity for owners of property. A policy issued by an insolvent company is no insurance at all, or virtually so. In the foregoing statutory plan, the State has undertaken to make available to its people the economic necessity of fire insurance policies, which actually insure, by authorizing the Bureau to propose premium rates just as would a single company having a monopoly of the fire insurance business in North Carolina. To protect the public against the danger of exorbitant rates for this economic necessity, which danger is inherent in monopolistic price fixing, the Legislature has vested in the Commissioner its own authority to withhold approval of such rates proposed by the Bureau and to fix rates which are fair and reasonable.

[8] It is beyond question that the Legislature may so delegate this authority to an administrative officer provided it prescribes sufficiently clear standards to control his discretion. See: *Harrill v. Retirement System* and *Bird v. Retirement System,* 271 N.C. 357, 156 S.E. 2d 702; *Utilities Com. v. State and Utilities Com. v. Telegraph Co.,* 239 N.C. 333, 80 S.E. 2d 133; *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310. The statutory plan above set forth complies with that constitutional requirement.

[9] Obviously, the Commissioner of Insurance has no authority to prescribe or regulate premium rates, except insofar as that authority has been conferred upon him by the above mentioned statutes. In exercising that authority he must comply with the statutory procedures and standards.

[10] Specifically, G.S. 58-131.2 directs him to fix premium rates such as "will produce a fair and reasonable profit" and no more. In reaching this end result, he is directed by that statute to "give consideration to all reasonable and related factors," including, but not limited to, the conflagration and catastrophe hazard, the past and prospective loss experience, the loss trend at the time of the investigation and the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made.

[11] It will be observed that the experience of the companies in the five calendar years next preceding the year of the investigation is not the sole factor to be considered by the Commissioner in fixing the rates for the future. He is also directed to consider the "prospective loss experience, including the loss trend at the time the investigation is being made." Admittedly, these terms are not as precise as might be desirable. It, nevertheless, seems clear that the "prospective loss experience" and the present "loss trend" relate,

not only to the number of fires and to the extent of the physical destruction thereby, but also to the cost of replacement of the destroyed property.

[12, 13] A statute must be construed in the light of the purpose to be accomplished. *In Re Dillingham,* 257 N.C. 684, 127 S.E. 2d 584; *Greensboro v. Smith,* 241 N.C. 363, 85 S.E. 2d 292; *Cab Company v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433. Here, the purpose of the statute is to provide for the public, at reasonable cost, insurance in financially responsible companies. Not only fair play but the accomplishment of this legislative purpose as well requires that the premium be fixed at a level which will enable the insuring company (i.e., the entire insurance industry in this State treated as if it were one company) (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a "fair and reasonable profit" and no more.

[14] To accomplish this purpose the Commissioner must consider the losses, both in number and in cost, which will be incurred in the future; i.e., during the life of the policies issued under the rates fixed by him. Obviously, the determination of the cost of replacing losses to be incurred at price levels then to prevail is a matter of informed judgment and not of precise calculation. Such judgment can be formed only by consideration both of the past experience and of the present prevailing conditions. This is true both as to the number and physical extent of the losses to be anticipated and as to the cost of replacing such losses as they occur.

[15, 16] For this reason, the statute specifically directs the Commissioner to consider the experience of the fire insurance business during a period of not less than five years preceding the year of the investigation. He is not limited, however, to that experience, but may extend his consideration to the experience of still earlier years, so long as such years are "reasonable and related" to an informed judgment as to the future. Evidence that present conditions are not those which prevailed during such former experience is, obviously, relevant to the translation of the past experience into an informed judgment concerning the future. For example, the past loss experience should be adjusted to take into account any newly discovered practicable procedures and devices for reducing the risk of fire. Similarly, recent events reliably indicating a rise, or a fall, in replacement costs previously experienced is a relevant circumstance in determining the extent to which past experience supplies a reliable guide to the future in the matter of replacement costs.

[17] The use of past experience to estimate future needs involves, of necessity, a projection of known data into the unknown future. See: *Los Angeles Gas & Electric Corporation v. Railroad Commission,* 289 U.S. 287, 311, 53 S. Ct. 637, 77 L. Ed. 1180; *McCardle v. Indianapolis Water Company,* 272 U.S. 400, 408, 47 S. Ct. 144, 71 L. Ed. 316; *Central Maine Power Company v. Public Utilities Commission,* 153 Me. 228, 136 A. 2d 726, 732-735. To bring past experience to the present level, by pro forma adjustments of premiums earned and losses incurred, and then to stop the adjusting process, is to project into the future the assumption that there will be no further change in the incidence of fires, in the extent of physical destruction thereby or in the cost of replacing the destroyed property. The question, therefore, is not whether a projection shall be made by the Commissioner, from the present into the future, for that is inevitable in the discharge of his statutory duty of fixing, for the future, a fair and reasonable premium rate. The question is as to the relevancy and trustworthiness of proposed evidence to and in the determination of the direction of such projection.

[18] As the Court of Appeals stated, the Commissioner of Insurance "is a specialist in the field" and has been given by the Legislature the authority and the duty to set rates which will, in the future, produce a fair and reasonable profit and no more. His projection of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence, G.S. 58-9.3, and if he has taken into account all of the relevant facts which he is directed by the statute to consider. G.S. 58-131.2.

[19, 20] The expert opinion of a witness, however well informed, as to what things are proper for consideration by the Commissioner in making his projection is not determinative. That is a matter determined by the provisions of the statute. Thus, the presence in this record of testimony of the actuary for the Department of Insurance that, in his admittedly expert opinion, it would not be "conservative" or "proper" for the Commissioner, in fixing rates for the future, to consider a projection of the present and past cost trend does not afford a basis for calling into play the statutory presumption that the order of the Commissioner, resting upon the same conclusion, is correct and proper because "supported by substantial evidence." We hold that otherwise competent opinion evidence as to such projection is, as a matter of law, relevant to the determination by the Commissioner of the probable loss experience of the companies during the life of policies to be issued in the near future. Here, the Commissioner has expressly refused to consider the evidence at all.

[21] Like the Court of Appeals, we cannot determine, and we have no authority to determine, whether the weighting process used by the Bureau in translating past experience into present conditions, plus the further adjustment of past experience to the present by applying to past costs inflation already experienced, leads, without more, to a correct projection of past experience and present conditions into that part of the future covered by policies hereafter to be issued. That question we do not determine. What we do hold is that evidence, otherwise competent, of a cost trend, upward or downward, which continues from the past into the present, and expert testimony, otherwise competent, that such trend may reasonably be expected to continue into the future, so that future costs will be higher or lower than present costs, is evidence of "reasonable and related factors" which G.S. 58-131.2 requires the Commissioner to consider in making his own projection into the future.

[22] It is not a proper ground for the rejection of such evidence that such projection of an upward or downward cost trend into the future has never before been used in the rate making process. The statute does not contemplate that procedures and methods for determining replacement costs for the future shall be frozen. See; *National Bureau of Casualty Underwriters v. Superintendent of Insurance,* 6 A.D. 2d 73, 174 N.Y.S. 2d 836, 840.

[23] In its holding that consideration of a prevailing cost trend, established by otherwise competent and credible evidence, is "a policy matter and should rest with the Commissioner," we think the Court of Appeals erred and to that extent its decision is hereby reversed. We conclude that the evidence offered by the Bureau as to the probability of a cost level on 30 June 1968 higher than that prevailing at the time of the filing, or at the time of the hearing before the Commissioner, was relevant and was improperly excluded by the Commissioner from his consideration. Its credibility and weight, as distinguished from its relevancy, are to be determined by the Commissioner. See: *Insurance Department v. City of Philadelphia,* 196 Pa. Super. 221, 173 A. 2d 811; *Long v. National Bureau of Casualty Underwriters (Tenn.),* 354 S.W. 2d 255. It is not, necessarily, more speculative than is expert testimony as to pain, suffering and disability to be experienced in the future by an injured person.

The Exclusion Of Evidence At The Rehearing

[24, 25] Upon the filing, within the time allowed, of a written request for a rehearing, G.S. 58-131.5 makes the holding of such rehearing mandatory. The statute clearly contemplates the introduc-

tion of relevant and otherwise competent evidence at such rehearing. The application for a rehearing, itself, automatically stays the former order of the Commissioner. We think it clear from the statute that, at such rehearing, evidence relevant to the issues involved in the original hearing and to the reasons stated in the petition for rehearing, if otherwise competent, is admissible.

[26] The evidence offered by the Bureau at the rehearing consisted of data, the credibility of which is not questioned by the Department of Insurance or the Commissioner, and which, if true, tends to corroborate the Bureau's evidence at the original hearing with reference to cost levels likely to prevail during the life of policies to be issued in the near future. Having determined that like evidence was properly admitted at the original hearing by the Commissioner, and should have been taken into consideration by him in making his own projection for the future, it follows that the evidence offered at the rehearing was relevant and should have been admitted and considered.

We affirm the holding of the Court of Appeals that in sustaining the objection to this evidence at the rehearing the Commissioner was in error. Neither the Department of Insurance, any other protestant, nor the Bureau is confined to evidence relating to conditions prevailing at the date of the filing and to experience prior thereto. While the statute requires that a hearing by the Commissioner upon a filing by the Bureau be held promptly, it is well within the bounds of possibility that, between the filing and the hearing, experience may be had which would be most relevant to the determination of the direction of a projection of the present "loss trend" into the future. Such change in conditions after the date of the filing might indicate a sharply downward trend in construction costs or in fire hazard. Surely, the statute does not contemplate that the Commissioner should shut his eyes to such a change in conditions after the date of the filing. It is equally clear that the Bureau may offer evidence of more recent experience which corroborates its allegations in the filing. The situation is somewhat analogous to testimony by a doctor as to the condition of a personal injury plaintiff observed in an examination conducted after the complaint was filed.

[27] It is, of course, within the sound discretion of the Commissioner to require complex statistical exhibits to be made available to the adverse party prior to the hearing, to restrict or deny the use of newly developed statistical data sprung suddenly at the hearings by either party to the surprise of the other, and to grant such recess of the hearing as he may deem necessary to permit rea-

sonable opportunity to study such data and to prepare evidence to refute it. That is not the situation presented in this record. Here, the Commissioner simply ruled, as a matter of law, that all evidence, however relevant, would be cut off as of the date of the filing. In this he did not follow the mandate of the statute.

Matters To Be Determined Upon The Remand To The Commissioner

We affirm the judgment of the Court of Appeals remanding the cause for further proceedings before the Commissioner. Those proceedings are to be conducted in accordance with this opinion. Their purpose will be to fix premium rates in accordance with the statutory plan. Since such further proceedings are to be had, we deem it advisable to discuss briefly questions which will necessarily arise therein.

When *In Re Rating Bureau, supra,* was decided by this Court, it was noted, "The question as to whether a 50 per cent loss ratio is a proper division of a premium dollar is not before us for decision." Neither is that question before us upon this appeal, for this record does not indicate that it has been determined by the Commissioner. It will be before him, however, upon the remand hearing and must be determined by him.

[28] G.S. 58-131.2 imposes upon the Commissioner the duty of fixing such rates as will produce "a fair and reasonable profit" and no more. In the statutory plan for the regulation of insurance premium rates, there is nothing comparable to the procedure prescribed by G.S. 62-133 for the fixing of rates by public utility companies for their services. The statutes conferring authority upon the Commissioner of Insurance, and directing his use of it, do not use the term "fair return on fair value" of the property devoted to the insurance business in North Carolina. Here, the direction is to prescribe rates which will yield a "reasonable profit." See, *Insurance Department v. City of Philadelphia, supra.*

[29-31] There are, however, certain underlying principles common to both price fixing processes. Neither a "fair return on fair value" nor a "reasonable profit" can be determined until there is first a determination of reasonable expenses attributable to the business operated in this State. See, *National Bureau of Casualty Underwriters v. Superintendent of Insurance, supra.* This figure may or may not coincide precisely with the actual expenses paid. Obviously, the operating companies must be given substantial freedom of management, including the incurring of operating expenses such as salaries, but, like public utility companies, their determination of the

propriety of expenditures for operating costs is not binding upon the Commissioner in a rate making procedure. This is true both of Loss Adjustment Expense and of other operating expenses. The determination of a fair and reasonable allowance for Loss Adjustment Expense and for other operating expenses, like the determination of a fair and reasonable allowance for losses, involves a projection of past experience into the immediate future.

[32] This determination having been made, it remains to be determined whether the difference between gross revenues to be derived from existing premium rates, Earned Premiums, less the combination of losses and expenses is a "fair and reasonable profit." This is not a question of law, nor is it a question upon which the determination of the Bureau is conclusive. It is a question of fact to be determined by the Commissioner upon evidence. As to this, as well as to the other factors in the equation, the burden of proof is upon the Bureau to show that the existing premium rates are not sufficient.

[33] There is nothing sacrosanct about 6% in this connection. Whether six cents out of each dollar of gross revenue, i.e., Earned Premiums, is a fair and reasonable profit, an excessive profit or an insufficient profit must be determined by the Commissioner from evidence and this, too, involves a projection into the future of past experience and present conditions. It involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk.

[34] Like construction costs and consumer prices, a "fair and reasonable profit" varies from time to time. There is nothing in this record to show that the Commissioner has ever determined what percentage of Earned Premiums constitutes a fair and reasonable profit for a fire insurance company. If upon the remand hearing of the present matter such finding in a former case be shown, it would not be res judicata and would not replace a finding of fact upon the question in the current investigation.

[35] The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a "fair and reasonable profit" in the immediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and, if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same

period, and (3) the percent of Earned Premiums which will constitute a "fair and reasonable profit" in that period. See, *National Bureau of Casualty Underwriters v. Superintendent of Insurance, supra.*

[36] Although neither of the orders of the Commissioner so states, the Attorney General, in his brief filed on behalf of the Commissioner in this Court, appears to take the position that the Commissioner must approve or disapprove a filing by the Bureau in its entirety. We find nothing in the statutory plan for fixing premium rates which leads to this conclusion. See, *National Bureau of Casualty Underwriters v. Superintendent of Insurance, supra.* Unquestionably, the Bureau may amend its filing so as to propose a smaller increase in premium rates than that proposed in the original filing, but, in the absence of such amendment, the Commissioner, upon proper findings of fact supported by substantial evidence, may fix premium rates at a level such as to allow part but not all of the increase proposed by the Bureau, just as the Utilities Commission may do in the case of rate proposals filed with it. See, *Utilities Commission v. Telephone Co.*, 263 N.C. 702, 140 S.E. 2d 319, in which Denny, C.J., speaking for the Court, said: "[T]here is nothing in the statutes that requires the Commission to accept the rate or rates proposed, or to reject them altogether." Judicial review of such an order may be had in accordance with the statute "by any person aggrieved." G.S. 58-9.3.

The orders of the Commissioner of Insurance are hereby vacated. This matter is remanded to the Court of Appeals for the entry by it of an appropriate judgment for a further remand to the Superior Court of Wake County and thence to the Commissioner of Insurance for further proceedings in accordance with this opinion.

Modified and affirmed.

DYER *v.* CITY OF LEAKSVILLE

STATE OF NORTH CAROLINA BY LEAVE OF THE ATTORNEY GENERAL, EX REL, JOHN DYER, W. L. EDWARDS AND ELIZABETH S. CHILDERS v. THE CITY OF LEAKSVILLE, A MUNICIPAL CORPORATION; THE TOWN OF SPRAY, A MUNICIPAL CORPORATION; THE TOWN OF DRAPER, A MUNICIPAL CORPORATION; MEADOW GREENS SANITARY DISTRICT, AN INCORPORATED SANITARY DISTRICT; JOHN SMITH, SR., AS MAYOR OF THE CITY OF LEAKSVILLE; AND JOHN SMITH, SR., INDIVIDUALLY; GRIEF JONES, AS MAYOR OF SPRAY; AND GRIEF JONES, INDIVIDUALLY; BROADUS BURGESS, AS MAYOR OF DRAPER; AND BROADUS BURGESS, INDIVIDUALLY; BILLY ARMFIELD AS COMMISSIONER; AND BILLY ARMFIELD, INDIVIDUALLY; W. D. LASHLEY, JR. AS COMMISSIONER; AND W. D. LASHLEY, JR., INDIVIDUALLY; JONES NORMAN AS COMMISSIONER; AND JONES NORMAN, INDIVIDUALLY; D. BLAIR BURKE AS COMMISSIONER; AND D. BLAIR BURKE, INDIVIDUALLY; MRS. ODESSA JOHNSON AS COMMISSIONER; AND MRS. ODESSA JOHNSON, INDIVIDUALLY; AND JIM ROBERTSON AS COMMISSIONER; AND JIM ROBERTSON, INDIVIDUALLY; DAVID COOK AS COMMISSIONER; AND DAVID COOK, INDIVIDUALLY; MRS. ODESSA THOMPSON AS COMMISSIONER; AND MRS. ODESSA THOMPSON, INDIVIDUALLY; GLENN CARTER AS COMMISSIONER; AND GLENN CARTER, INDIVIDUALLY; J. MOIR DEHART AS COMMISSIONER; AND J. MOIR DEHART, INDIVIDUALLY; DANIEL SQUIRES AS COMMISSIONER; AND DANIEL SQUIRES, INDIVIDUALLY; HOMER WOODS AS COMMISSIONER; AND HOMER WOODS, INDIVIDUALLY; JAMES R. HIXON, AS COMMISSIONER; AND JAMES R. HIXON, INDIVIDUALLY; GLENN BOYLES AS COMMISSIONER; AND GLENN BOYLES, INDIVIDUALLY; JOHN E. SETTLIFF AS COMMISSIONER; AND JOHN E. SETTLIFF, INDIVIDUALLY; WILLIAM O. MOSER AS COMMISSIONER; AND WILLIAM O. MOSER, INDIVIDUALLY; GARVIN WARREN AS COMMISSIONER; AND GARVIN WARREN, INDIVIDUALLY; ROBERT I. WILKERSON AS COMMISSIONER; AND ROBERT I. WILKERSON, INDIVIDUALLY; HENRY KNOTT AS COMMISSIONER; AND HENRY KNOTT, INDIVIDUALLY; GLENN SIMPSON, FIRE CHIEF OF THE CITY OF LEAKSVILLE; AND GLENN SIMPSON, INDIVIDUALLY; WOODROW VESTAL, FIRE CHIEF OF THE TOWN OF SPRAY; AND WOODROW VESTAL, INDIVIDUALLY; LANDIS POWELL, FIRE CHIEF OF THE TOWN OF DRAPER; AND LANDIS POWELL, INDIVIDUALLY; M. O. CLARK, POLICE CHIEF OF THE CITY OF LEAKSVILLE; AND M. O. CLARK, INDIVIDUALLY; WISEMAN TERRY, POLICE CHIEF OF THE TOWN OF SPRAY; AND WISEMAN TERRY, INDIVIDUALLY; WILLIE ADKINS, POLICE CHIEF OF THE TOWN OF DRAPER; AND WILLIE ADKINS, INDIVIDUALLY; AND THE PURPORTED "CITY OF EDEN"

No. 766

(Filed 21 January 1969)

1. Statutes § 1— non-revenue statutes — proof of enactment

With respect to the passage of non-revenue bills, ratification certificates signed by the President of the Senate and the Speaker of the House are conclusive of the fact that a bill was read three times and was passed three times in each house of the General Assembly in compliance with Art. II, § 23, N. C. Constitution, and the journals of the House and Senate are not competent evidence to contradict the certificates of the presiding officers that a bill was duly read in each house three times and passed on each reading.

2. Statutes § 1— revenue statutes — proof of enactment

With respect to the passage of revenue bills, the House and Senate Journals, not the certificates of ratification signed by the presiding officers, are the exclusive sources of proof as to whether the revenue bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals in compliance with Art. II, § 14, N. C. Constitution.

3. Statutes § 1— proof of enactment of revenue bill

Findings by the trial court that the revenue bill in question was read three several times in each house of the General Assembly and passed three several readings on three different days with the yeas and nays having been recorded on the second and third readings and entered on the journals *are held* supported by the House and Senate Journals which were before the court.

4. Taxation § 2; Municipal Corporations § 39— uniformity in taxation — double taxation by different authorities

Where a legislative Act authorized the consolidation of four separate municipalities into a single new municipality, but left unaffected a sewerage district which included within its limits three of the former municipalities but not the fourth, the constitutional requirement of uniformity in taxation is not violated by the fact that property within both the new municipality and the sewerage district is subject to taxation by both authorities while property in the new municipality which is outside the sewerage district is subject only to city tax levies, the rule of uniformity not being violated by double taxation resulting from taxes levied by different authorities if each authority adhers to the uninformity rule in its levies. Ch. 967, Session Laws of 1967; Art. V, § 3, N. C. Constitution.

5. Taxation § 2— inequality in taxation — municipal corporations with overlapping boundaries

Any remedy for inequality in tax burdens resulting from the creation of municipal corporations with partially overlapping boundaries must be supplied by the General Assembly, which created the taxing districts and fixed their boundaries, and not by the courts.

6. Municipal Corporations § 1— creation of municipalities

The Legislature, not the courts, has the sole power to create municipal corporations.

APPEAL by plaintiffs from *Copeland, J.*, April 8, 1968 Session, ROCKINGHAM Superior Court.

The plaintiffs, residents and taxpayers who, on and prior to September 12, 1967, had resided within the limits of Leaksville, Draper or Spray, instituted this civil action against the named defendants for the purpose of challenging the validity of Chapter 967, Session Laws of 1967, which purported to authorize the consolida-

tion of the named municipalities, together with Meadow Greens Sanitary District, into a single municipality. The specific boundaries of the new city were set out in the consolidation act. The consolidation was conditioned on voter approval.

The election was held as provided. A majority of the votes in all units was cast for consolidation. "Eden" was selected as the name of the consolidated municipality.

The Act provided that if the voters approved the consolidation the four municipalities were abolished, all their properties, rights, duties and obligations were transferred to and assumed by the new city. All ordinances, franchises, etc. in effect before the consolidation were to be observed. All officers and employees were to continue until their successors were chosen.

Long before Chapter 967 was enacted, the Eden Metropolitan Sewerage District was in operation as a municipality. It was not abolished. The plaintiffs' amended complaint alleged, and the answer admitted, the following:

> "70. Eden Metropolitan Sewerage District is a municipal corporation incorporated pursuant to N.C. G.S. 153-297. The sewerage District had, and has, as one of its functions, the disposal of sewage for the area comprising Leaksville, Draper and Spray, but neither had nor has any function insofar as the area comprising the Meadow Greens Sanitary District is concerned. The Sewerage District has a large outstanding bonded indebtedness of at least $2,000,000.00 secured by the power of the Board of the Sewerage District to levy taxes within only the areas which comprised Leaksville, Draper and Spray and, with the tax revenues therefrom derived, to pay the indebtedness."

As a result of the consolidation, the taxpayers of the Metropolitan Sewerage District (Leaksville, Draper and Spray) were taxed for city purposes and also for the payment of Metropolitan's outstanding obligation. All other taxpayers of the City of Eden were exempt from liability for Metropolitan's indebtedness.

The plaintiffs attacked the constitutionality of Chapter 967, Session Laws of 1967, upon the grounds: (1) That House Bill No. 1139 was not passed on three several readings in each House of the General Assembly and was not agreed to by each House respectively, as required by the State Constitution; and (2) The failure to abolish the Eden Metropolitan Sewerage District and transfer its obligations to Eden had the effect of relieving property in Meadow Greens and in the area outside the former limits of Leaksville,

Draper and Spray from tax liability for the Metropolitan Sewerage District debts. Section 8 of Chapter 967 contains this provision:

> "Nothing in this Act shall be deemed or construed to affect in any manner the Eden Metropolitan Sewerage District of Rockingham County, North Carolina, or to affect in any manner any rights or obligations, including outstanding indebtedness, of the Eden Metropolitan Sewerage District of Rockingham County, North Carolina."

The plaintiffs allege the lack of tax uniformity in the City of Eden, resulting in failure to abolish Metropolitan, and to require Eden to assume its debts, violate Article V, Section 3, Article II, Section 14, of the North Carolina Constitution, and the Fourteenth Amendment to the United States Constitution.

The plaintiffs prayed for relief: (1) That Chapter 967, Session Laws of 1967, be declared void; (2) That the municipalities of Leaksville, Draper, Spray and Meadow Greens Sanitary District be restored to their former status; (3) That their former officials be required to resume their former duties and to render a proper accounting to their former municipalities; and (4) That the defendants be restrained from expending any tax funds and from performing any duties or functions in the name of the City of Eden.

The parties waived a jury trial and agreed that Judge Copeland should hear the evidence, find the facts, state his conclusions of law and render judgment. After hearing and review of the House and Senate Journals, the certificates of presiding officers of both the House and Senate, Judge Copeland made these findings:

> "1. That this action was instituted by the plaintiffs to challenge the validity and to prevent the enforcement of House Bill No. 1139, as enacted as Chapter 967 of the 1967 Session Laws of the General Assembly of North Carolina, entitled 'An Act to Authorize an Election on the Question of Consolidation of the Town of Draper, the City of Leaksville, the Town of Spray, and the Meadow Greens Sanitary District as a Single Municipality.'
>
> 2. That on September 12, 1967, the Town of Draper, the City of Leaksville, and the Town of Spray were duly incorporated municipalities under the laws of North Carolina and had been for many years, and that Meadow Greens Sanitary District was a duly incorporated sanitary district.

* * *

That on said date the Town of Draper, the City of Leaksville, and the Town of Spray did not own a sewage treatment plant; and that untreated sewage from said municipalities was emptied into the Dan River and another river.

4. That on September 12, 1967, an election was duly held in said municipalities and in the adjoining central area pursuant to Chapter 967 of the 1967 Session Laws of the State of North Carolina, with notice of such election having been duly published in accordance with the provisions of said Act, for the purpose of determining whether said areas should have a single consolidated municipal government; . . .

5. That Chapter 967 of the 1967 Session Laws of the General Assembly of North Carolina was duly and lawfully enacted into law by the North Carolina General Assembly, same having been read three several times in each House of the General Assembly and passed on three several readings, which readings were on three different days, with the yeas and nays on the second and third readings having been entered on the journal.

6. That Eden Metropolitan Sewerage District is a municipal corporation incorporated pursuant to North Carolina N.C. G.S. 153-297, and same is a separate legal entity and it was not included within the area to be consolidated into a single municipality as provided by Chapter 967 of the 1967 Session Laws of the General Assembly of North Carolina.

7. That in the incorporation of the City of Eden, all the requirements of the North Carolina and United States Constitutions and of all applicable State and Federal laws have been duly and fully complied with in all respects."

The court concluded as a matter of law, and adjudged:

"1. That House Bill No. 1139, enacted as Chapter 967 of the 1967 Session Laws of the General Assembly of North Carolina was duly adopted in accordance with the provisions of the North Carolina and United States Constitutions, and in accordance with all applicable State and Federal laws.

2. That, under the facts as found and under the allegations as contained in the pleadings filed in the cause, the City of Eden, North Carolina, has been duly incorporated and now exists as a municipal corporation of the State of North Carolina in compliance with all lawful requirements.

3. That the plaintiffs are not entitled to any of the relief

prayed for in the Complaint or Amended Complaint filed herein, and the same is hereby denied, and this action is hereby dismissed.

4. That the City of Eden is lawfully constituted in all respects and is a duly existing municipality under the laws of the State of North Carolina, and is entitled to the relief prayed for in the Answer to the Amended Complaint filed herein, and the costs of this action are taxed against the plaintiffs."

From the judgment, the plaintiffs gave notice of appeal to the North Carolina Court of Appeals. Upon proper application and because of the significant public interest in the legal questions involved in the appeal and the likelihood that delay in their final adjudication might jeopardize the rights of both the parties and the public, we granted certiorari without prior review by the North Carolina Court of Appeals.

T. W. Bruton, Attorney General, Harry W. McGalliard, Deputy Attorney General for the State.

W. Harold Edwards, Jordan, Wright, Nichols, Caffrey & Hill, and Edward L. Murrelle by Welch Jordan and Edward L. Murrelle, for plaintiff appellants.

Floyd Osborne; H. L. Fagg; Earl Vaughn; Womble, Carlyle, Sandridge & Rice by E. Lawrence Davis, III and Irving E. Carlyle, for defendant appellees.

HIGGINS, J.

The plaintiffs' appeal presents the question whether House Bill No. 1139 (Chapter 967, Session Laws of 1967) was passed by the General Assembly in the manner required by Article II, Section 14, North Carolina Constitution. If the question be answered in the affirmative, the plaintiffs contend the Act should be declared unconstitutional upon the ground it violates Article V, Section 3, North Carolina Constitution by permitting levies in violation of the uniform tax rule.

[1] With respect to the first question, Article II, Section 23 of the North Carolina Constitution provides: ". . . All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses." This Court has held that the ratification certificates signed by the President of the Senate and the Speaker of the House are conclusive of the fact that the bill was read three

times and was passed three times in each house of the General Assembly. *Carr v. Coke,* 116 N.C. 223, 22 S.E. 16; *Commissioners v. Snugg,* 121 N.C. 394, 28 S.E. 539; *Black v. Commissioners,* 129 N.C. 121, 39 S.E. 818; *Commissioners v. DeRosset,* 129 N.C. 275, 40 S.E. 43; *Wilson v. Markley,* 133 N.C. 616, 45 S.E. 1023; *Frazier v. Commissioners,* 194 N.C. 49, 138 S.E. 433. The certificates of the presiding officers are conclusive that the requirements of Section 23 were observed in the passage of the bill. The journals of the House and Senate are not competent evidence to contradict the certificates of the presiding officers that a bill was duly read in each house three times and passed on each reading. *Broadnax v. Groom,* 64 N.C. 244. Such is the rule with respect to passage of non-revenue bills.

[2] However, Section 14 of the same article provides:

> ". . . No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

With respect to the requirements in the above quoted revenue section, the House and Senate Journals, and not the certificates of ratification signed by the presiding officers, are the sources of proof as to whether the bill was read on three several days in each house of the General Assembly and passed three several readings on three different days and that the yeas and nays on the second and third readings were entered on the journals.

The additional steps necessary to show the passage of revenue acts are not within the conclusive presumption arising from the certificates of the presiding officers. The journals are made the exclusive sources of such proof. A full discussion, and citations of authority, appear in Justice Connor's opinion in *Frazier v. Commissioners, supra.*

> "The Constitution requires that it should appear, not from the entries on the original bill, but from the Journal, that the bill was properly read and the necessary entry of yeas and nays was made. If the Journal should show that bill was properly passed, no evidence will be received to contradict what is therein recorded." *Frazier v. Commissioners, supra.*

[3] Judge Copeland found that House Bill No. 1139, now Chapter 967, Session Laws of 1967, was read three several times in each house of the General Assembly and passed on three several readings, which readings were on three different days with the yeas and nays having been recorded on the second and third readings, and entered on the journals. This finding, in all respects, was supported by the House and Senate Journals. The House Journal shows that House Bill No. 1139 was introduced in the House of Representatives on May 25, 1967 and referred to the Committee on Courts and Judicial Districts. The bill was amended by committee and reported to the House with a favorable report on June 12, 1967. The House considered and approved the amendment. On June 14, 1967, by a recorded roll call vote, 113 named Representatives having voted for passage and none against, the bill passed its second reading and remained on the calendar. On June 15, 1967, by a recorded roll call vote, 115 named Representatives having voted for passage and none against, the bill passed its third reading and was ordered engrossed and sent to the Senate.

The Senate Journal shows that on June 16, 1967 House Bill No. 1139 was received in the Senate as a message from the House, and was referred to the Committee on Calendar. On June 22, 1967, by a recorded roll call vote, 46 Senators having voted for passage and none against, House Bill No. 1139 passed its second reading and remained on the calendar. On June 23, 1967, by a recorded roll call vote, 44 Senators having voted for passage and none against, House Bill No. 1139 passed its third reading and was ordered enrolled.

The records before Judge Copeland furnished authentic proof supporting the finding and conclusion that House Bill No. 1139 was duly passed and is valid and binding.

[4] Although Chapter 967, Session Laws of 1967 (with voter approval) abolished the municipalities of Leaksville, Draper, Spray and Meadow Greens Sanitary District; however, the Act did not abolish the Eden Metropolitan Sewerage District, which included, within its limits, all of Leaksville, Draper and Spray, but did not include Meadow Greens Sanitary District. Property within Metropolitan continued subject to tax for all of Metropolitan's liabilities, including its large bonded debt. Property within the new municipality, but not within Metropolitan, is not subject to levy for Metropolitan's obligations. By specific provision of Section 8 of Chapter 967, the consolidation left the Eden Metropolitan Sewerage District unaffected. Its functions, obligations and taxing authority are left intact.

The plaintiffs contend the rule of uniformity is broken in that property both within the new municipality and within the Metropolitan Sewerage District is subject to both tax levies, whereas the property in the city, but outside Metropolitan, is subject only to the city tax levies. Unquestionably the Constitution requires that the rule of uniformity be observed. It is observed if the rate is uniform throughout each taxing authority's jurisdiction. When property is within more than one taxing authority, each has the right to make its own levy. The constitutional requirement is that taxing powers shall be exercised "by uniform rule". The rule of uniformity is not violated by double taxation resulting from taxes levied by different authorities if each authority adheres to the uniformity rule in its levies. *Anderson v. Asheville,* 194 N.C. 117, 138 S.E. 715; *Kenilworth v. Hyder,* 197 N.C. 85, 147 S.E. 736; *Sabine v. Gill,* 229 N.C. 599, 51 S.E. 2d 1; *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904; *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 36 S.C. 204, 60 L. Ed. 392, *McQuillan on Municipal Corporations,* 2d Ed., Sec. 2565.

> " 'Sometimes it is deemed wise to create a tax district for special purposes, generally for public improvements, such as for highway taxes, bridge taxes, drainage taxes, or the like, and to fix the boundaries of such district as including two or more counties or towns or even making the district wholly independent of such political boundaries.' . . . 'Taxing districts may be as numerous as the purposes for which taxes are levied. Equality and uniformity of taxation does not preclude the power of the state to create separate taxing districts, provided the taxes are equal and uniform within each taxing district.' " *Kenilworth v. Hyder, supra.*

[5] The plaintiffs allege the failure to abolish Metropolitan and transfer its duties and obligations (including its heavy bonded debt) to the new municipality resulted in an unequal tax burden on the property within the Metropolitan taxing area. True, this burden is not shared by property which is within the city but is outside Metropolitan. Inequality in tax burdens follows the creation of municipal corporations with partially overlapping boundaries. The remedy, if one is due, must be supplied by the agency which created the taxing districts and fixed their boundaries. The General Assembly and not the court, has the requisite power.

[6] The Legislature has the sole power to create municipal corporations. The courts do not have that power.

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. . . . In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . ." *Hunter v. Pittsburgh,* 207 U.S. 161, 52 L. Ed. 151.

The questions whether the Eden Metropolitan Sewerage District of Rockingham County should have been, or should be, abolished, and its duties and obligations assumed by the city or left undisturbed (as provided in the Act) were within legislative, not judicial, competence. Appeal for relief, if warranted, should be to the General Assembly.

We have carefully considered the plaintiffs' excellent brief and examined the cases therein cited. However, the record fully supports the findings, conclusions, and judgment of the Superior Court. The judgment is

Affirmed.

STATE OF NORTH CAROLINA v. THOMAS BERNARD MORRIS

No. 414

(Filed 21 January 1969)

1. Automobiles § 130— driving while under influence — punishment

The offense of operating an automobile upon the public streets while under the influence of intoxicating liquor is a general misdemeanor for which an offender, for the first offense, may be imprisoned for two years in the discretion of the court. G.S. 20-138, G.S. 20-179.

2. Constitutional Law § 32— right to counsel

A defendant has a constitutional right in all criminal cases to be represented by counsel selected and employed by him.

3. Constitutional Law § 32— right to counsel

Where a defendant is aware of his constitutional right to counsel, failure of officers to so advise him is harmless.

4. Constitutional Law § 32— right to counsel in felony case — duty of trial judge

With respect to every defendant charged with a felony and not represented by counsel, the judge of the superior court is required to (1) advise defendant that he is entitled to counsel, (2) ascertain if defendant is indigent and unable to employ counsel, and (3) appoint counsel for each defendant found to be indigent unless the right to counsel is intelligently and understandingly waived. G.S. 15-4.1.

5. Constitutional Law § 32— right to counsel where defendant charged with misdemeanor amounting to a serious offense

By virtue of the Sixth and Fourteenth Amendments to the Constitution of the United States, a defendant who is charged with a misdemeanor amounting to a serious offense has a constitutional right to the assistance of counsel during his trial; G.S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with misdemeanors amounting to a serious offense, is unconstitutional. *State v. Hayes*, 261 N.C. 648, and *State v. Sherron*, 268 N.C. 694, are no longer authoritative.

6. Constitutional Law § 32; Criminal Law § 4— "serious offense" defined

A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine.

7. Constitutional Law § 37— waiver of counsel

Waiver of counsel may not be presumed from a silent record.

8. Constitutional Law § 32— right to counsel in prosecution for misdemeanor amounting to serious offense — duty of trial judge

Where defendant is charged with a misdemeanor amounting to a serious offense and is not represented by privately employed counsel, the presiding judge must (1) settle the question of defendant's indigency and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived; these findings and determinations should appear of record.

9. Constitutional Law § 30; Criminal Law § 99— duty of trial judge to aid defendant on defense

A trial judge is not required by either the Federal or State Constitutions to aid a defendant on trial before him in the presentation of his defense.

10. Searches and Seizures § 1— applicability of immunity

The question of constitutional immunity to illegal searches and seizures does not arise where police officers were invited into defendant's home by defendant and his wife and no search was conducted.

11. Criminal Law § 75— evidence of defendant's statements and intoxication — absence of warning of rights

Where conversation between defendant and police officers took place in defendant's home and defendant was not in custody, the officers' testimony as to defendant's intoxicated condition and as to the statements made by defendant are admissible in evidence notwithstanding defendant was not advised as to his Fifth Amendment rights.

12. Criminal Law § 138— trial in superior court by appeal from inferior court — imposition of greater sentence

Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum.

APPEAL by defendant from decision of the Court of Appeals upholding judgment of *McLaughlin, J.*, at the January 1968 Mixed Session, DAVIDSON County Superior Court.

On 16 October 1967 defendant was tried in the Recorder's Court of Thomasville upon five warrants charging him with the following offenses: (1) operating a motor vehicle on a public street in Thomasville while under the influence of intoxicants, (2) disorderly conduct and creating a disturbance by cursing and using profanity and indecent language in a loud and boisterous manner in the presence of divers people while on a public street in the City of Thomasville, (3) hit and run doing property damage of $100 or more, (4) public drunkenness, and (5) resisting arrest and assaulting an officer. Attorney Charles F. Lambeth, Jr., privately employed, represented him. The judge of the Recorder's Court dismissed the charge of hit and run but found defendant guilty on the other four charges. Judgments were pronounced as follows: On the charge of operating a motor vehicle on the public streets of Thomasville while under the influence of intoxicants, twelve months in prison suspended for two years on condition defendant (a) be of good "character" and violate no laws, (b) spend three nights in the city jail from 6 p.m. to 6 a.m., (c) not drive a motor vehicle for twelve months, and (d) pay a fine of $100 and costs. In the other three cases prayer for judgment was continued on condition defendant comply with the judgment above set out and pay the costs in the case in which defendant was found guilty of resisting arrest and assaulting an officer.

Defendant gave notice of appeal to the Superior Court of Davidson County in all four cases.

In the Superior Court the State took a nol pros on the charges of disorderly conduct, resisting arrest and assaulting an officer, and public drunkenness. Defendant was placed upon trial on the charge

of operating a motor vehicle upon a public street while under the influence of intoxicants. Defendant, appearing without counsel, entered a plea of not guilty. A jury of twelve was duly empaneled, and evidence was offered by both the State and defendant as hereinafter set out.

The State's evidence tends to show that on 24 September 1967 George Burton, a police officer of the City of Thomasville who was off duty at the time, saw defendant leave a nearby house, stagger down the steps, and enter a white 1959 Chevrolet parked on the left side of the street. An elderly man, who was later a witness for the defendant, came out of the same house and got in the car as a passenger. Defendant started the car, attempted to go forward and killed the motor. He cranked up again and struck some mailboxes on the left curb as he drove away. He was "kind of weaving" and driving on the left side of the street.

Officer Burton directed his wife to call the police and then followed defendant in his own personal car. He momentarily lost sight of defendant in the traffic but shortly came upon the white 1959 Chevrolet, bearing the license number he had previously noted, parked in a driveway beside a house. He stopped and was joined by Officers Smith and Batten who arrived in a patrol car. Defendant's wife answered their knock on the door and invited the three officers into the house.

Inside the house Officer Burton told defendant the people were angry because their mailboxes had been knocked down and requested defendant to do something about them. Defendant was highly intoxicated, became very belligerent, cursed the officers and called Officer Batten a "white s. o. b.", and told them to leave his house. He continued cursing them as they left and followed them into the street where Officer Smith placed him under arrest. He was charged in five separate warrants as above detailed.

Defendant, as a witness in his own behalf, testified he was driving his motor vehicle on the day in question and struck the mailboxes referred to by the officers but denied he was under the influence of intoxicants. Defendant's wife testified that he had been home about 45 minutes when the officers arrived; that when they knocked defendant invited them in; that defendant was practically asleep but not drunk. W. C. Henderson testified that he and defendant were together on September 24 and defendant did not appear to be under the influence or drinking. He said defendant took him home that day but didn't have any liquor. He admitted that he and defendant were "old drinking buddies." Defendant called Officer Smith

as a defense witness. This officer's testimony corroborated that of the two officers who testified for the prosecution. He stated that he and Officer Batten arrived at defendant's home within 10 minutes after receiving the call; that defendant was under the influence of intoxicants when they arrived and was still drunk several hours later in the jail when defendant's wife came to bail him out, and that defendant was kept in jail overnight.

The jury convicted defendant of driving a motor vehicle on a public street while under the influence of intoxicants, and the judge imposed an active prison sentence of 18 months. Defendant appealed to the Court of Appeals and was represented before that tribunal by privately employed counsel. That Court upheld his conviction and sentence, 2 N.C. App. 262, 163 S.E. 2d 108, and defendant in apt time appealed to the Supreme Court asserting violations of his constitutional rights in four particulars as follows:

1. Under the Sixth and Fourteenth Amendments to the Federal Constitution and under Article I, Secs. 11 and 17, of the State Constitution his rights were violated in that the trial court failed to advise defendant (a) of his right to retain counsel, (b) of his right to have counsel appointed for him if he could not afford counsel, and (c) of the possible adverse consequences of standing trial without counsel.

2. Under the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, Sec. 17, of the State Constitution his rights were violated in that the trial court failed to adequately aid defendant in the presentation of his defense without counsel.

3. Under the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Secs. 11, 15 and 17 of the State Constitution his rights were violated in that the trial court admitted (a) statements made by the defendant to police officers when said officers had not advised defendant of his Fifth Amendment rights and (b) the testimony of police officers based on information obtained by illegal search and seizure.

4. Under the Fifth and Fourteenth Amendments to the Federal Constitution and Article I, Sec. 17, of the State Constitution his rights were violated in that defendant received a greater sentence in the superior court than he received in the Recorder's Court of Thomasville.

Defendant is represented before this Court by privately employed attorneys.

Chambers, Stein, Ferguson & Lanning, Attorneys for defendant appellant.

Thomas Wade Bruton, Attorney General; William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

HUSKINS, J.

G.S. 20-138 provides in pertinent part that "[i]t shall be unlawful and punishable, as provided in § 20-179, for any person . . . who is under the influence of intoxicating liquor . . . to drive any vehicle upon the highways within this State."

G.S. 20-179 provides *inter alia* that "[e]very person who is convicted of violating § 20-138, relating to . . . driving while under the influence of intoxicating liquor . . . shall, for the first offense, be punished by a fine of not less than one hundred dollars ($100.00) or imprisonment for not less than thirty (30) days, or by both such fine and imprisonment, in the discretion of the court."

[1] In *State v. Lee*, 247 N.C. 230, 100 S.E. 2d 372 (1957), where defendant had been convicted of driving an automobile upon a public highway of the State while under the influence of intoxicants and given an active sentence of not less than eighteen nor more than twenty-four months, it was held: "G.S. 20-179 fixes no maximum period of imprisonment as punishment for the first offense of a violation of G.S. 20-138, and it is well settled law in this jurisdiction that when no maximum time is fixed by the statute an imprisonment for two years will not be held cruel or unusual punishment, as prohibited by Art. I, Sec. 14, of the State Constitution. (Citations omitted.) The judgment entered in this case was within the limits authorized by G.S. 20-179." Thus the offense condemned by G.S. 20-138 is a general misdemeanor for which an offender, for the first offense, may be imprisoned for two years in the discretion of the court.

As his first assignment of error, defendant asserts that under the Sixth and Fourteenth Amendments to the Federal Constitution and under Article I, Secs. 11 and 17, of the State Constitution his rights were violated in that the trial court failed to advise him (a) of his right to retain counsel, (b) of his right to have counsel appointed for him if he could not afford counsel, and (c) of the possible adverse consequences of standing trial without counsel.

[2, 3] A defendant has a constitutional right in all criminal cases to be represented by counsel selected and employed by him. *State*

v. Sykes, 79 N.C. 618 (1878); *State v. Hardy,* 189 N.C. 799, 128 S.E. 152 (1925); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948); *State v. Hayes,* 261 N.C. 648, 135 S.E. 2d 653 (1964). Where he is aware of such right, as here, failure of the officers to so advise him is harmless. The right to assigned counsel in case of indigency, however, is another question. If an indigent defendant is charged with a general misdemeanor the punishment for which may be two years in prison, what are his constitutional rights with respect to counsel?

Betts v. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), held that failure or refusal to appoint counsel for an indigent defendant charged with a felony in a State court did not necessarily violate the Due Process Clause of the Fourteenth Amendment because the Sixth Amendment provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense" applied only to the federal courts and meant that counsel must be provided in federal courts for indigent defendants unless the right was intelligently waived. Appointment of counsel for an indigent defendant in a State court was not required unless after appraising "the totality of facts in a given case" refusal to provide counsel amounted to "a denial of fundamental fairness, shocking to the universal sense of justice" in violation of the Due Process Clause of the Fourteenth Amendment. *Betts* established the rule that the Sixth Amendment's guaranty of counsel for indigent defendants in the federal courts was not made obligatory upon the states by the Fourteenth Amendment. This was recognized as the law of the land until *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), which overruled *Betts* and held that the Sixth Amendment is made obligatory upon the states by the Due Process Clause of the Fourteenth Amendment because the right to counsel is fundamental and essential to a fair trial. But to what extent the rule enunciated applies to misdemeanors is not answered by *Gideon.*

[4] G.S. 15-4.1, enacted as a result of *Gideon,* provides: "When a defendant charged with a felony is not represented by counsel, before he is required to plead the judge of the superior court shall advise the defendant that he is entitled to counsel. If the judge finds that the defendant is indigent and unable to employ counsel, he shall appoint counsel for the defendant. . . . *The judge may in his discretion appoint counsel for an indigent defendant charged with a misdemeanor if in the opinion of the judge such appointment is warranted.* . . ." (Emphasis added.) Thus, by statute in North

Carolina, the judge of the superior court, with respect to every defendant charged with a felony and not represented by counsel, is required to (1) advise the defendant that he is entitled to counsel, (2) ascertain if defendant is indigent and unable to employ counsel, and (3) appoint counsel for each defendant found to be indigent unless the right to counsel is intelligently and understandingly waived. With respect to those charged with a misdemeanor, however, the statute permits the judge in the exercise of his discretion to appoint counsel for indigent defendants if in the opinion of the judge such appointment is warranted.

In *State v. Bennett,* 266 N.C. 755, 147 S.E. 2d 237 (1966), defendant was charged with a petty misdemeanor the punishment for which could not exceed imprisonment for thirty days or a fine of $50. The record disclosed that defendant was a certified public accountant, drove his own car, and had an income of "about $3,000." His request for court-appointed counsel was refused. The court said: "The Statute with reference to the appointment of counsel for indigent defendants charged with misdemeanors leaves the matter to the sound discretion of the presiding judge. Some misdemeanors and some circumstances might justify the appointment of counsel, but this is not true in all misdemeanors. The facts of an individual case would determine the action of the court and it is not intended that anything in this opinion shall restrict or require the appointment of counsel in any given case."

In *Cheff v. Schnackenberg,* 384 U.S. 373, 16 L. Ed. 2d 629, 86 S. Ct. 1523 (1966), defendant was sentenced by the Seventh Circuit Court of Appeals to six months' imprisonment for violating an order of that court. On certiorari, the Supreme Court of the United States affirmed, holding the proceedings equivalent to a prosecution for a petty offense and that the right of trial by jury in criminal cases secured by Article III, Sec. 2, of the Federal Constitution, and by the Sixth Amendment thereto, does not extend to petty offenses. Accord, *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (1968).

In *State v. Hayes,* 261 N.C. 648, 135 S.E. 2d 653 (1964), wherein defendant was charged with a felony, the court said:

> "It is established law that a person charged with a criminal offense is entitled (1) to select, employ and be represented by counsel, or (2) to have the court appoint counsel to represent him if he is without means to employ one of his own choosing (when he is charged with a felony, or when he is charged with a misdemeanor of such gravity that the judge in the exercise

of sound discretion deems that justice so requires), or (3) to waive representation by counsel and conduct his own defense."

In *State v. Sherron,* 268 N.C. 694, 151 S.E. 2d 599 (1966), defendant was tried for three misdemeanors and convicted on two charges of malicious injury to personal property with a maximum authorized punishment of two years in prison in each case. The two cases were consolidated for judgment and a prison sentence of ninety days imposed. The defendant was not represented by counsel in his trial in the superior court, and the record on appeal was completely silent with respect to indigency or request for appointment of counsel. The court held that G.S. 15-4.1 places upon the trial judge "the affirmative duty to advise the defendant in felony cases that he is entitled to counsel and to appoint counsel for him if he is indigent, or unless the defendant executes a written waiver of his right thereto. None of these provisions are included as to misdemeanors, and even for an indigent defendant the judge may exercise his discretion as to appointing counsel, and shall do so only when the judge is of the opinion that the appointment is warranted."

It should be noted, however, that recent decisions of the United States Supreme Court do not support the views expressed in *Hayes* and *Sherron.* Two years after our decision in *Sherron,* that Court decided *Duncan v. Louisiana,* 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968), wherein defendant was charged with simple battery, a misdemeanor punishable by a fine of not more than $300 or imprisonment of not more than two years, or both. Defendant's demand for a jury trial was denied by the trial court on the grounds that the Louisiana Constitution authorizes trial by jury only in capital cases or cases in which hard labor is the prescribed punishment. Defendant was convicted and sentenced to sixty days in jail and fined $150. The Supreme Court of Louisiana denied review, and on appeal the Supreme Court of the United States reversed, holding that (1) trial by jury in criminal cases is fundamental to the American scheme of justice and guaranteed by the Fourteenth Amendment in all criminal cases which, if tried in a federal court, would command a jury trial under the Sixth Amendment, and (2) a crime punishable by two years in prison is a serious crime — not a petty offense — and thus requires a trial by jury.

In *Bloom v. Illinois,* 391 U.S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477 (1968), defendant was charged with criminal contempt for which Illinois law provided no maximum punishment. Motion for a jury trial was denied, and defendant was found guilty and sentenced to prison for twenty-four months. The Supreme Court of Illinois affirmed,

and on certiorari the Supreme Court of the United States reversed, holding that prosecutions for *serious* criminal contempt are subject to the jury trial provisions of Article III, Sec. 2, of the Federal Constitution, and of the Sixth Amendment thereto, which is binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment.

[5, 6] Although the United States Supreme Court has not stated precisely where the line falls between crimes and punishments that are "petty" and those that are "serious," *Cheff* makes it clear that a six months' sentence is short enough to be petty while *Duncan* and *Bloom* make it equally clear that a crime punishable by two years in prison is a serious offense. In the federal system petty offenses are defined by statute as those punishable by not more than six months in prison and a $500 fine. 18 U.S.C. § 1. Hence, any federal crime the authorized punishment for which exceeds six months in prison and a $500 fine is a serious offense which entitles the offender to trial by jury under Article III, Sec. 2, of the Federal Constitution and under the Sixth Amendment. Since the provisions of the Sixth Amendment with respect to assistance of counsel, as well as trial by jury, are binding upon the states by the Due Process Clause of the Fourteenth Amendment, *Gideon v. Wainwright, supra* (372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963)), we hold that defendant here, who is charged with a serious offense, has a constitutional right to the assistance of counsel during his trial in the superior court and that G.S. 15-4.1, insofar as it purports to leave to the discretion of the trial judge the appointment of counsel for indigent defendants charged with serious offenses, is unconstitutional. A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine. The cases of *State v. Hayes, supra* (261 N.C. 648, 135 S.E. 2d 653 (1964)), and *State v. Sherron, supra* (268 N.C. 694, 151 S.E. 2d 599 (1966)), are no longer authoritative.

[7] In the case before us, defendant was represented by privately employed counsel in the Recorder's Court of Thomasville and on appeal to the Court of Appeals and to this Court. Yet in the trial of his case before a jury in the superior court he had no counsel. Was he able to employ counsel? Was he indigent? Did he request appointment of counsel? Did he waive the right to counsel? The record is silent. Waiver of counsel may not be presumed from a silent record. "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. Anything less is not waiver." *Carnley v. Cochran,* 369 U.S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884

(1962); *State v. Bines,* 263 N.C. 48, 138 S.E. 2d 797 (1964). This is in accord with constitutional principles enunciated thirty years ago in *Johnson v. Zerbst,* 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), in the following language:

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused — whose life or liberty is at stake — is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

[8] Where defendant is charged with a serious crime, it is equally important for the trial judge to determine in the first instance the question of indigency and for the record to show whether lack of counsel results from indigency or choice.

For failure of the trial judge to determine indigency and appoint counsel to represent defendant if indigent, the judgment must be vacated and a new trial ordered. At the next trial if defendant is not represented by privately employed counsel, the presiding judge shall (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. These findings and determinations should appear of record.

[9] A trial judge is not required by either the Federal or State Constitutions to aid a defendant on trial before him in the presentation of his defense. There is no merit in defendant's Second Assignment of Error.

[10, 11] There is no evidence in this case of a search and seizure, unreasonable or otherwise. The police officers were invited into defendant's home by defendant and his wife. No search was conducted. None was necessary. Hence, the constitutional immunity to illegal searches and seizures does not arise. 47 Am. Jur., Searches and Seizures, Sec. 20. The conversation which ensued may not be likened to police interrogation while a defendant is in jail or after prolonged questioning. Defendant was not in custody. There is no evidence that defendant was coerced by the officers or that he was in fear of them or that the officers induced any statement by him through any suggestion of hope or fear. Defendant was in his own home and not in

a "police dominated atmosphere." Furthermore, defendant's statements were not in the nature of a confession. They were decidedly to the contrary. It was no violation of his constitutional rights for the officers to observe him, converse with him, and testify respecting his state of insobriety. There is no merit in defendant's Third Assignment of Error.

[12] The fact that defendant received a greater sentence in the superior court than he received in the Recorder's Court of Thomasville is no violation of his constitutional or statutory rights. Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. *State v. Tolley,* 271 N.C. 459, 156 S.E. 2d 858 (1967). In *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371 (decided December 9, 1968), Sharp, J., speaking for the Court, exhaustively treats the subject of greater sentences upon retrial and adheres to former decisions of this Court that 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. See *State v. Pearce,* 268 N.C. 707, 151 S.E. 2d 571 (1966); *State v. Slade,* 264 N.C. 70, 140 S.E. 2d 723 (1965); *State v. Merritt,* 264 N.C. 716, 142 S.E. 2d 687 (1965); and *State v. White,* 262 N.C. 52, 136 S.E. 2d 205 (1964). This view is in accord with the weight of authority in the United States. See Annot., 12 A.L.R. 3d 978 (1967) and cases there cited. Defendant's Fourth Assignment of Error is overruled.

For the reasons stated, the decision of the Court of Appeals is reversed. The case is remanded to that Court where it will be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

STATE v. JAMES LEE PRIMES

No. 493

(Filed 21 January 1969)

1. Criminal Law § 104— nonsuit — consideration of evidence

On motion for compulsory nonsuit made at the close of all the evidence, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

2. Rape § 1— elements of the offense

Rape is the carnal knowledge of a female person by force and against her will.

3. Rape § 1— elements of the offense — force

The force necessary to constitute rape need not be actual physical force; fear, fright or coercion may take the place of force.

4. Rape § 1— elements of the offense — consent

While consent by the female is a complete defense to the charge of rape, consent which is induced by fear of violence is void and is no legal consent.

5. Criminal Law § 104— nonsuit — consideration of evidence

In considering the motion for a compulsory nonsuit, the court is not concerned with the weight of the testimony, or with its truth or falsity, but only with the sufficiency to carry the case to the jury and to sustain the indictment.

6. Rape § 5— sufficiency of evidence

In this prosecution charging defendant with rape, the evidence is sufficient to be submitted to the jury on the question of defendant's guilt.

7. Criminal Law § 66— evidence of lineup identification — corroborative evidence

In a prosecution for rape, testimony of the prosecutrix that she identified the defendant in a police identification lineup is admissible to corroborate her other testimony that she had identified the defendant prior to the lineup, and there is no merit in defendant's contention that, since he admitted the intercourse and did not dispute his identity, the evidence of the lineup identification was prejudicial in tending to obscure his defense that the intercourse was at the insistence and with the consent of the prosecutrix.

APPEAL by defendant from *Bickett, J.*, 2 February 1968 Regular Criminal Session of WAKE.

Criminal prosecution on an indictment charging that James Lee Primes on 9 October 1967, with force and arms, did unlawfully, willfully, and feloniously ravish and carnally know Carolyn Wayne Daniels, a female, by force and against her will, a violation of G.S. 14-21.

The defendant, who was an indigent and was represented by his court-appointed counsel, Garland B. Daniel, entered a plea of not guilty. Verdict: The defendant, James Lee Primes, is guilty of rape with the recommendation that punishment be imprisonment for the term of his natural life. From a sentence of imprisonment for life in the State's Prison, defendant appeals.

Attorney General T. W. Bruton and Staff Attorney Andrew A. Vanore, Jr., for the State.

Garland B. Daniel for defendant appellant.

PARKER, C.J.

On appeal defendant was represented at the State's expense by his court-appointed counsel, Garland B. Daniel, a member of the Wake County Bar. The record in the case and the brief of defendant were mimeographed in the same manner as is done in the case of solvent defendants.

[1] Defendant assigns as error the denial of his motion for compulsory nonsuit made at the close of all the evidence. On such a motion the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. 2 Strong's N. C. Index 2d Criminal Law § 104.

The State's evidence, considered in the light most favorable to it, tends to show the following material facts: On 9 October 1967 Carolyn Wayne Daniels, a young white woman, was employed at Eckerd's Drug Store in Raleigh. She and Robert Calvin Stephens had plans to be married and were married on 16 February 1968. At 5:30 p.m. on 9 October 1967 she got off work and proceeded to her automobile which was parked in a parking deck. On her way home down Salisbury Street in the city of Raleigh she had a flat tire at the corner of Lenoir and South Salisbury Streets. She pulled into a parking place and got out of her car to look at the flat tire. Defendant, a Negro, was walking along the street. He offered to place the spare tire on the car in place of the flat tire, and she accepted his offer. When he had placed the spare tire on the automobile, she got $2 out of her pocketbook and offered to pay him $2 for fixing her tire. At first he refused to accept the $2, and then upon her insistence accepted it. Defendant said that he had missed his ride with his brother-in-law to Garner, a town near Raleigh. She said, "Well I'm going out that way. I live out on 401 South and I can let you off right there where the ends meet." They got into her automobile and she drove off. In driving down the street they engaged in a conversation. He told her that he worked at the Carolina Power and Light Company as a linesman. He had on a yellow helmet like linesmen wear. When they got to the road where she was supposed to keep going straight, he told her to turn down Tryon Road, that his brother worked down that road and he could take him home. She turned off Highway 401 South onto Tryon Road. They came to a

filling station where she was supposed to turn left on Lake Wheeler Road to go to her boy friend's house to baby sit for his sister. He told her to go ahead down the road. She said, "I am supposed to go the other way," and he said, "It's just a little ways down this road." She was really getting scared and drove ahead. They proceeded a distance down the road and stopped at a dirt road. She told him he could get out and walk down the dirt road a little ways. He replied, "No, it's just a little ways down this road, go ahead and take me." She turned down this dirt road and saw a sign ahead reading "dead-end road." She said to him, "This is a dead-end road," and defendant said, "No, it's not. It's just a sign." He further said, "It's just a little ways down here." At the dead-end road there is a circle where one can circle around and come right back up the road. She turned around in that circle and started coming back up the road. Defendant clapped his hand over her mouth and she started struggling. He said, "Don't scream. If you do I'll kill you. Come on and get out." She replied, "No, please leave me alone, please leave me alone. If it's my car you want you can have it. If it's money you want you can have that. Just anything just please leave me alone." He replied, "I'm not gonna hurt you. I just want to look at you." He started pulling her out of the side of her automobile, so she got out and he started pulling her into the woods. She started crying and begging him to leave her alone. He kept pulling her. He said, "I'm not gonna hurt you, I'm not gonna hurt you, I just want to look at you." She replied, "Please don't do anything to me, please don't. I haven't ever been touched before. Please don't mess with me. Just please leave me alone. I'm planning on getting married soon, please don't mess with me." He kept saying, "I'm not gonna hurt you. I just want to look at you." He told her to pull her pants down, and she told him, "No." Defendant said, "I said pull them down, or I'll kill you." So she pulled up her dress and started pulling her pants down and could not get them down. He took his hands and jerked them and pulled them down just as fast as he could, and he told her to lie down on the ground. She told him that she was not. He said, "You'll do what I say. I'll kill you. I'll shoot you." She said, "Please don't. Please leave me alone." He got on top of her on the ground, unzipped his pants and had intercourse with her. He had his arms on her arms, and they were pinned back on the ground. She was crying. Miss Daniels testified that she "did not at any time consent or agree to have intercourse" with the defendant. She testified that she was afraid that if she did not submit to the defendant's demands he would kill her. She testified, "I really thought he was gonna shoot me, because I have heard so many cases that have come up like that, where

people get raped and they killed them and leave them. That's what I was scared of. I just thought if I could live and get out of there that everything would be all right." He heard a car coming. He got up and said, "Get up, get up." She got up and was trying to pull her pants up and said, "I can't get them up." He started coming at her and she jerked them up any way she could. He said, "Come on, come on." She could hardly walk. He took her by her arm and dragged her out of the woods. She never saw an automobile, but she heard one. He told her to take him to the end of the road at Dix Hill. She took him there and when she let him out, defendant said that he was married and had a baby and asked her not to tell anybody about it. She let him out at the road at Dix Hill. When he got out she went straight to her fiance's house. When she got there, her fiance, Robert Calvin Stephens, was washing his automobile. She could not get out of the automobile and could not move. She opened the automobile door and started screaming for Robert to come to her. She told him what had happened. She was hurting so she could not move. It hurt her when she was penetrated because she had never been touched before and was a virgin. Her fiance got a neighbor to call the sheriff's department and carry her to a local hospital. At the hospital she talked with the sheriff's deputies and with Dr. Clifford C. Byrum.

Dr. Byrum examined her in the hospital. Her clothes were ruffled and she had beggar lice over her clothing and quite a bit of dirt on her legs. She was quite upset emotionally. He made a general examination and pelvic examination. He swabbed her entire vagina for smears. From the smears he found sperms. She told Dr. Byrum that she had been raped by a Negro.

About 8 p.m. on 9 October 1967 Richard Branch, a deputy sheriff with the Wake County Sheriff's Department, saw Carolyn Wayne Daniels at Wake Memorial Hospital. She was there with her present husband. He talked with Carolyn. She told him what had occurred, which is substantially what we have related above. When he saw her at the hospital, she was in a highly nervous condition. The next day he had Carolyn Daniels and her fiance meet him at the sheriff's office at approximately 5 p.m. He took an unmarked car and went back to the parking lot where Carolyn saw the defendant the previous evening. They arrived there about 5:10 and sat there until about 5:45 observing Negroes with construction helmets. About 5:45 p.m. Carolyn stated to him, "That's the man right there, getting out of the back of that pickup truck." The man she identified was the defendant. Defendant got out of the pickup truck on Lenoir

Street and walked east on Lenoir Street towards Fayetteville Street. The officer asked Carolyn and her fiance to get out of his automobile and go to the Sheriff's Department and wait for him, and then he pulled his automobile in behind defendant at the Shell station on Fayetteville Street and asked him to come to his car. He asked defendant for his identification, at which time he took out of his wallet a selective service card with the name "James Lee Primes" on it. He told Primes that he was a deputy sheriff and that he was running an investigation on a crime, that he was not under arrest, and wanted to know if he would go of his own free will with him to a magistrate's office and let him talk to him, and defendant stated that he did not mind. Primes had on a yellow helmet at that time. He rode with him to the magistrate's office. Carolyn Daniels came there later. They had a lineup at the jail, with the consent of James Lee Primes. There were seven men in the lineup — all Negroes. In the lineup she identified Primes as the man who had assaulted her.

W. E. Weathersbee is a member of the City-County Bureau of Identification. He has been employed there for two years and his duties are to gather evidence, fingerprints, take pictures, and other things. About 8 p.m. on 9 October 1967 he was called to Wake Memorial Hospital where he met Deputy Sheriffs Howell and Branch. Carolyn Wayne Daniels was there. He went back into the emergency room in the hospital and saw her lying on the table. Beggar lice were in her hose. After observing her, he followed her fiance to where Miss Daniels' car was parked near a trailer. He dusted the right front door of this automobile, the trunk lid, and a jack which was in the trunk. He lifted fingerprints of a sufficient quality to be able to make comparison for identification purposes. He lifted prints from the right door, glass, and also around the right door edge, and one print from a jack which was in the trunk of the car. The fingerprint which was lifted from the jack in the automobile was marked as State's Exhibit No. 2. The fingerprints lifted from the right door of this automobile were marked State's Exhibit No. 1. Mr. Weathersbee made a comparison of these fingerprints with the fingerprints of James Lee Primes in the files of the City-County Bureau of Identification. In his opinion the fingerprint marked State's Exhibit No. 1 was the fingerprint of the left middle finger of James Lee Primes. The fingerprint marked State's Exhibit No. 2 was the left index finger of James Lee Primes.

Defendant went on the stand in his own behalf. His testimony in brief summary tends to show these facts: He changed the flat tire on the automobile for Miss Daniels. He accompanied her in her automobile and had sexual intercourse with her but only because of

her insistence and demand that he do so. He did not harm her or threaten to harm her in any way. He did not use any force or threaten to use force.

[2-4] Rape is the carnal knowledge of a female person by force and against her will. *S. v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232; *S. v. Jim,* 12 N.C. 142. The force necessary to constitute rape need not be actual physical force. Fear, fright, or coercion may take the place of force. *S. v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620. While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent. *S. v. Carter,* 265 N.C. 626, 144 S.E. 2d 826.

This is said in 44 Am. Jur., Rape, § 13, p. 910:

> "Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape. . . ."

Defendant contends that the statements and acts of his under the prevailing circumstances, as shown by the State's evidence, should not have induced fear or fright on the part of Miss Daniels, and the defendant had reasonable grounds to believe by the acts of the prosecuting witness that she was consenting for him to have sexual intercourse with her. Such an argument is based upon the supposition that the defendant's evidence is true, and ignores the testimony of Miss Daniels that the defendant pulled her into the woods when she was crying and pleading with him to let her alone, that she had never been touched before, that she was planning to get married soon, and that the defendant had her pinned back on the ground with his arms on her arms and saying, "Don't scream. If you do, I'll kill you," and under such circumstances had sexual intercourse with her.

[5, 6] In considering the motion for a compulsory nonsuit in this case, we are not concerned with the weight of the testimony, or with its truth or falsity, but only with the sufficiency to carry the case to the jury and to sustain the indictment. Considering the evidence in the light most favorable to the State, we conclude that the motion for a judgment of compulsory nonsuit was properly denied. The assignment of error thereto is overruled.

As stated above in the recapitulation of the State's testimony, about 5:45 p.m. on the day after the alleged assault, Miss Daniels

in company with her fiance and Deputy Sheriff Richard Branch saw defendant get out of a pickup truck on Lenoir Street and walk east on that street toward Fayetteville Street. At that time Miss Daniels identified defendant as the man who had criminally assaulted her the night before. Afterwards Deputy Sheriff Branch picked defendant up and carried him to a magistrate's office in his automobile. There was a lineup at the jail. At that time counsel for the defendant objected because the evidence of the lineup at the jail was not material, and was prejudicial. The judge asked him if he wanted a *voir dire* hearing on that, and counsel for defendant replied, "No." The defendant excepted. In the lineup at the jail Miss Daniels identified the defendant. Defendant assigns the identification of him in the lineup as error.

[7] Defendant contends that the identification of him in the lineup was incompetent and prejudicial in that the prosecutrix had already identified him previously before he was in the lineup, and the defendant's identity was not disputed, his defense being that he used no force and that the admitted intercourse was at the insistence and with the consent of the prosecuting witness. Defendant further contended that it tended to give the jury the erroneous impression that the defendant's defense was that he was not the party who had intercourse with the prosecuting witness and diverted attention from the real issue. There was no objection to the testimony of Deputy Sheriff Branch that the prosecuting witness identified defendant after he had gotten out of the pickup truck before Branch accosted him.

The testimony of defendant is clear and positive that he was at the scene and had sexual intercourse with the defendant at her insistence and with her consent. Considering all the facts of the case that the prosecuting witness had identified defendant after he had gotten out of the pickup truck before Deputy Sheriff Branch carried him to a magistrate's office, and that the defendant's defense was consent, it is our opinion, and we so hold, that the identification of him in the police lineup was not prejudicial and was not error. Obviously, the testimony of the prosecutrix identifying him in the lineup was admissible to corroborate the victim's testimony when she said "That's the man" when she saw him get out of the pickup truck immediately prior to the lineup. 7 Strong's N. C. Index 2d Witnesses § 5. We do not think that the identification in the lineup comes within the principles condemned by *United States v. Wade,* 388 U.S. 218, 18 L. Ed. 2d 1149 and *Gilbert v. California,* 388 U.S. 263, 18 L. Ed. 2d 1178, for the simple reason that the identification

in the lineup had an independent origin in the prosecuting witness's identification of defendant just previously when she saw defendant get out of the pickup truck, and further she had ample opportunity to see him when he changed the flat tire on her automobile, when he rode with her down the road, and when he assaulted her. See S. *v. Wright*, 274 N.C. 84, 161 S.E. 2d 581.

Defendant assigns as error that the court in its charge used language amounting to an expression of an opinion. From a meticulous reading of the charge in its entirety, there is nothing to show that there was the slightest intimation from the judge as to the strength of the evidence or as to the credibility of the witnesses, or of a witness, and there is nothing in the charge that prejudiced the defendant and prevented him from having a fair and impartial trial. This assignment of error is overruled.

Defendant has several other assignments of error to the charge. Reading the charge in its entirety, it is clear that the trial judge gave equal stress to the contentions of the State and the defendant, and declared and explained the law arising on the evidence given in the case in a fair and impartial manner. A careful examination of defendant's assignments of error discloses no new question or feature requiring extended discussion as to the charge. The jury, under application of settled principles of law, resolved the issues of fact against the defendant. Neither reversible nor prejudicial error has been made to appear. The verdict and judgment below will be upheld.

No error.

STATE OF NORTH CAROLINA v. LONNIE PARRISH

No. 823

(Filed 21 January 1969)

1. Burglary and Unlawful Breakings § 6; Larceny § 8— necessity for instruction as to abandoned property

In a prosecution for breaking and entering and larceny, refusal of the trial court to give special instructions requested by defendant with respect to abandoned property is not error where there was no evidence which would justify such instructions.

2. Constitutional Law § 31; Criminal Law §§ 76, 95— joint trials — exclusion of confession implicating codefendant

Under the decision of *Bruton v. United States*, 391 U.S. 123, which is to be applied retroactively, the admission in a joint trial of a nontestifying

defendant's confession implicating a codefendant violates the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment and made obligatory on the states by the Fourteenth Amendment.

3. Criminal Law §§ 76, 92— joint trials — exclusion of confession implicating codefendant

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; failing this, the State must choose between relinquishing the confession or trying defendants separately.

4. Criminal Law § 146— review in Supreme Court of decision by Court of Appeals

The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. G.S. 7A-31.

5. Criminal Law §§ 146, 174— review of constitutional questions

The Supreme Court will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or that it was passed upon in the Court of Appeals if the question arose after the trial.

6. Criminal Law § 113— joint trial — instructions permitting guilty verdict as to all defendants if one defendant committed offense

In a joint trial of two defendants for the same offense, a charge susceptible to the construction that should the jury find beyond a reasonable doubt that either defendant committed the offense charged it should convict both defendants *is held* to constitute reversible error.

7. Criminal Law § 168— instructions correct at one point, incorrect at another — new trial

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, particularly when the incorrect portion of the charge is the application of the law to the facts.

8. Criminal Law § 168— ambiguity in the charge

A new trial must result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation.

9. Criminal Law §§ 113, 123— joint trials — issues submitted

Where the evidence against each of several defendants is not identical, the trial court should submit the question of the guilt or innocence of each separately.

ON Certiorari to the Court of Appeals to review its decision reported in 2 N.C. App. 587, 163 S.E. 2d 523.

At the January 1968 Criminal Session of Alamance Superior

Court defendant Lonnie Parrish and one Jimmy Harris were jointly charged in Case No. 40 with breaking and entering a dwelling house, the property of E. L. Mansfield, on October 18, 1967, and larceny therefrom of various articles of his personal property valued at $1323. In Case No. 41 they were charged with breaking and entering a dwelling house, the property of Frances Talalah, on October 19, 1967, and larceny therefrom of various articles of her personal property valued at $57. When the evidence disclosed that the personal property stolen from the E. L. Mansfield house did not belong to him, as alleged in the bill of indictment, but was the property of his son Lonnie Gray Mansfield, the trial judge quashed the larceny count in Case No. 40. The cases were consolidated and the trial proceeded on the remaining three counts.

The State's evidence tended to show the facts narrated below. In October 1967 Lonnie Gray Mansfield was renting a certain dwelling house from his father, E. L. Mansfield, and had stored therein a Homelite chain saw, a Craftsman skill saw, two sleeping bags, a scuba diving suit, a waterpump, a grease gun, air tanks for scuba diving, a spear gun, diving lights and a dresser drawer — all of which were missing after the house was broken into on or about 18 October 1967. He later recovered the dresser drawer, an antenna, and the diving lights from defendant Parrish when he accompanied the officers to the Parrish house. There he identified these and other items as his personal property. He also recovered his Homelite chain saw which he found in the possession of one William Flinn and purchased from Flinn for $35. Flinn had bought it from a man named Alex Baker who had purchased it from Wayne Moorefield, who, in turn, had purchased the saw from defendant Lonnie Parrish for $30 cash.

Officers David Wilson and S. D. George, Deputy Sheriffs of Alamance County, testified that Jimmy Harris, after being warned of his constitutional rights, stated during interrogation that he, in the company of Lonnie Parrish and Jerry Hill, broke into the E. L. Mansfield house on the morning of 18 October 1967, carried various items of personal property out the front door and loaded them into Lonnie Parrish's motor vehicle, including a deep well pump, a diving suit, hunting outfit, a chain saw, swim fins, electric wire, copper wire, two sleeping bags and fishing rods and reels; that he later took part of the property to his house and the remainder of it to Parrish's house and put it in a small house back of the Parrish home; that on the same day between 6 and 7 p.m. the three of them broke into the Frances Talalah house near the Mansfield house and took a T.V.

stand, a dresser, a nightstand and a T.V.; that the T.V. was left in the yard of the Talalah house and the remainder of this property was taken to the Parrish home and left in Parrish's station wagon.

A day of two after his conversation with Harris, Officer Wilson saw some of the missing property at Lonnie Parrish's home, including the dresser and the nightstand and other property from the Talalah home. He also found a well pump in Parrish's station wagon and a diving light and a dresser drawer in Parrish's home, all of which Parrish stated came from the Mansfield home.

At the time of the break-in Mrs. Frances Talalah and her family were in the process of moving into a trailer and, while she and her husband were away from home, her house was broken into and all the children's clothing, a maple dresser, a Silvertone television, a black television stand and an antique nightstand were taken. The Silvertone T.V. was found in the yard. About a month later she saw some of the missing articles when the officers brought the dresser and the television stand to her for identification.

The only evidence offered by defendant Parrish was the testimony of his sixteen-year-old nephew Jerry Hill. He testified that he and Jimmy Harris had been invited to the Mansfield house for a party by three girls and two or three boys, one of whom stated that the house was owned by his uncle; that one of the boys swapped the skin diving equipment and two sleeping bags to Harris for his rifle; that sometime later Harris asked Parrish to drive him to the Mansfield house to pick up this equipment; that from the Mansfield house the three of them went to the Talalah residence where some boys told them that the Talalahs had moved out a week or two previously and that the back door was open. Upon this evidence from Jerry Hill, defendants contended the articles of property allegedly stolen by them had been abandoned by the owners and requested special instructions as noted in the opinion with respect to abandoned property.

Neither defendant Parrish nor Jimmy Harris took the witness stand.

In Case No. 40 the jury convicted both defendants of breaking and entering the Mansfield house. In Case No. 41 defendants were found guilty on both counts. Prison sentences were imposed in each case. Jimmy Harris did not appeal, and the sentences imposed upon him do not appear of record. Defendant Lonnie Parrish appealed to the Court of Appeals which upheld his conviction and sentences. 2 N.C. App. 587, 163 S.E. 2d 523. We allowed certioiari.

T. W. Bruton, Attorney General; Harry W. McGalliard, Deputy Attorney General, for the State.

James E. Long, Attorney for defendant appellant.

HUSKINS, J.

[1] Defendant Parrish contends that the Talalah and Mansfield houses had been vacated and left open and the items of personal property located in them abandoned. He requested numerous special instructions with respect to abandoned property and assigns as error the court's refusal to give them. We have reviewed the evidence and the requested instructions. There is no merit in defendant's position. The Court of Appeals correctly held that there was no evidence which would justify or require instructions with respect to abandoned property.

Defendant filed a supplemental brief in this Court asserting, for the first time, that his constitutional rights were violated in that the trial court, in a joint trial where the confessor did not take the stand, admitted in evidence the extrajudicial confession of Jimmy Harris implicating this defendant in the crimes for which they were both on trial. He asserts this violated his constitutional right "to be confronted with the witnesses against him" as guaranteed by the Sixth Amendment to the Federal Constitution.

Defendant's position was unsound at the time this case was tried below. At that time (January 1968) it was not error to admit the extrajudicial confession of one defendant, even though it implicated a codefendant against whom it was inadmissible, provided the trial judge instructed the jury to consider the confession only against the defendant who made it. *State v. Lynch,* 266 N.C. 584, 146 S.E. 2d 677; *State v. Bennett,* 237 N.C. 749, 76 S.E. 2d 42. The federal rule likewise sanctioned the admission of the confession of one defendant in a joint trial if the court instructed the jury to consider it only against the confessor. *Delli Paoli v. United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 (1957).

[2] Since the trial of this case, however, the United States Supreme Court in *Bruton v. United States,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (May 20, 1968), overruled *Delli Paoli* and held that in a joint trial the admission of the confession of one defendant, who did not take the stand, implicating the other violated the codefendant's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. The decision in *Bruton* is retroactive, *Roberts v. Russell,* 392 U.S. 293, 20 L. Ed. 2d 1100, 88 S.

Ct. 1921 (1968); and the right of confrontation is obligatory on the states by the Fourteenth Amendment to the Federal Constitution. *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

[3] The rule now applicable in North Carolina is summarized by Sharp, J., with her usual clarity, in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (October 9, 1968), as follows: "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* [250 N.C. 113, 108 S.E. 2d 128]), 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,* 246 N.C. 157, 97 S.E. 2d 876.

[4, 5] *Fox* would control decision here had the question been raised in the court below and passed on in the Court of Appeals. This was not done. The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. G.S. 7A-31. It will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or in the Court of Appeals, if, as here, the question arose after the trial. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. Even so, we have discussed the question since *Fox* will control admissibility of the Harris confession at the next trial.

Although not brought forward for review in compliance with our rules, the Court considers it appropriate to take cognizance of the following excerpts from the charge, which was defendant's Assignment of Error No. 9 in the Court of Appeals:

> ". . . and that the defendants *or either of them* intentionally broke and entered the said dwelling house with the intent to commit the felony of larceny as I have heretofore defined that term to you, then it would be your duty to return a verdict of guilty as charged in the first count in this bill of indictment *against both or either* of these two defendants.
>
> If you do not find from the evidence and beyond a reasonable doubt it will be your duty to return a verdict of Not Guilty *against either or both* of the defendants; or, upon the whole evi-

dence in the case there remains in your mind a reasonable doubt as to *both or either one* of these defendants' guilt, it would be your duty to give *either him or them* the benefit of that reasonable doubt and to *acquit him or them,* on the first count in the bill of indictment as to breaking and entering of the Talalah home."

"So, you are instructed if you find from the evidence and beyond a reasonable doubt that on or about the 19th day of October, 1967, in this county, the defendant Lonnie Parrish and the defendant Jimmy Robert Harris or *either of these two defendants* without the consent of Frances Talalah took and carried away the personal property of Frances Talalah or any part thereof named in the bill of indictment, and that *either one or both* of these defendants took and carried it away with the felonious intent permanently to deprive Frances Talalah of the use thereof and to convert it to defendants' or either of the defendants' own use or the use of some other person not entitled thereto, it will be your duty to return a verdict of guilty as to *either or both* of these defendants on this charge of larceny. If you are not so satisfied from the evidence and all of the evidence beyond a reasonable doubt it will be your duty to return a verdict of Not Guilty *as to either or both of these defendants;* or, if upon a fair consideration of all the facts and circumstances in the case you have a reasonable doubt *as to both the defendants' guilt or the guilt of either of them,* it will be your duty to return a verdict of Not Guilty *as to either or both of the two defendants.*"

". . . if the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 18th day of October, 1967, the Defendants Lonnie Parrish and Jimmy Robert Harris *or either of them* broke or entered the dwelling house of E. L. Mansfield and further satisfied you from the evidence and beyond a reasonable doubt that valuable securities or personal property of E. L. Mansfield or other persons was contained in said dwelling house, and that the defendants or *either one of them* intentionally broke and entered these premises with the intent to commit the felony of larceny as I have heretofore defined that term to you, then it will be your duty to return a verdict of guilty as charged in the second bill of indictment against *both or either one of these defendants* on the charge of breaking and entering the dwelling house of E. L. Mansfield. If you do not so find from the evidence and beyond a reason-

able doubt, it would be your duty to return a verdict of Not Guilty; or, if upon the whole of the evidence in the case there remains in your minds *a reasonable doubt as to both or either one* of the defendant's guilt, either one of them, *it will be your duty to give him or them the benefit of that reasonable doubt and acquit him or them* on the first count in this bill of indictment charging breaking or entering the premises of E. L. Mansfield." (Italics ours.)

[6] The trial judge no doubt intended the foregoing charge to mean that a verdict of guilty should be returned only against the defendant concerning whose guilt the jury had no reasonable doubt and that the jury should not convict both defendants unless it was satisfied of the guilt of each beyond a reasonable doubt. Even so, it has other connotations as well. For example, the jury could easily construe it to mean that if the State had satisfied the jury beyond a reasonable doubt that either defendant broke and entered the Talalah house with the felonious intent to commit larceny it would be the duty of the jury to return a verdict of guilty as charged against both defendants. Certainly this interpretation is reasonably implied. The same interpretation may be given to the charge on the other counts for which defendants were on trial. The charge is inaccurate, confusing and ambiguous.

[7, 8] It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. *State v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143; *State v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685. A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation.

[6] Where two or more defendants were tried together for the same offense, charges susceptible to the construction that should the jury find beyond a reasonable doubt that either defendant committed the offense charged it should convict all the defendants, were held to constitute reversible error in *State v. Wolfe,* 227 N.C. 461, 42 S.E. 2d 515; *State v. Massengill,* 228 N.C. 612, 46 S.E. 2d 713; *State v. Meshaw,* 246 N.C. 205, 98 S.E. 2d 13; *State v. Miller,* 253 N.C. 334, 116 S.E. 2d 790; and *State v. Harvell,* 256 N.C. 104, 123 S.E. 2d 103. The charge in this case is therefore erroneous and is disapproved.

[9] Where the evidence against each of several defendants is not

identical, the trial court should submit the question of the guilt or innocence of each separately. *State v. Massengill, supra.*

For the errors noted in the charge there must be a new trial. The decision of the Court of Appeals is reversed. The case is remanded to that court where it will be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

STATE v. CARL LEONARD WILLIAMS AND EDDIE JOEL WILLIAMS

No. 661

(Filed 31 January 1969)

1. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty — exclusion of veniremen opposed to capital punishment

While under the decision of *Witherspoon v. Illinois*, 389 U.S. 1035, 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, that decision does not apply where the jury in a capital case recommends a sentence of life imprisonment.

2. Constitutional Law § 29; Jury § 3— scruples against capital punishment

Jurors are not necessarily biased in favor of conviction simply because they do not have conscientious or religious scruples against capital punishment.

3. Constitutional Law § 29; Jury § 7— right to unbiased jury — challenges for cause

Each party to a criminal trial is entitled to a fair and unbiased jury and may challenge for cause a juror who is prejudiced against him, the right being not to select a juror prejudiced in his favor but to reject one prejudiced against him.

4. Constitutional Law § 29; Jury § 7— exclusion of jurors having scruples against capital punishment — jury recommends life imprisonment

In a prosecution for rape in which the jury returned a verdict of guilty as charged with recommendation of life imprisonment, defendant was not denied the right to an impartial jury on the issue of guilt by the exclusion for cause of prospective jurors who expressed conscientious or religious scruples against capital punishment, there being nothing in the record to indicate that any member of the jury was biased in favor of

conviction or otherwise prejudiced against defendants on account of his views on capital punishment and it not appearing that the jury included any juror who was challenged by defendant.

5. Kidnapping § 1— sufficiency of evidence

In this prosecution for kidnapping, defendants' motions for nonsuit are properly denied where the State's evidence tends to show that defendants forced the prosecutrix' car off the road and forcibly put her in their car, that defendants drove the prosecutrix to another location where they raped her, and that defendants confined the prosecutrix in their custody continuously by force, threats of force, and fear from the time they forced her into their car until she was released.

6. Rape § 5— sufficiency of evidence

In this prosecution for rape, defendants' motions for nonsuit are properly denied where all the evidence tends to show that defendants had sexual intercourse with the prosecutrix without her consent and that she submitted at a time and place when she was helpless to protect herself and her submission was induced by fear of death or serious bodily harm if she resisted.

7. Rape § 6— submission of lesser degrees of the crime of rape

G.S. 15-169 and 15-170 are applicable only when there is evidence tending to show that the defendant may be guilty of a lesser offense.

8. Criminal Law § 115— submission of lesser degrees of the crime charged

The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed.

9. Rape § 6— submission of issue of assault with intent to commit rape

In this prosecution for rape, the court did not err in failing to instruct the jury that they could return verdicts of guilty of assault with intent to commit rape where all the evidence is to the effect that each defendant had actual sexual intercourse with the prosecutrix and that she, kidnapped, captive and helpless, submitted solely because fearful of death or serious bodily harm if she resisted.

10. Criminal Law § 34— evidence of other offenses

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

11. Criminal Law § 34— evidence that defendant was AWOL

In a prosecution for kidnapping and rape, refusal of the court to strike from defendant's signed confession which was admitted into evidence the statement that defendant "went AWOL from Fort Hood, Texas,"

is not prejudicial error where defendant's AWOL status could be inferred from other evidence admitted without objection and his entire statement corroborates the testimony of the prosecutrix, it not appearing that the reference to his AWOL status could have affected the result of the trial.

12. Criminal Law § 169— admission of evidence — harmless and prejudicial error

Where there is abundant evidence to support the main contention of the State, the admission of evidence which is technically incompetent will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result.

13. Constitutional Law § 31; Criminal Law §§ 76, 95— joint trials — admission of confession implicating a codefendant

Under the decision of *Bruton v. United States*, 391 U.S. 123, which is to be applied retroactively, the admission in a joint trial of a nontestifying defendant's extrajudicial confession implicating a codefendant violates the codefendant's right of confrontation secured by the Sixth Amendment and made obligatory on the states by the Fourteenth Amendment.

APPEAL by defendants from *Braswell, J.*, April 1, 1968 Criminal Session, Superior Court of CUMBERLAND County.

Defendants, in separate bills, were indicted for the rape of Rose Marie Hargrove on November 15, 1967. A third bill charged that defendants, on November 15, 1967, "did unlawfully, wilfully and feloniously and forcibly kidnap Rose Marie Hargrove. . . ."

The court, on account of the indigency of defendants, appointed counsel. James C. MacRae, Esq., was appointed to represent Carl Leonard Williams. Charles G. Rose, Jr., Esq., was appointed to represent Eddie Joel Williams.

Upon arraignment on said indictments, defendants entered pleas of not guilty. The cases were consolidated for trial.

The only evidence was that offered by the State. The essential portions thereof are summarized, except where quoted, below.

On November 15, 1967, Rose Marie Hargrove (Mrs. Hargrove), a member of the Women's Army Corps, and her husband, a member of the Army, were stationed at Fort Bragg, N. C. They lived in a trailer court in Fayetteville, N. C.

In the early morning of November 15th, Hargrove drove their car a distance of four or five miles to his duty station at Fort Bragg, arriving there at 4:30 a.m. Mrs. Hargrove went with him to drive the car back. She was to report for duty at 7:00 a.m.

While driving south on Reilly Road, Mrs. Hargrove stopped her

car in obedience to a red traffic light at the intersection of Reilly Road and Gruber Road. Reilly Road, in the area of this intersection, is a four-lane highway. In order to go straight (south) through this intersection, Mrs. Hargrove was in the westerly lane for southbound traffic. While waiting for the signal light to change, a car pulled up on her left side and stopped "about two or three feet away." Glancing over, she saw "these two colored men staring at (her)." When the light changed to green, she "pulled off right away in the direction (she) was going." Observing no headlights behind her, she thought the men had turned left into Gruber Road.

Leaving the intersection, Mrs. Hargrove drove south on Reilly Road at a speed of "about 50 or 60 miles an hour," although the posted speed limit in the Fort Bragg Reservation was forty-five. After traveling approximately two miles, and as she was leaving the Reservation at a speed of "about 60 miles an hour," she saw in her rear view mirror the headlights of another car that was "coming up behind (her) fast."

The overtaking car pulled up beside Mrs. Hargrove's car "as if to pass." Thinking it might be an M.P., she slowed down to "about 50 miles per hour." She then recognized the car beside her as the one she had seen at the Reilly-Gruber intersection. Eddie Joel Williams (Eddie), in the passenger seat, was looking at her. The car, operated by Carl Leonard Williams (Carl), turned into and struck Mrs. Hargrove's car. (Note: These men were complete strangers to her. Subsequent investigation disclosed their names.) She applied her brakes "very hard." Her car went over onto the shoulder and into the ditch and stopped. "(T)he wind was knocked out of (her)" and she was "stunned." When she looked up "(her) car was completely off the road in the ditch and their car was stopped to the left and in front of (her) vehicle." At that time, "the headlights were on, on both of (the) cars." No light was on *in* her car.

As to what then occurred, Mrs. Hargrove testified as follows:

"Almost immediately my door opened and Carl Williams slid in on the seat, put his arm around the back of my seat, and asked me if I was hurt and was I all right. I asked him what in the hell was the matter. was he drunk? With that he hit me in the mouth and nose with his left fist, and said shut up, you are coming with me. I smelled nothing on his breath. He hit me right in the mouth, my two front teeth cut my bottom lip, and I started to bleed pretty bad. The blow stunned me, it caught me by surprise.

"When Carl Williams said shut up, you are coming with me, I said no, no, and I grabbed on to the steering wheel. At this time he

leaned over and turned off the ignition and turned off the lights. I was holding on to the steering wheel and I said no, I am not, and he reached over and hit me again in the same spot. I started crying real hard and put my left hand over my face. At this time he got out of the car, grabbed hold of my left arm and pulled my hand loose and pulled me out of the car. When out of the car I was (standing) on the grass beside the car. At this time I was crying real hard and saying no, no, don't, you are going to jail for this, and Carl Williams said shut up, and pulled me around the back of his car. At this time I had my hand on my mouth because it was bleeding so bad, and he was pulling me by the other arm. During this time all Carl Williams said was shut up.

"His car was a two door car, and he opened the driver's side, pushed the seat forward with his left hand and pushed me in. Carl Williams then shut the door and went around and got in the other side, and Eddie Joel Williams drove away."

After driving approximately two miles south on the Reilly Road, Eddie, as directed by Carl, turned right therefrom onto the Cliffdale Road; and, after driving one and one-half to two and one-half miles thereon, turned therefrom onto a private dirt road. They traveled on this dirt road approximately five hundred feet and stopped (turning off all car lights) near a broken fence at a remote and deserted place in the woods. There, in the back seat of the Williams car (a Thunderbird with Texas license tag JWV-938) Carl first and then Eddie had sexual intercourse with Mrs. Hargrove. No help of any kind was available to Mrs. Hargrove at the scene of collision on Reilly Road or while traveling on Reilly Road or on Cliffdale Road or on the dirt road or where they stopped on the dirt road. All these locations were isolated and deserted.

En route to the isolated spot in the woods, Mrs. Hargrove, in obedience to Carl's command, was lying on the back seat of the car. She was crying "real hard," pleading that these men not kill her or hurt her, offering to get one hundred and fifty dollars for them if they would take her to her trailer in Fayetteville, attempting to dissuade them by saying her husband would soon be coming along the Reilly Road and would see her car and call the police. To her pleadings, they said, "No," Carl repeatedly telling her to "shut up" and striking her when she did not obey his command. Eddie said: ". . . shut up, all that crying won't do you any good." Carl said to Eddie: ". . . if she gets noisy, I'll get this knife out of the glove compartment." During this time, Carl, in vulgar phrase, made unmis-

takably clear his determination to have sexual intercourse with Mrs. Hargrove.

Upon arrival in the woods, Carl made Mrs. Hargrove take off her clothing, which consisted of an overcoat and gown. Notwithstanding her pleading, Carl and Eddie had sexual intercourse with her. In this dark, secluded area, alone with two strange, licentious and brutal men, she submitted without attempting to fight, kick, scratch or scream. Mrs. Hargrove testified: "I did not forcibly physically fight with either of them, and I did not resist because I was scared to death. I let them go ahead and do what they wanted to so I could get back alive, and not be left out in the woods." With reference to Carl, Mrs. Hargrove testified: ". . . I put my hands over my face, shut my eyes tight, clinched my teeth, and tried to think of something else." With reference to Eddie, Mrs. Hargrove testified: ". . . I closed my eyes, put my hands over my face, gritted my teeth and tried to think about something else."

Defendants took Mrs. Hargrove back to where her car was in the ditch, pushed her out of their car and left. It was then about 5:15 a.m.

Unable to find her car keys, she stood beside her car, "very much upset," "crying," "her hair and her general appearance was all mussed up," flagging approaching motorists. The second car stopped. One of the men in it waited with Mrs. Hargrove while the other(s) notified the sheriff's department. Soon thereafter a detective sergeant arrived. Mrs. Hargrove gave him a description of each defendant and of the car and gave him the license number of the car defendants were driving. The investigation proceeded apace. Defendants were placed under arrest about 12:00 noon and charged with rape and kidnapping.

The State offered massive corroborative evidence. This includes a statement made by Carl, stenographically transcribed, which was read and signed by him, which substantially corroborated the testimony of Mrs. Hargrove. On *voir dire,* Carl testified he made and signed this statement voluntarily and understandingly after he had been fully advised and had full knowledge of his constitutional rights.

There was evidence that Mrs. Hargrove, nineteen years of age, was married on November 4, 1967, some eleven days before the alleged kidnapping and rapes occurred; and that her general reputation was excellent.

The jury, for their verdicts, found each defendant (1) guilty of

kidnapping, and (2) guilty of rape with recommendation that the punishment be imprisonment for life. The following judgments were pronounced:

As to Carl Leonard Williams: In the kidnapping case (No. 67-21967-A), judgment imposing a prison sentence of forty years was pronounced. In the rape case (No. 67-21970), the judgment pronounced imposed a sentence of imprisonment for the term of his natural life, this sentence to begin at the expiration of the sentence pronounced in No. 67-21967-A.

As to Eddie Joel Williams: In the kidnapping case (No. 67-21967-A), judgment imposing a prison sentence of thirty-five years was pronounced. In the rape case (No. 67-21968), the judgment pronounced imposed a sentence of imprisonment for the term of his natural life, this sentence to begin at the expiration of the sentence pronounced in No. 67-21967-A.

Each defendant excepted and appealed.

Orders were entered (1) permitting defendants to appeal *in forma pauperis*, (2) appointing the trial counsel of each defendant to perfect his appeal, and (3) providing that Cumberland County pay for the transcript and other documents incident to the appeals.

Based on one statement of assignments of error, a brief was filed in behalf of each defendant.

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

MacRae, Cobb, MacRae & Henley for defendant appellant Carl Leonard Williams.

Charles G. Rose, Jr., for defendant appellant Eddie Joel Williams.

BOBBITT, J.

Defendants assign as error the action of the court "in excusing from the jury those jurors who expressed the personal conviction that they were opposed to capital punishment." This assignment is based solely on the following statement in the agreed case on appeal: "In the selection of the jury the court excused from the jury all those jurors who stated that they were opposed to Capital Punishment. EXCEPTION No. 1." Defendants rely upon *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. ed. 2d 776, 88 S. Ct. 1770.

A jury had convicted Witherspoon of murder *and had fixed his*

penalty at death. 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.

[1] 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." (Our italics.) 391 U.S. at 521-523, 20 L. ed. 2d at 784-785, 88 S. Ct. at 1776-1777.

Directly pertinent to the present case, 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." 391 U.S. at 517-518, 20 L. ed. 2d at 782-783, 88 S. Ct. at 1774-1775. 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." A separate opinion of Mr. Justice Douglas, who considered the basis of 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." 391 U.S. at 531, 20 L. ed. 2d at 790, 88 S. Ct. at 1782.

It is noted that Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White dissented from the decision in *Witherspoon.*

In *State v. Bumper* (erroneously designated *Bumpers*), 270 N.C. 521, 155 S.E. 2d 173, the jury returned a verdict of guilty of rape with recommendation that the punishment be imprisonment for life. Upon this verdict the court, in compliance with the mandate of G.S. 14-21, pronounced judgment imposing a sentence of life imprisonment. This Court found "No error." In *Bumper v. North Carolina,* 391 U.S. 543, 20 L. ed. 2d 797, 88 S. Ct. 1788, the Supreme Court of the United States reviewed our decision on the two grounds on which it was attacked by *Bumper,* namely, (1) that his constitutional right to an impartial jury had been violated because the prosecution was permitted to challenge for cause all prospective jurors who stated their opposition to capital punishment, and (2) that a rifle introduced in evidence against him was obtained by a search made in violation of the Fourth and Fourteenth Amendments. Our decision was reversed on the ground the search was unlawful and therefore the rifle should not have been admitted in evidence.

With reference to Bumper's claim that his constitutional right to an impartial jury had been violated, Mr. Justice Stewart, expressing the views of five members of the Court, said: "In *Witherspoon v. Illinois,* 391 U.S. 510, 20 L. ed. 2d 776, 88 S. Ct. 1770, 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. (Citations.) 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." 391 U.S. at 545, 20 L. ed. 2d at 800-801, 88 S. Ct. at 1790.

The foregoing is quoted with approval by Higgins, J., in *State v. Peele,* 274 N.C. 106, 113-114, 161 S.E. 2d 568, 573-574, *certiorari* denied, 393 U.S. 1042, 21 L. ed. 2d 590, 89 S. Ct. 669, which, like *Bumper,* did not involve a death sentence and is direct authority in this jurisdiction for decision herein.

In *Bumper,* Mr. Justice Douglas, concurring in result, expressed the view that reversal should have been based also on the ground Bumper had been denied "the right to trial on the issue of guilt by a jury representing a fair cross-section of the community" since the record showed "that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment."

The views of the majority in *Crawford v. Bounds,* 4 Cir. 1968, 395 F. 2d 297, seemingly are in accord with those expressed in the dissenting opinion of Mr. Justice Douglas in *Bumper.* It is noted that the Supreme Court of the United States in *Bounds v. Crawford,* 393 U.S. 76, 21 L. ed. 2d 62, 89 S. Ct. 234, vacated the judgment and remanded the case to the Court of Appeals "for further consideration in the light of *Witherspoon v. Illinois,*" *supra,* "and for consideration of the other constitutional questions raised in the case."

[2] Here, as in *Bumper* and *Peele,* death sentences are not involved. In accord with *Witherspoon, Bumper* and *Peele,* we reject the idea the jurors are biased in favor of conviction simply because they do not have conscientions or religious scruples against capital punishment.

[3] "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. Peele,* 274 N.C. at 113, 161 S.E. 2d at 573. See also, *State v. Spence,* 274 N.C. 536, 538, 164 S.E. 2d 593, 594. In *State v. Peele, supra,* Higgins, J., in his opinion for the Court, cites federal cases substantially in accord with the stated North Carolina rule.

[4] Nothing in the record before us indicates that any member of the jury which tried defendants was biased in favor of conviction or otherwise prejudiced against defendants on account of his views on capital punishment or otherwise. Nor does it appear that the jury included any juror who was challenged by defendants. In accord with the decision of the Supreme Court of the United States in *Bumper,* and our own decision in *Peele,* we hold the record fails to show prejudice to defendants in respect of the manner in which the jury was selected. Although distinguishable factually in certain particulars, 1968 decisions generally in accord with the views expressed herein include the following: *Commonwealth v. Wilson,* 431 Pa. 21, 30, 244 A. 2d 734, 739; *Commonwealth v. Sullivan,* 239 N.E. 2d 5, 11 (Mass.); *People v. Speck,* 242 N.E. 2d 208, 225-228 (Ill.).

At the close of the evidence, each defendant moved for judgment

as in case of nonsuit and excepted to the court's denial thereof. Assignments of error based on these exceptions are without merit.

[5] The only reasonable inference that may be drawn from the evidence is that Mrs. Hargrove did not accompany defendants voluntarily at any time or under any circumstances but that she was forcibly put in their car by defendants and confined in their custody continuously by force, threats of force and fear from the time and point of collision on the Reilly Road until she was brought back and left there. Hence, there was ample evidence to support the convictions of kidnapping in violation of G.S. 14-39. *State v. Bruce,* 268 N.C. 174, 182-183, 150 S.E. 2d 216, 223, and cases cited.

[6] The only reasonable inference that may be drawn from the evidence is that Mrs. Hargrove did not consent that either of defendants have sexual intercourse with her. On the contrary, she pleaded persistently that they refrain from forcing her to do so. All the evidence tends to show she submitted at a time and place when she was helpless to protect herself and her submission was induced by fear of death or serious bodily harm if she resisted. Hence, in accordance with legal principles recently stated by Parker, C.J., in *State v. Primes,* 275 N.C. 61, 67, 165 S.E. 2d 225, 229, there was ample evidence to support the convictions for rape.

The portion of the charge to which defendants excepted is in full accord with the legal principles stated in *State v. Primes, supra,* and cases cited. The assignment of error based on this exception is without merit.

Defendants excepted to the court's failure to instruct the jury they could return a verdict of guilty of an assault with intent to commit rape. The statutes pertinent to a consideration of the assignment of error based on these exceptions are quoted below.

G.S. 15-169 provides: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, *if the evidence warrants such finding;* and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character." (Our italics.)

G.S. 15-170 provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less de-

gree 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."

[7, 8] G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *State v. Jones,* 249 N.C. 134, 139, 105 S.E. 2d 513, 516, and cases cited. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547.

[9] All the evidence is to the effect that each defendant had actual sexual intercourse with Mrs. Hargrove and that she, kidnapped, captive and helpless, submitted solely because fearful of death or serious bodily harm if she resisted. There is no particle or trace of evidence that Mrs. Hargrove at any time willingly permitted either defendant to have sexual intercourse with her or willingly remained in the presence of defendants. There being no evidence that would warrant a verdict of guilty of the included crime of assault with intent to commit rape, the court properly refused to instruct the jury with reference to such verdict.

[11] Defendants excepted to and assigned as error the court's failure to strike from the signed transcript of Carl's statement the following: "I went AWOL from Fort Hood, Texas on 18 October 1967, along with Eddie Joel Williams." For reasons stated below, a new trial must be awarded Eddie. Hence, we consider this exception with specific reference to the case against Carl.

Immediately after the quoted statement, Carl related where he was between October 18, 1967, when he left Colleen, Texas, until his arrival "about 2:00 or 2:30 a.m. on the 15th of November, 1967," in the Fort Bragg area. There was evidence, admitted without objection, that Carl, prior to his arrest on November 15th, was asked by an M.P. for his ID card, driver's license and registration card; that he produced his ID card but failed to produce a driver's license or a registration card; and that, in response to an inquiry as to his unit, gave "a unit which was a Fort in Texas." Carl was wearing civilian clothes.

[10] The rule upon which Carl bases this contention is well stated as follows: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it

tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, North Carolina Evidence, Second Edition, § 91. The general rule and the exceptions thereto are set forth fully, with copious citations, in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364.

[11] Whether Carl was AWOL, a violation of the Uniform Code of Military Justice, 10 U.S.C.A. § 886, has no significant relationship to whether he committed the crimes for which he was indicted, tried and convicted. Conceding, *arguendo,* it would have been technically correct to strike this particular sentence from Carl's statement, the failure to do so cannot be considered prejudicial. It would seem his AWOL status could be inferred clearly from evidence admitted without objection. In any event, we cannot conceive that the jurors could have been affected to any extent by this reference in Carl's statement that he went AWOL on October 18, 1967, from Fort Hood, Texas. His entire statement corroborates and in large measure specifically confirms the testimony of Mrs. Hargrove.

[12] "Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." 3 Strong, North Carolina Index 2d, Criminal Law § 169, p. 135. Recent decisions affirming and applying this rule include the following: *State v. Temple,* 269 N.C. 57, 66, 152 S.E. 2d 206, 212; *Gasque v. State,* 271 N.C. 323, 340, 156 S.E. 2d 740, 752. Defendant's (Carl's) assignment of error is without substance and hence without merit.

Consideration of Carl's appeal fails to disclose prejudicial error.

[13] There remains for consideration the impact on Eddie's conviction of the decision on May 20, 1968, by the Supreme Court of the United States, in *Bruton v. United States,* 391 U.S. 123, 20 L. ed. 2d 476, 88 S. Ct. 1620, which, overruling prior decisions, held that the extrajudicial confession of a defendant who did not testify at trial, which confession incriminated his codefendant, was not admissible in evidence notwithstanding the presiding judge instructed the jury explicitly that it was admitted and to be considered only against the confessing defendant. In *Roberts v. Russell,* 392 U.S. 293, 20 L. ed. 2d 1100, 88 S. Ct. 1921, the Supreme Court held that *Bruton* is to be applied retroactively. In *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492, where the prior rule in this jurisdiction and in the federal courts and the changes wrought by *Bruton* are fully dis-

cussed by Sharp, J., it is held that *Bruton* "is binding upon this Court. . . ." Accord: *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230.

Eddie was tried and convicted in April, 1968, prior to the decision in *Bruton.* The record does not show Eddie's counsel objected to the admission of any portion of Carl's confession other than the sentence relating to their status as AWOL. The record contains no instruction by the presiding judge that Carl's confession was admitted only as against Carl. Nor does the record show Eddie's counsel requested that the court give such instruction. While appropriate at that time, such instruction, when tested by *Bruton,* would have been of no avail.

The assignments of error, in referring to Carl's confession, are concerned only with the sentence relating to their AWOL status. Moreover, the brief filed in behalf of Eddie attacks the admissibility of Carl's statement solely on that ground.

Notwithstanding the foregoing, under the law as established in *Bruton,* Eddie has been denied a constitutional right, namely, "the Sixth Amendment's right of an accused to confront the witnesses against him," this being a fundamental right made obligatory on the States by the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403, 13 L. ed. 2d 923, 926, 85 S. Ct. 1065, 1068; *State v. Fox,* 274 N.C. at 291, 163 S.E. 2d at 502. Consequently, for prejudicial error against Eddie on account of the admission of the confession of Carl, Eddie must be and is awarded a new trial.

As to Carl Leonard Williams: No error.

As to Eddie Joel Williams: New trial.

BERNICE T. HAGINS v. REDEVELOPMENT COMMISSION OF GREENSBORO, NORTH CAROLINA, A BODY CORPORATE

No. 683

(Filed 31 January 1969)

1. Notice § 1— necessity for notice

The rule that parties to an action are fixed with notice of all motions or orders made during the term of court at which the cause is regularly calendared for trial unless actual notice is required by the constitution or statute must bend to embrace common sense and fundamental fairness.

2. Judgments § 6; Trial § 30— vacating nonsuit judgments during term — notice to plaintiff

During the term at which he enters judgments of nonsuit in plaintiff's actions, trial judge has the authority, upon his own motion and without giving notice, to vacate the nonsuits and to restore the cases to the docket; but in the absence of official notice that the cases have been reinstated, plaintiff is not charged with knowledge of any further proceedings in the cases.

3. Infants § 5; Insane Persons § 2— next friend — guardian ad litem

Although technically a next friend represents a plaintiff and a guardian *ad litem* represents a defendant, there is no substantial difference between the two, the class of persons for whom next friends and guardians *ad litem* may be appointed being the same. G.S. 1-64, G.S. 1-65.

4. Insane Persons § 2— jurisdiction to appoint next friend for adult plaintiff

An adult plaintiff who is not an idiot or lunatic must be *non compos mentis* before the court has jurisdiction to appoint a next friend for him.

5. Notice § 1— necessity of notice in absence of statute

Notwithstanding the silence of a statute, notice of motion is required where a party has a right to resist the relief sought by the motion and principles of natural justice demand that his rights be not affected without an opportunity to be heard.

6. Insane Persons § 2— appointment of next friend — mental incapacity — notice and hearing

When a party's lack of mental capacity is asserted and denied — and the party has not previously been adjudicated incompetent to manage his affairs — he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian *ad litem* for him.

7. Constitutional Law § 24; Damages § 5— due process — right to recover damages

The right to recover damages for injury to one's property is no less a property right than the right to sell or use the property which was damaged.

8. Attorney and Client § 3; Constitutional Law § 24— denial of litigant's right to conduct lawsuit

Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit, to conduct his litigation according to his own judgment and inclination, and — if the case is to be compromised — to have it settled upon terms satisfactory to him; if this right is taken from him upon a factual finding which he disputes, fundamental fairness and the constitutional requirements of due process require that he be given an opportunity to defend and be heard.

9. Insane Persons § 2— appointment of next friend — notice

A person for whom a next friend or guardian *ad litem* is proposed is entitled to notice as in case of an inquisition of lunacy under G.S. 35-2,

and, by analogy to G.S. 1-581, ten days' notice is appropriate unless the court, for good cause, should prescribe a shorter period.

10. Insane Persons § 2— appointment of next friend — necessity for hearing

Where the party for whom a next friend or guardian *ad litem* is proposed does not deny at the hearing the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith and that the party is *non compos mentis*, the judge may proceed to appoint a next friend to act for him: but if the party asserts his competency, he is entitled to have the issue determined as provided in G.S. 35-2.

11. Insane Persons § 2— appointment of next friend — validity of appointment

Where plaintiff has had neither notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue, order of trial court appointing an attorney as her next friend is void, and the attorney's settlements of her actions against a redevelopment commission for the destruction of her property are not binding upon her, notwithstanding they were approved by the court.

12. Insane Persons § 2— necessity for next friend — cases of emergency

An inquisition is not always a condition precedent for the appointment of a next friend or a guardian *ad litem*, as where, in an emergency, it is necessary, *pendente lite*, to safeguard the property of a person *non compos mentis* whose incompetency has not been adjudicated.

13. Insane Persons § 2— appointment of next friend — criterion of mental incompetency

The law will not deprive a person of the control of his lawsuit or his property unless he is "incompetent from want of understanding to manage his own affairs," G.S. 35-2; the words "affairs" encompasses a person's entire property and business — not just one transaction or one piece of property to which he may have a unique attachment.

14. Insane Persons § 2— appointment of next friend — criterion of mental incompetency

Incompetency to administer one's property depends upon the general frame and habit of mind and not upon specific actions such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs.

15. Insane Persons § 2— appointment of next friend

To authorize the appointment of next friend or guardian *ad litem* it is not enough to show that another might manage a man's proporty more wisely or efficiently than he himself.

16. Constitutional Law § 21— incident of private property — right to expend for lost causes

It is one of the incidents of the cherished right of private property that ordinarily an individual may expend his property in fighting a lost cause or for any legal purpose whatever.

17. Insane Persons § 2— "incompetent from want of understanding to manage his own affairs"

It is not possible to frame a definition of the phrase "incompetent from want of understanding to manage his own affairs," G.S. 35-2, which will include every aberration which might produce the incompetency to which reference is made.

18. Insane Persons § 2— essentials of mental incompetency

A person is incompetent to manage his affairs if his mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property and if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate. G.S. 35-2.

19. Insane Persons § 2— essentials of mental competency

If a person understands what is necessarily required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law and he cannot be deprived of the control of his litigation or property. G.S. 35-2.

APPEAL by plaintiff from the decision of the Court of Appeals (reported in 1 N.C. App. 40, 159 S.E. 2d 584) affirming the judgment of *Crissman, J.*, entered at the 2 October 1967 Civil Session of GUILFORD, Greensboro Division.

Plaintiff-landowner (Hagins) instituted this action to recover $407,460.00 as damages for the premature destruction of buildings upon her two lots, subsequently condemned by defendant, Redevelopment Commission of Greensboro, North Carolina (Commission). The chronicle of Commission's attempts to acquire Hagins' property for the purpose of slum clearance is fully set out in *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391; *Redevelopment Commission v. Hagins,* 267 N.C. 622, 148 S.E. 2d 585, *cert. denied,* 385 U.S. 952, 17 L. Ed. 2d 230, 87 S. Ct. 332.

Commission's efforts to acquire plaintiff's property began on 7 August 1961, when it instituted condemnation proceedings under the "Urban Redevelopment Law," G.S. 160-454 *et seq.* Hagins, in an answer which she herself prepared, alleged that her buildings were not dilapidated and that Commission had no power to condemn her land. The Superior Court, after extensive hearings, upheld Commission's right of eminent domain and, at the 26 April 1962 Session, adjudged that title to the premises be transferred to Commission. Upon Hagin's appeal, this Court held that Commission's petitions were fatally defective and reversed the judgment of the Superior Court. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d

391 (filed 12 December 1962). While that appeal was pending, on or about 24 May 1962, Commission demolished the buildings upon Hagins' lots.

On 14 January 1963, Commission brought a second condemnation proceeding to acquire title to Hagins' lots. Thereafter, on 14 May 1963, plaintiff began this action to recover both compensatory and punitive damages from Commission for the destruction of the improvements upon the lots.

Before razing the buildings, Commission had the personal property located therein removed and stored by corporations which are, along with Commission, defendants in two other actions instituted by Hagins: *Hagins v. Aero Mayflower Transit Co., Inc., Champion Storage & Trucking Co., Inc., & Redevelopment Commission of Greensboro,* and *Hagins v. South Atlantic Bonded Warehouse Corporation, Allied Van Lines, Inc., Redevelopment Commission of Greensboro.* These two cases, also before us on appeal (Nos. 684 & 685), involve the same question herein presented. Hagins instituted a fourth suit (Superior Court Docket No. 5045) against the Sheriff of Guilford County, two of his deputies, and the surety on his official bond to recover damages for the removal of her property. This case is not before us.

In Commission's second condemnation proceeding the jury awarded Hagins $3,000.00 as just compensation for the *land* embraced within the boundaries of the two lots. From the judgment on the verdict, Hagins appealed. In a decision, filed 16 June 1966 and reported in 267 N.C. 622, 148 S.E. 2d 585, we held this proceeding to be valid and affirmed the judgment decreeing that Commission had acquired fee simple title to the lots. That opinion noted the pendency of this action for damages.

This and the three other cases enumerated above were calendared for trial 23 January 1967, Monday of the second week of a two weeks' civil session. On that day Hagins' counsel, Samuel S. Mitchell and Earl Whitted, Jr., informed the presiding judge, Honorable Walter E. Crissman, that Hagins had notified them she was sick and unable to attend court. However, on the following morning, 24 January 1967, she was present at the opening of court and presented Judge Crissman with a letter in which she complained that her two attorneys had failed to keep her informed of developments in her litigation. She requested the judge to dismiss them from her case and to require them to return the fee which she had paid them. In response to the court's direct question, she said she was firing her lawyers. With reference to events occurring immediately thereafter, the

agreed case on appeal recites that, "after the discharge of her counsel," the court advised Hagins that she could proceed with the trial of this action. When she replied that she was not prepared to proceed to trial, Judge Crissman entered a judgment of nonsuit in this and the other three cases. At the same time he advised Hagins that she would have one year from the date of the nonsuit in which to reinstitute the actions if she desired to do so.

On 25 January 1967, Attorneys Whitted and Mitchell each filed an affidavit with the Superior Court. Whitted averred that Hagins could not accept the fact that Commission had condemned her land; that she was not interested in compensation but only in recovering her land. In his opinion, "Hagins has a fixation about this case beyond which she will not go; that she will neither listen to the advice of counsel nor to reason or understanding; that she is both illogical and incapable of handling her affairs in this matter." Mitchell averred that he had found Hagins "to be mentally aware and alert in all matters, excepting in regards to her relationship to her land, which was recently condemned . . ."; that with reference to her claims arising out of the condemnation proceedings he had found her "to be totally irrational"; that she has neither the willingness nor the capacity to understand the effect of the judgment of nonsuit which the court had entered; that he and his associate had many times attempted to explain these circumstances to her; that she "is so obsessed with the repossession of her condemned land that her ability to manage her claims for damages for the taking is nonexistent."

On 26 January 1967, in the exercise of his discretion and without notice to Hagins, Judge Crissman set aside the judgment of nonsuit in this and the other three cases and continued them for the term. On the same day, in an order reciting that he acted upon the affidavits filed by Mitchell and Whitted, upon his own observation of Hagins, and upon certain other facts (evidence of which does not appear in the record), Judge Crissman found "that the Plaintiff in this action is completely incapable of protecting her own rights, is ignorant of court procedure, and that her actions have been detrimental to her own interests; . . . (that) the Court Ex Mero Motu finds it imperative to appoint a next friend for this Plaintiff to look after and manage her affairs in the present litigation." He thereupon appointed Joseph Franks, Jr. (Franks), next friend for Hagins in this and the other three cases "for the sole purpose of inquiring into her cause of action, to consider all elements of damage and offers to settle, to pursue all remedies offered by law to the end that Plain-

tiff's property and personal rights are protected in full, and that her best interests be protected, as provided by law."

The record discloses that "the plaintiff did not know of this action by the court until the following Monday when she read it in the newspaper." At that time the term of court at which Judge Crissman's orders had been made had ended.

On 10 March 1967, Joseph Franks, Jr., filed an affidavit in which he reported to the court the following information: On 30 January 1967, he had advised Hagins by telephone that the court had appointed him next friend to protect her interest in her four actions. He had attempted to confer with her, but she kept no appointment made for that purpose. After making a thorough investigation into the law and facts pertaining to her pending suits, the details of which he enumerated, he had conferred with the attorneys for the defense and had entered into negotiations with Commission for a settlement. Commission had offered to pay the costs of the actions, to pay Hagins $40,000.00 in full settlement of all of her claims against it, and to pay South Atlantic Bonded Warehouse Corporation $2,235.23, and to pay Champion Storage & Trucking Company $617.62 for moving and storage bills. In Frank's opinion, this was a fair and reasonable settlement and in Hagins' best interest. In his opinion, Hagins had no cause of action against the Sheriff of Guilford County (Case No. 5045). He recommended to the court (1) that he be authorized to accept Commission's offer of settlement; (2) that the cases against South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Inc., Aero Mayflower Transit Company, Inc., and Champion Storage & Trucking Company, Inc., be retained on the trial docket for final disposition; (3) and that Case No. 5045 be nonsuited.

On the day he filed the foregoing affidavit, Franks mailed a copy to Hagins, together with a copy of the order of 26 January 1967 appointing him her next friend. He also informed her by letter that, on 15 March 1967 at 9:30 a.m., he would appear before Judge Crissman and ask him to approve the proposed settlement. He requested her to be present. She did not appear.

On 17 March 1967, acting upon the affidavit and recommendation of Franks, Judge Crissman signed a judgment approving the proposed settlement and decreeing that upon Commission's payment of $40,000.00 into the court for the use and benefit of Hagins, of $2,235.23 to Atlantic Bonded Warehouse Corporation, of $617.62 to Champion Storage & Trucking Company, Inc., and the cost of the action, Commission would be released from all liability to Hagins

in this and any other actions growing out of the taking of her property.

On 21 March 1967, Franks mailed Hagins a copy of the judgment and advised her by letter that, in addition to the payments specified in the judgment, Commission would pay all fees which she owed Mitchell and Whitted; that Franks' compensation as next friend would be deducted from the $40,000.00 which she had recovered; and that Case No. 5045 had been nonsuited. He also advised her that Commission would no longer be responsible for the cost of storing her personal property in the storage warehouses.

Thereafter, Franks petitioned the court for an allowance for his services as next friend. He mailed Hagins a copy of the petition and notified her that, on 14 April 1967 at 9:30 a.m., he would present the petition to Judge Crissman. On 18 May 1967, Judge Crissman signed an order allowing Franks a fee of $1,000.00 for his services in negotiating the settlement.

On 20 June 1967, through her present counsel, Comer and Harrelson, Hagins filed a motion to vacate the appointment of Franks as her next friend, together with all judgments and orders entered subsequent to his appointment on 26 January 1967. She asserted that his appointment and subsequent actions were void because, in violation of the due-process clause of the Fourteenth Amendment and Section 17, Article I of the Constitution of North Carolina, (1) he was appointed without notice to her and without a judicial determination that she was an idiot, lunatic or person *non compos mentis;* (2) she was *sui juris* and is now, and was then, capable of managing her affairs; (3) the settlement of her claim of $407,460.00 against Commission for $40,000.00 deprived her of her property without due process of law.

This motion came on for hearing before Crissman, J., at the 2 October 1967 Civil Session. He denied the motion, and Hagins appealed to the Court of Appeals, which affirmed his judgment. From its decision Hagins appealed to this Court as a matter of right.

Comer & Harrelson for plaintiff appellant.

Cannon, Wolfe, Coggin & Taylor for defendant appellee.

SHARP, J.

Plaintiff Hagins asserts (1) that she was deprived of due process when the court, after nonsuiting her four cases and advising her that she would have one year in which to reinstitute the actions, va-

cated the judgments of nonsuit and, without notice to her, appointed Franks as her next friend; and (2) that Franks' appointment was void and his purported settlement of her cases, although approved by the court, is not binding upon her.

Defendant's position is (1) that plaintiff was charged with notice of the orders vacating the judgments of nonsuit and appointing Franks as her next friend because they were entered during the term at which the cases were calendared for trial; (2) that the judge was not required to give plaintiff notice that he, *ex mero motu,* was contemplating the appointment of a next friend to conduct her litigation; (3) that G.S. 1-64 empowered the judge to make the appointment upon any evidence or facts coming to his attention which convinced him she was not competent to manage her litigation; and (4) that the law authorized the next friend, with the court's approval, to settle plaintiff's litigation.

This crucial question is presented: Was plaintiff entitled to actual notice and an opportunity to be heard upon the issue of her mental competency before the judge was empowered to appoint a next friend to take charge of her litigation?

[1] If the answer to the foregoing question is YES, the fact that the order appointing the next friend was made at term is irrelevant. However, at the outset, we deem it desirable to dispose of defendant's first contention. In doing so we note the two well-established rules of practice and procedure upon which defendant relies: (1) During a term of court all judgments and orders are *in fieri,* and, except for those entered by consent, may be opened, modified, or vacated by the court upon its own motion. *Shaver v. Shaver,* 248 N.C. 113, 102 S.E. 2d 791; *Hoke v. Greyhound Corporation,* 227 N.C. 374, 42 S.E. 2d 407; 5 N.C. Index 2d, Judgments § 6 (1968). (2) Unless actual notice of a particular motion is required by the constitution or statute, parties to an action are fixed with notice of all motions or orders made during the term of court at which the cause is regularly calendared for trial. *Insurance Co. v. Sheek,* 272 N.C. 484, 158 S.E. 2d 635; *Speas v. Ford,* 253 N.C. 770, 117 S.E. 2d 784; *Collins v. Highway Commission,* 237 N.C. 277, 74 S.E. 2d 709; *Harris v. Board of Education,* 217 N.C. 281, 7 S.E. 2d 538. This rule with reference to constructive notice, however, bends to embrace common sense and fundamental fairness. For instance, in *Long v. Cole,* 74 N.C. 267, an order made at term was subsequently set aside, "the order being made at midnight, when the plaintiff was absent, and did not know, and had no reason to believe that the Court

was in session, and his counsel not being able to attend. . . ." *Id.* at 269. See also *Sircey v. Rees,* 155 N.C. 296, 71 S.E. 310.

[2] Under rule (1) noted above, during the term at which he had entered the judgments of nonsuit, Judge Crissman had the authority, upon his own motion and without giving notice, to vacate the nonsuits and to restore the cases to the docket. *See Collins v. Highway Commission, supra* at 282, 74 S.E. 2d at 714. Hagins, however, was entitled to immediate official notice that the cases had been reinstated. In the absence of such notice she was not charged with knowledge of any further proceedings in the cases. Between the time the actions were nonsuited and reinstated they were no longer pending, *Burton v. Reidsville,* 243 N.C. 405, 90 S.E. 2d 700, and plaintiff was not required to maintain a constant vigil until the court adjourned for the term lest the judgments of nonsuit be vacated without notice to her. As Ervin, Jr., pointed out in *Collins v. Highway Commission, supra,* if the law "is to be a practical instrument for the administration of justice," it cannot "require parties to abandon their ordinary callings, and dance 'continuous or perpetual attendance' on a court" simply because they have a case pending, *Id.* at 281, 74 S.E. 2d at 713 — a fortiori, if the case has been terminated by a judgment of nonsuit and is no longer pending.

Preliminary to a consideration of the question presented, we correlate the facts: Hagins is an adult. She denies that she is incompetent. She has never been committed to a mental hospital. She has never been adjudged insane in any civil or criminal action nor has she been adjudged incompetent from want of understanding to manage her affairs in a proceeding under G.S. 35-2. She is not an inebriate. All the evidence tends to show that, if she is mentally disordered or lacks mental capacity, her want of understanding is confined to *one* subject — her land and Commission's power to condemn it. On this subject, her former attorneys declare that she is "totally irrational" and "is so obsessed with the repossession of her condemned land" that she has "neither the willingness nor the capacity to understand" and manage her claims for damages; as to all other matters, she is "mentally aware and alert."

We next consider the applicable statutes. G.S. 1-64 provides in pertinent part: "In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis . . . they must appear by their general or testamentary guardian, if they have any within the State; but . . . if there is no such guardian, then said persons may appear by their next friend. . . ." G.S. 1-65 authorizes the court to appoint a guardian *ad*

litem for any defendant who is an infant, idiot, lunatic, or person *non compos mentis* and without a general guardian.

The only stated procedure for the appointment of a next friend appears in Superior Court Rule 16, "Next Friend — How Appointed: In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed." N.C. Gen. Stat. Vol. 4A, p. 204 (1955).

Chapter 35, Article 2, of the N. C. General Statutes provides for guardianship and management of the estates of incompetents. In behalf of a person deemed "a mental defective, inebriate, or mentally disordered or incompetent from want of understanding to manage his own affairs," G.S. 35-2 authorizes any person to file with the Clerk of the Superior Court of the county in which the "supposed mentally disordered person" resides a duly verified petition setting forth the facts. Thereafter, "upon notice to the supposed mental defective," a jury of twelve inquires into the mental state of the alleged incompetent. If the jury finds him "to be a mental defective," the Clerk proceeds to appoint a guardian for him.

G.S. 35-2.1 authorizes the Clerk to appoint a guardian or trustee for any person whom a jury, in either a criminal or a civil case, has found to be insane or incompetent to conduct business. G.S. 35-3 empowers the Clerk to appoint a guardian for any "idiot, lunatic, or insane person" confined in a State-supervised hospital for the insane upon the certificate of its superintendent declaring such person "to be of insane mind and memory or mentally retarded." However, before any person can be committed to a mental hospital, over his or his family's objection, G.S. 122-58 declares that he must be given a hearing as provided in G.S. 122-63.

From the foregoing statutes, it is apparent that the jurisdictional facts which would authorize the Clerk of the Superior Court to appoint a general guardian or trustee for plaintiff do not exist. What facts will authorize the judge to appoint a next friend?

[3, 4] In *Orr v. Beachboard,* 199 N.C. 276, 154 S.E. 311, after the defendant had filed answer, he was adjudged insane and committed to the State Hospital. Therein he recovered his sanity and was officially discharged from the hospital as cured. Approximately one month thereafter the court appointed a guardian *ad litem* for him

under C.S. 451 (now G.S. 1-65). In holding the appointment of the guardian *ad litem* void and the acts not binding upon the defendant, this Court said: "C.S., 451, empowers the court to appoint a guardian *ad litem* for infants, idiots, lunatics, or persons *non compos mentis*. . . . [A]t the time the guardian *ad litem* was appointed the defendant did not fall within the classification provided in the statute, and there was no authority or warrant of law for such appointment." *Id.* at 278, 154 S.E. at 312. Although technically a next friend represents a plaintiff and a guardian *ad litem* represents a defendant, we note that there is no substantial difference between the two. 44 C.J.S. *Insane Persons* § 140 (1945). The respective classes of persons for whom next friends and guardians *ad litem* may be appointed are the same. G.S. 1-64 and 1-65.

[4] The effect of *Orr v. Beachboard* is that an adult plaintiff who is not an idiot or lunatic must be *non compos mentis* before the court has jurisdiction to appoint a next friend for him. How, then, must the incompetency of a party-litigant be established in order to meet constitutional requirements of due process?

Neither G.S. 1-64 nor Superior Court Rule 16 contains any provision for notice to the party for whom it is suggested that a next friend be appointed. Furthermore, no procedure is specified for adjudicating a dispute over a party's infancy or his competency to conduct his litigation. Perhaps the explanation for these omissions is (1) the fact of infancy is rarely disputed and, if it is, age can ordinarily be established by an official record, and (2) a person *non compos mentis* who owns property will ordinarily be represented by a general guardian. Neither a next friend nor a guardian *ad litem* has authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. *Teele v. Kerr,* 261 N.C. 148, 134 S.E. 2d 126.

[5, 6] Notwithstanding the silence of a statute, "notice of motion is required where a party has a right to resist the relief sought by the motion and principles of natural justice demand that his rights be not affected without an opportunity to be heard. . . ." 60 C.J.S. *Motions and Orders* § 15 (1949). "[F]rom the earliest times the common law and the course of the legislation in common-law states has guarded sedulously the right of persons accused of incompetency of any kind to traverse the inquisition or other proceeding in the nature of one de lunatico inquirendo." *In Re Haynes' Will,* 143 N.Y.S. 570, 572 (1913). *See also Abrons v. Abrons,* 24 A.D. 2d 970, 265 N.Y.S. 2d 381 (1965). It is clear, therefore, that when a

party's lack of mental capacity is asserted and denied — and he has not previously been adjudicated incompetent to manage his affairs — he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian *ad litem* for him. *See Surety Co. v. Sharpe,* 232 N.C. 98, 104, 59 S.E. 2d 953, 597; *McMillan v. Robeson County,* 262 N.C. 413, 417, 137 S.E. 2d 105, 108; Annot., 23 A.L.R. 594 (1923).

[7, 8] The right to recover damages for injury to one's property is no less a property right than the right to sell or use the property which was damaged. Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit, to conduct his litigation according to his own judgment and inclination, and — if the case is to be compromised — to have it settled upon terms which are satisfactory to him. If this right is taken from him upon a factual finding which he disputes, fundamental fairness and the constitutional requirements of due process require that he be given an opportunity to defend and be heard. *Graham v. Graham,* 40 Wash. 2d 64, 240 P. 2d 564 (1952). *Accord, East Paterson v. Karkus,* 136 N.J. Eq. 286, 41 A. 2d 332 (1945); 44 C.J.S. *Insane Persons* § 143(b), p. 308 (1945). "Where the claim or defense turns upon a factual adjudication, the constitutional right of the litigant to an adequate and fair hearing requires that he be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it." *In Re Custody of Gupton,* 238 N.C. 303, 304, 77 S.E. 2d 716, 717-18; *Accord: In Re Wilson,* 257 N.C. 593, 126 S.E. 2d 489; *Eason v. Spence,* 232 N.C. 579, 61 S.E. 2d 717.

[9, 10] It follows, therefore, that a person for whom a next friend or guardian *ad litem* is proposed is entitled to notice as in case of an inquisition of lunacy under G.S. 35-2. This statute does not specify the time but, by analogy to G.S. 1-581, ten days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith and that the party is *non compos mentis,* the judge may proceed to appoint a next friend to act for him. If, however, he asserts his competency, he is entitled to have the issue determined as provided in G.S. 35-2. *See Graham v. Graham, supra; East Paterson v. Karkus, supra; Kalanianaole v. Liliuokalani,* 23 Haw. 457 (1916).

[11] Plaintiff Hagins has had neither notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue. Consequently, the order appointing Franks as her next

friend was void and his settlements of her actions, notwithstanding they were approved by the court, are not binding upon her.

The cases of *Moore v. Lewis,* 250 N.C. 77, 108 S.E. 2d 26; *Abbott v. Hancock,* 123 N.C. 99, 31 S.E. 268; *Smith v. Smith,* 106 N.C. 498, 11 S.E. 188; and *Tate v. Mott,* 96 N.C. 19, 2 S.E. 176, cited by defendant as authority for its contention that an inquisition to determine sanity was not a condition precedent to the appointment of a next friend for Hagins, involve factual situations not comparable to those we have considered. The holdings do not conflict with decision here.

In *Moore v. Lewis, supra* (a proceeding for partition), a guardian *ad litem* had been appointed for Lewis upon the affidavit of a disinterested person. Notwithstanding, Lewis employed counsel of his own choosing and filed an answer. Thereafter he defended the action in his own name, and the guardian *ad litem* took no further part in the proceedings. Upon appeal Lewis contended, *inter alia,* that the order appointing a guardian *ad litem* for him was invalid and rendered all subsequent proceedings void. This Court, while specifically recognizing the right of an alleged incompetent who objected to the appointment of a guardian *ad litem* to be heard with respect to his need for one, held that the failure of the court, *ex mero motu,* to enter an order vacating the appointment was immaterial, since the defendant, and not the guardian *ad litem,* had actually defended the case. In *Abbott v. Hancock, supra,* the attack upon the appointment of a next friend for the plaintiff was made by the defendant, whose demurrer admitted that the plaintiff was insane and confined in an asylum. In *Smith v. Smith, supra,* the plaintiff himself did not contest the appointment of his next friend, and *Tate v. Mott, supra,* involved only minors.

[12] Situations comparable to the one presented by the instant case will not often arise. Upon the facts of this case we hold that an inquisition must be held before the court can appoint a next friend for plaintiff Hagins. However, an inquisition is not always a condition precedent for the appointment of a next friend or a guardian *ad litem.* In an emergency, when it is necessary, pendente lite, to safeguard the property of a person *non compos mentis* whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as next friend. The reasons for allowing this procedure are well stated by Sir G. Jessel, M. R., in *Jones v. Lloyd,* 18 L.R. Eq. 268 (1874): "If this were not the law, anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance

to him or his property, without there being any remedy whatever. . . . [E]verybody knows it takes a considerable time to make a man a lunatic by inquisition, and his family sometimes hesitate about making him a lunatic, or hope for his recovery, and take care of him in the meantime without applying for a commission in lunacy. Is it to be tolerated that any person can injure him or his property without there being any power in any Court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as a next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this Court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he cannot maintain such a suit." *Id.* at 275. See *Smith v. Smith, supra* at 503, 11 S.E. at 189, where a portion of the above quotation appears.

Obviously, however, it is ordinarily desirable that an incompetent's litigation be conducted by a general guardian, who, being in control of all his ward's affairs, can relate the effect of the litigation to the incompetent's entire estate.

[13] We, of course, express no opinion as to whether plaintiff is incompetent to manage her litigation. However, an application for the appointment of a next friend or a general guardian may yet be made for her. Therefore, in view of the assertion that plaintiff's want of understanding is confined to only one subject — her land, which Commission has condemned — we deem it appropriate to consider when a person is *non compos mentis* within the meaning of G.S. 1-64 and G.S. 35-2. While there are varying degrees of mental inadequacy, the law will not (and should not) deprive a person of the control of his lawsuit or his property unless he is "incompetent from want of understanding to manage his own affairs." This is the criterion fixed by G.S. 35-2, and we understand the word *affairs* to encompass a person's entire property and business — not just one transaction or one piece of property to which he may have a unique attachment.

[14, 15] Incompetency to administer one's property "obviously depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices,

or the holding of particular beliefs." 29 Am. Jur. *Insane Persons* § 7 (1960). Eccentricity, like profligacy, may coexist with the ability to manage one's property. Likewise, to authorize the appointment of next friend or guardian *ad litem,* it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. Annot., 9 A.L.R. 3d 774 (1966).

[16] Many a man has prosecuted a lawsuit to his detriment or ruin, his ordinary caution and good judgment warped by prejudice, spite, or a stubborn purpose to vindicate "the principle of the thing." His attorneys and the court may have been entirely convinced that he was blindly and contumaciously refusing to settle his case upon terms which were obviously advantageous to him — and they may have been right. Yet "no man shall be interferred with in his personal or property rights by the government, under the exercise of its parental authority, until the actual and positive necessity therefor is shown to exist." *Schick v. Stuhr,* 120 Iowa 396, 398, 94 N.W. 915, 916 (1903). It is one of the incidents of the cherished right of private property that ordinarily an individual may expend his property in fighting a lost cause or for any legal purpose whatever.

[17] We have found no completely satisfactory definition of the phrase "incompetent from want of understanding to manage his own affairs." Furthermore, we do not believe it is possible to frame a definition which will include every aberration which might produce the incompetency to which reference is made. The facts in every case will be different and competency or incompetency will depend upon the individual's "general frame and habit of mind." As pointed out in *In Re Anderson,* 132 N.C. 243, 43 S.E. 649, mere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs. At the time *Anderson* was decided The Code § 1670 (now, as amended, G.S. 35-2) applied to "an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs." In 1945, the legislature deleted the words "idiot" and "lunatic" from the statute and substituted therefor "mental defective" and "mentally disordered" respectively. S.L. 1945 Ch. 952. Therefore, the statement in *Anderson* that the fourth class of persons listed in The Code § 1670 were "embraced under the head of lunatics" and that "their want of understanding in order to render them incompetent to manage their own affairs must be complete" is no longer correct.

[18, 19] Under G.S. 35-2, as presently written, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable

of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. *See* Annot., 9 A.L.R. 3d 774 (1966); *Schick v. Stuhr, supra.*

For the errors specified herein, the decision of the Court of Appeals is reversed, and the cause is remanded to that Court with the direction that it vacate the judgment of the Superior Court from which plaintiff appealed and remand the case to that court for such further proceedings, consistent with the legal principles herein enunciated, as may be initiated.

Error and remanded.

BERNICE T. HAGINS v. AERO MAYFLOWER TRANSIT CO., INC.; CHAMPION STORAGE AND TRUCKING COMPANY, INCORPORATED, AND REDEVELOPMENT COMMISSION OF GREENSBORO

No. 684

(Filed 31 January 1969)

APPEAL by plaintiff from the decision of the Court of Appeals (reported in 1 N.C. App. 51, 159 S.E. 2d 592) affirming the judgment of *Crissman, J.*, entered at the 2 October 1967 Civil Session of GUILFORD, Greensboro Division.

Comer & Harrelson for plaintiff appellant.

McLendon, Brim, Brooks, Pierce & Daniels by Edgar B. Fisher, Jr., for Aero Mayflower Transit Company, Inc., and Champion Storage and Trucking Company, Inc., defendant appellees.

Cannon, Wolfe, Coggin & Taylor for Redevelopment Commission of Greensboro, defendant appellee.

PER CURIAM.

This is a companion case to *Hagins v. Redevelopment Commission,* decided this day and reported *ante* 90. It is referred to in

sufficient detail in the statement of facts in that case to disclose that decision there controls decision here. See also the statement of facts preceding the final four paragraphs in the opinion of the Court of Appeals. 1 N.C. App. 51, 55, 159 S.E. 2d 592, 595.

For the reasons stated in *Hagins v. Redevelopment Commission,* the decision of the Court of Appeals is reversed, and this cause is remanded to that Court with the direction that it vacate the judgment of the Superior Court from which plaintiff appealed and remand the case to that court for such further proceedings, consistent with the legal principles herein enunciated, as may be initiated.

Error and remanded.

BERNICE T. HAGINS v. SOUTH ATLANTIC BONDED WAREHOUSE CORPORATION, ALLIED VAN LINES, INC., AND REDEVELOPMENT COMMISSION OF GREENSBORO

No. 685

(Filed 31 January 1969)

APPEAL by plaintiff from the decision of the Court of Appeals (reported in 1 N.C. App. 56, 159 S.E. 2d 596) affirming the judgment of *Crissman, J.,* entered at the 2 October 1967 Civil Session of GUILFORD, Greensboro Division.

Comer & Harrelson for plaintiff appellant.

D. Newton Farnell, Jr., Jordan, Wright, Nichols, Caffrey & Hill for South Atlantic Bonded Warehouse Corporation and Allied Van Lines, Inc., defendant appellees.

Cannon, Wolfe, Coggin & Taylor for Redevelopment Commission of Greensboro, defendant appellee.

PER CURIAM.

This is a companion case to *Hagins v. Redevelopment Commission,* decided this day and reported *ante* 90. It is referred to in sufficient detail in the statement of facts in that case to disclose that decision there controls decision here. See also the statement of facts preceding the final five paragraphs in the opinion of the Court of Appeals. 1 N.C. App. 56, 61, 159 S.E. 2d 596, 600.

For the reasons stated in *Hagins v. Redevelopment Commission*, the decision of the Court of Appeals is reversed, and this cause is remanded to that Court with the direction that it vacate the judgment of the Superior Court from which plaintiff appealed and remand the case to that court for such further proceedings, consistent with the legal principles herein enunciated, as may be initiated.

Error and remanded.

STATE v. ERVIN MERCER

No. 251

(Filed 31 January 1969)

1. Homicide § 26— second degree murder — instructions

In a homicide prosecution, an instruction to the effect that once a killing with a deadly weapon is established, it is murder in the second degree at least, is incomplete and inaccurate and is not cured by an instruction upon the presumptions arising from the establishment of an intentional killing with a deadly weapon which contains numerous errors and irrelevancies.

2. Homicide § 14— presumptions — intentional killing with deadly weapon

When the State satisfies the jury from the evidence that defendant intentionally shot the deceased with a pistol and thereby proximately caused his death, the presumptions arise that the killing was (1) unlawful and (2) with malice, and nothing else appearing, defendant would be guilty of murder in the second degree.

3. Homicide § 11— defenses — misadventure or accident

Misadventure or accident is not an affirmative defense but is merely a denial that defendant intentionally shot the deceased.

4. Homicide § 28— instructions — insanity

In a homicide prosecution, it is error for the court to instruct the jury upon the principles relating to legal insanity where there is no evidence that defendant was legally insane.

5. Homicide § 7.5— instructions — defense of unconsciousness

In a homicide prosecution, it is error for the court to restrict the jury's consideration of defendant's evidence that he was completely unconscious of what transpired when the killings occurred to the elements of premeditation and deliberation in first degree murder, unconsciousness being a complete defense to a criminal charge.

6. Criminal Law § 113— instructions — duty to apply law to evidence

G.S. 1-180 requires the court to instruct the jury on all substantial features of the case arising on the evidence without special request.

7. Criminal Law § 113; Homicide § 28— instructions — defenses

Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto, the weight to be given such evidence being for determination by the jury.

8. Criminal Law § 1— definition of crime at common law

The common law conception of crime required (1) an evil deed and (2) *mens rea* — a guilty mind.

9. Criminal Law § 5; Homicide § 7.5— defense of unconsciousness

A person who is unconscious at the time he commits an act which would otherwise be criminal generally cannot be held responsible therefor.

10. Criminal Law § 5; Homicide § 7.5— defenses of insanity and unconsciousness

Unconsciousness and insanity are separate grounds of exemption from criminal responsibility.

11. Criminal Law § 5; Homicide § 7.5— defense of unconsciousness

Unconsciousness is never an affirmative defense.

12. Criminal Law § 5; Homicide § 7.5— defenses of unconsciousness and insanity

A jury finding that defendant intentionally shot the deceased and thereby proximately caused his death negates and refutes any contention that defendant was then unconscious; notwithstanding such a finding by the jury, the defendant is exempt from criminal responsibility if he satisfies the jury he was insane when he inflicted the fatal injury.

13. Criminal Law § 5— insanity defined

An accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would be punishable as a crime while he is laboring under such a defect of reason from disease of the mind as to be incapable of knowing the nature and quality of the act or, if he does know this, incapable of distinguishing between right and wrong in relation to such act.

14. Criminal Law § 5; Homicide § 7.5— insanity — unconsciousness

Insanity is incapacity, from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto; in contrast, one who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong.

15. Homicide § 28— instructions — defense of unconsciousness

In a prosecution for homicide in which defendant testified that he was completely unconscious of what transpired when deceased was shot, de-

fendant was entitled to an instruction to the effect that the jury should return a verdict of not guilty if in fact defendant was completely unconscious of what transpired when deceased was shot.

16. Criminal Law § 5; Homicide § 7.5— defense of unconsciousness

While unconsciousness is always a factor of legal significance, it is not a complete defense under all circumstances, as where the unconsciousness is produced by voluntary intoxication.

17. Homicide §§ 4, 5— intent to kill

While a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, it is not an element of second degree murder, which is an unlawful killing with malice.

18. Criminal Law § 43; Homicide § 20— gruesome photographs

While the fact that an otherwise relevant and material photograph is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible, the admission of an excessive number of photographs depicting the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors.

19. Criminal Law § 43; Homicide § 20— photographs of crime scene

In a consolidated trial of defendant for three homicides, four photographs depicting substantially the same scene which were identified as accurate representations of the clothed dead body of one victim at the crime scene and blood where another victim was found when officers arrived are competent for illustrative purposes, and whether all or a less number should have been admitted was within the discretion of the trial judge.

20. Criminal Law § 43; Homicide § 20— photographs of corpse

In a homicide prosecution, three photographs of the deceased's body at the funeral home with projecting probes indicating the point of entry, the course, and the point of exit of the bullet that caused his death are inflamatory and have no probative value in respect of any issue for determination by the jury where the evidence is uncontradicted as to the cause of death and all the evidence tended to show deceased was lying on a bed when shot.

ON writ of *certiorari* to the Court of Appeals.

Separate indictments charged defendant with the first degree murder on September 14, 1967, of (1) Myrtle R. Mercer, defendant's wife, (2) Ida Mae Dunn, and (3) Jeffrey Lane Dunn, Ida's five-year-old son. The three indictments were consolidated for trial and tried before Parker, J., at February 1968 Criminal Session of Wilson.

Evidence was offered by the State and by defendant.

There was evidence tending to show the facts narrated below.

Defendant, a member of the United States Army for 19½ years, was stationed at Fort Benning, Georgia, at the time of the trial.

Defendant and Myrtle Mercer were married in Fayetteville, N. C., in April, 1965. Thereafter, he was stationed at duty posts in and out of the United States. Myrtle Mercer, Ida Mae Dunn, and Jeffrey Lane Dunn, Ida's five-year-old boy, lived together in Wilson, N. C. Defendant visited Myrtle in Wilson from time to time when on leaves. He was thirty-nine; Myrtle was twenty-three.

Marital difficulties developed. Defendant had heard that Myrtle was having affairs with other men. He thought Myrtle's relationship with Ida involved more than normal affection. As time passed, defendant's strong affection for Myrtle was not reciprocated.

On July 6, 1967, defendant received a letter from Myrtle, referred to in the evidence as a "Dear John" letter, in which she told him she was tired of being tied down and wanted to come and go as she pleased. In a letter mailed August 10th from Kentucky (where he was then stationed), defendant wrote Myrtle: "Please don't make me do something that will send both of us to our graves." Also: "I could never see you with another man, and I would die and go to hell before I would see you with some other man, and take myself with you."

In September, 1967, defendant obtained a ten-day leave "to come home and see if he could get straightened out with his wife. . . ." Defendant told his first sergeant that "if he did not get straightened out he would not be back."

On September 13, 1967, defendant visited the house in Wilson where Myrtle, Ida, and Jeffrey lived. He talked with Myrtle. However, she would not discuss their marital problems and did not want him to stay at that house.

Defendant stayed at the home of his cousin, Mrs. Mable Owens, in Tarboro. He left there on the morning of September 14, 1967, and arrived at Myrtle's around noon. She would not talk with him. (Note: Defendant testified Myrtle at that time gave him some clothes, a camera and a paper bag containing a pistol he had given to her for her protection.) At the conclusion of this visit, he returned to the home of Mrs. Owens. Sometime during the day defendant bought a pint of vodka and had two drinks from it.

About 8:30 p.m., Mrs. Owens, at the request of defendant, drove defendant to Myrtle's house in Wilson. The two children of Mrs.

Owens accompanied them. Defendant knocked. There was no response. The house was unlighted and apparently no one was there. They left and visited defendant's brother (in Wilson) for some twenty-five or thirty-five minutes. While there, defendant telephoned Myrtle's house. The line was busy. They went back to Myrtle's house. Defendant asked Mrs. Owens if she and her children would go into the house with him. She replied that they would wait in the car.

Defendant went to the front door and knocked several times. There was no answer. Defendant shot at the door twice, pushed it open with his foot and went inside. At that time, a light came on in the front bedroom. Someone said, "Ervin, don't do that." Defendant fired three or four shots killing Myrtle instantly and fatally wounding Ida and Jeffrey. He then left the house. A neighbor called the police.

The police arrived about 10:30 p.m. In the front room, they found Myrtle, dead, and Ida and Jeffrey gasping for breath. Later that evening or early the next morning Ida and Jeffrey died.

Defendant was arrested at the home of his brother in Wilson, a few hours after the fatal shots were fired. He accompanied the officers to a lot behind Myrtle's house where the gun which inflicted the fatal injuries was hidden.

Testimony of defendant, in addition to that referred to above, is set out in the opinion. It tended to show he was completely unconscious of what transpired when Myrtle, Ida and Jeffrey were shot.

In each case, the jury returned a verdict of guilty of murder in the second degree. In each case, the court pronounced a judgment imposing a prison sentence of not less than twenty nor more than twenty-five years, the sentences to run consecutively. Defendant entered numerous exceptions and, upon appeal to the Court of Appeals, assigned as error (1) the denial of his motions for judgment as in case of nonsuit, (2) rulings relating to the admission or exclusion of testimony, and (3) excerpts from the charge as given and the refusal to charge as requested by defendant. The Court of Appeals found "No Error." 2 N.C. App. 152, 162 S.E. 2d 563.

Defendant sought *certiorari*, and the writ was granted, for review by this Court of the questions considered and discussed in the opinion.

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

Farris & Thomas for defendant appellant.

BOBBITT, J.

The evidence, when considered in the light most favorable to the State, was sufficient to require submission to the jury and to support verdicts of guilty of murder in the first degree. There is no substance to the contention that the motion to dismiss as in case of nonsuit should have been allowed. However, assignments of error, based on exceptions to the charge, are well taken.

The court's instructions include the following: "(W)hen an intentional killing with a deadly weapon is admitted or established, the law then casts upon the defendant the burden of showing to the satisfaction of the jury, not by the greater weight of the evidence, nor beyond a reasonable doubt, but simply to satisfy the jury (of) the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will excuse it altogether upon some grounds recognized in law as a defense, such as insanity or misadventure or accident, or self-defense or some other. (That is, gentlemen of the jury, once the killing is admitted or established with a deadly weapon, the law presumes malice, a presumption of malice arises, and therefore it is an unlawful killing with malice, it's murder in the second degree at least.)"

[1, 2] Defendant excepted to and assigns as error the portion of the quoted excerpt enclosed by parentheses. This particular sentence, standing alone, states without qualification that "once the killing is admitted or established with a deadly weapon . . . it's murder in the second degree *at least.*" (Our italics.) It is inaccurate, in conflict with the preceding instruction and tends to confuse rather than clarify. The factual situation called for an instruction in the case involving Myrtle (and a similar instruction in the cases involving Ida and Jeffrey) substantially as follows: If the State has satisfied the jury from the evidence beyond a reasonable doubt that the defendant *intentionally* shot Myrtle with a .38 pistol and thereby proximately caused her death, two presumptions arise: (1) That the killing was unlawful, and (2) that it was done with malice; and, *nothing else appearing,* the defendant would be guilty of murder in the second degree. *State v. Propst,* 274 N.C. 62, 70-71, 161 S.E. 2d 560, 567, and cases cited. "The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives

rise to the presumptions." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 324.

In the quoted excerpt, preceding the portion to which defendant excepted, the court instructed the jury that "when *an intentional killing* with a deadly weapon is admitted or established, the law then casts upon the defendant the burden of showing to the satisfaction of the jury, not by the greater weight of the evidence, nor beyond a reasonable doubt, but simply to satisfy the jury (of) the legal provocation that will rob the crime of malice and thus reduce it to manslaughter, or that will *excuse it altogether upon some grounds recognized in law as a defense, such as insanity or misadventure or accident, or self-defense* or some other." (Our italics.)

[3, 4] There was no evidence of self-defense. There was no evidence of misadventure or accident. Moreover, misadventure or accident is not an *affirmative* defense but merely a denial that defendant intentionally shot the deceased. *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. McLawhorn,* 270 N.C. 622, 628, 155 S.E. 2d 198, 203; *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731. As to insanity, the record discloses: In a portion of the charge to which defendant excepted, extensive instructions were given with reference to insanity. However, near the conclusion of the charge, in an instruction to which defendant excepted, the court charged the jury as follows: "(U)nder the evidence in the case, as the Court understood the evidence, there is no evidence of legal insanity, no evidence of insanity that would have a legal recognition." We agree there was no evidence defendant was legally insane. Under the circumstances, it is unnecessary to consider whether the instructions given as to legal insanity were correct. It is, however, error to instruct the jury as to legal principles unrelated to the factual situation under consideration. *State v. Duncan,* 264 N.C. 123, 141 S.E. 2d 23.

[1] The instruction preceding the sentence to which defendant excepted is fraught with errors and irrelevancies. Under these circumstances, it cannot be considered sufficient to cure the incompleteness and inaccuracy in the instruction to which defendant excepted.

Defendant testified that, when he went upon the porch, he took with him, in a bag, the pistol Myrtle had turned over to him earlier that day; that he had given it to her originally for her protection and was returning it to her for this purpose; that he walked up on the porch, knocked on the door, "heard somebody walking there in the house," laid the pistol in a porch chair beside the door; that he knocked on the window and then knocked twice on the door; and that the next thing he knew, "right out of the blue sky, Myrtle just

hollered out and said, 'If you don't get off the damn porch, I'm going to call the police on you' "; and, from that point, he was "blank in (his) mind." He testified that, when he became conscious, he was standing on the porch and that the pistol, which was beside his head, clicked.

The court's final instructions were as follows: "(T)he Court instructs you that the evidence in regard and surrounding the alleged loss of memory by the defendant will be considered by you *on the question of premeditation and deliberation in the charge of murder in the first degree.* . . . if you find from the evidence, not by the greater weight, nor by the preponderance, but if the defendant has satisfied you — merely satisfied you — that he lost consciousness, sufficient consciousness, to the extent that he did not have sufficient time to *premeditate or deliberate,* that is, if he did not have sufficient time to form in his mind the intent to kill, under the definition of *premeditation* and *deliberation,* then it would be your duty to return a verdict of not guilty of murder in the first degree, because the Court has instructed you if the State has failed to satisfy you of the element of *premeditation* or *deliberation,* or if there arises in your minds a reasonable doubt in regard to those two elements or either one of those two elements, it would be your duty to return a verdict of not guilty. And further in regard, when you come to consider those elements of *premeditation* and *deliberation,* if the defendant has satisfied you, not beyond a reasonable doubt, not by the greater weight of the evidence, but has merely satisfied you that he lost consciousness to such an extent that he was unable to *premeditate,* and was unable to *deliberate,* according to the definition of those terms that the law has given you, then he could not be guilty of murder in the first degree, and it would be your duty to return a verdict of not guilty as to murder in the first degree, under those circumstances. Now, *the Court feels that those are the only two elements in the case in which this evidence in regard to his loss of consciousness applies,* and the Court has ruled that there is no element of legal insanity in the evidence." (Our italics.)

[5] Defendant's assignment of error, based on his exception to the foregoing portion of the charge, must be sustained. Defendant testified he was completely unconscious of what transpired when Myrtle, Ida and Jeffrey were shot. The court instructed the jury that this evidence was for consideration *only* in respect of the elements of premeditation and deliberation in first degree murder. This restriction of the legal significance of the evidence as to defendant's unconsciousness was erroneous.

[6, 7] G.S. 1-180 requires a trial judge to instruct the jury as to "every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect." *State v. Merrick,* 171 N.C. 788, 795, 88 S.E. 501, 505; *State v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53, and cases cited. Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury. *State v. Wagoner,* 249 N.C. 637, 107 S.E. 2d 83.

[8] "To put the subject in perspective, we must start with the common law's conception of crime. The common law required (1) an evil deed and (2) *mens rea* — a guilty mind." Weintraub, C.J., concurring in *State v. Sikora,* 44 N.J. 453, 210 A. 2d 193 (1965).

[9] "If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." 1 Wharton's Criminal Law and Procedure (Anderson), § 50, p. 116.

"Unconsciousness is a complete, not a partial, defense to a criminal charge." 21 Am. Jur. 2d, Criminal Law § 29, p. 115.

"*Unconsciousness.* A person cannot be held criminally responsible for acts committed while he is unconscious. Some statutes broadly exempt from responsibility persons who commit offenses without being conscious thereof. Such statutes, when construed in connection with other statutes relating to criminal capacity of the insane and voluntarily intoxicated, do not include within their protection either insane or voluntarily intoxicated persons, and are restricted in their contemplation to persons of sound mind suffering from some other agency rendering them unconscious of their acts. . . ." 22 C.J.S., Criminal Law § 55, p. 194.

[10] Defendant contends he had no knowledge of and did not consciously commit the act charged in the indictments. He does not contend he was insane. Unconsciousness and insanity are separate grounds of exemption from criminal responsibility.

In certain jurisdictions statutes provide that all persons are capable of committing crime except those in enumerated classes, one excepted class being insane persons and a separate excepted class being persons who commit the acts charged without being conscious

thereof. See California, Penal Code § 26, subdivisions 3 and 5, and Oklahoma, Penal Code § 152, subdivisions 4 and 6.

As stated by Brett, J., in *Carter v. State,* 376 P. 2d 351 (Okl. Cr. 1962): "It should be noted that it has been clearly pointed out that a defense of insanity and defense of unconsciousness are not the same, either by statutory definition or by interpretation of the courts." Decisions cited in support of this statement are: *People v. Martin,* 87 Cal. App. 2d 581, 197 P. 2d 379; *People v. Taylor,* 31 Cal. App. 2d 723, 88 P. 2d 942. Accord: *People v. Hardy,* 33 Cal. 2d 52, 198 P. 2d 865.

[11, 12] This distinction is noted. Unconsciousness is never an *affirmative* defense. The presumptions of unlawfulness and of malice arise when, and only when, the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant *intentionally* shot the deceased and thereby proximately caused his death. A jury finding to this effect negates and refutes any contention the defendant was then unconscious. However, notwithstanding such a finding by the jury, the defendant is exempt from criminal responsibility if he satisfies the jury he was insane when he inflicted the fatal injury.

[13, 14] In accordance with cited prior decisions, Ervin, J., in *State v. Swink,* 229 N.C. 123, 47 S.E. 2d 852, restated the established rule in this jurisdiction as follows: "(A)n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act." Subsequent decisions in accord include the following: *State v. Creech,* 229 N.C. 662, 674, 51 S.E. 2d 348, 357; *State v. Spence,* 271 N.C. 23, 38, 155 S.E. 2d 802, 814. Insanity is incapacity, from disease of the mind, *to know the nature and quality* of one's act or *to distinguish between right and wrong* in relation thereto. In contrast, a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong. As stated succinctly by Francis, J., in *State v. Sikora, supra:* "Criminal responsibility must be judged at the level of the conscious."

Statements in accord with the quoted excerpts from Wharton, Am. Jur. 2d and C.J.S. are set forth in the opinions in the following cases: *People v. Baker,* 42 Cal. 2d 550, 575, 268 P. 2d 705, 720;

People v. Anderson, 63 Cal. 2d 351, 366, 46 Cal. Rptr. 763, 773, 406 P. 2d 43, 53; *People v. Gorshen,* 51 Cal. 2d 716, 727, 336 P. 2d 492, 499; *People v. Wilson,* 59 Cal. Rptr. 156, 427 P. 2d 820 (1967); *Carter v. State, supra; Fain v. Commonwealth,* 78 Ky. 183, 39 Am. Rep. 213 (1879); *Smith v. Commonwealth,* 268 S.W. 2d 937 (Ky. 1954); *Corder v. Commonwealth,* 278 S.W. 2d 77 (Ky. 1955); *Watkins v. Commonwealth,* 378 S.W. 2d 614 (Ky. 1964).

People v. Wilson, supra, involved a factual situation similar to that now under consideration. In brief, there was evidence that the defendant, armed, entered his estranged wife's apartment where he shot and killed her and one of the three men (two fled) who were in the apartment when he arrived. The defendant testified he did not remember firing and did not know what happened during the shootings. The Supreme Court of California held the trial judge erred in refusing to give proffered instructions, which included the following:

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"This rule of Law does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

"When the evidence shows that a person acted as if he was conscious, the law presumes that he then was conscious. The presumption, however, is disputable and may be overcome or questioned by evidence to the contrary."

In *People v. Wilson, supra,* Peters, J., for the Court, said: "That the proffered instructions on unconsciousness should have been given was decided in *People v. Bridgehouse,* 47 Cal. 2d 406, 303 P. 2d 1018." After reviewing the factual situation in *Bridgehouse,* which, as to evidence of unconsciousness, seems less favorable to the defendant than the evidence in the case now under consideration, Justice Peters continued: "It was stated in *Bridgehouse, supra* (47 Cal. 2d at p. 414, 303 P. 2d 1018), that it was error for the court to refuse the instructions on the legal effect of unconsciousness offered by the defendant and upon which he relied as a defense. (Citations

omitted.) In *Bridgehouse,* as here, the only evidence of unconsciousness came from the defendant."

The instructions proffered and refused in *People v. Wilson, supra,* referred to as CALJIC No. 71-D, apparently are *standard* instructions in California.

There was no evidence defendant was a somnambulist or an epileptic. Nor was there evidence he was under the influence of intoxicants or narcotics. Under cross-examination, defendant testified his only previous "blackout" experience, which was of brief duration, occurred when he received and read the "Dear John" letter.

[15] Upon the present record, defendant was entitled to an instruction to the effect the jury should return verdicts of not guilty if in fact defendant was *completely* unconscious of what transpired when Myrtle, Ida and Jeffrey were shot.

The State's evidence tends to show defendant *intentionally* shot Myrtle (Ida, Jeffrey) with a .38 pistol and thereby proximately caused her (his) death. If the jury should so find from the evidence beyond a reasonable doubt, two presumptions would arise, namely, that the killing was unlawful and that it was done with malice; and, nothing else appearing, the defendant would be guilty of murder in the second degree. In such event, there is nothing in the record now before us that would reduce the crime from murder in the second degree to manslaughter or that would excuse it.

[16] It should be understood that unconsciousness, although always a factor of legal significance, is not a complete defense under all circumstances. Without undertaking to mark the limits of the legal principles applicable to varied factual situations that will arise from time to time, but solely by way of illustration, attention is called to the following: In California, "unconsciousness produced by voluntary intoxication does not render a defendant incapable of committing a crime." *People v. Cox,* 67 Cal. App. 2d 166, 153 P. 2d 362, and cases cited. In Colorado, a person who precipitates a fracas and as a result is hit on the head and rendered semi-conscious or unconscious cannot maintain that he is not criminally responsible for any degree of homicide above involuntary manslaughter, or that he is not criminally responsible at all. *Watkins v. People,* 158 Colo. 485, 408 P. 2d 425. In Oklahoma, a motorist is guilty of manslaughter if he drives an automobile with knowledge that he is subject to frequent blackouts, when his continued operation of the automobile is in reckless disregard to the safety of others and constitutes culpable or criminal negligence. *Carter v. State, supra; Smith v. Com-*

monwealth, supra. As to somnambulism, see *Fain v. Commonwealth, supra,* and *Lewis v. State,* 196 Ga. 755, 27 S.E. 2d 659.

[17] The record shows the court defined murder in the second degree as the unlawful and *intentional killing* of a human being with malice. Although not assigned as error, it seems appropriate to point out again that "(a) specific intent *to kill,* while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter." *State v. Gordon, supra.* An *unlawful killing* with malice is murder in the second degree

Discussion of defendant's other assignments of error based on exceptions to the charge is deemed unnecessary. The asserted errors to which they relate will not likely recur at the next trial. Errors heretofore discussed require that defendant be awarded a new trial.

Although not the basis of decision, it seems appropriate to refer to defendant's assignments of error relating to photographs admitted in evidence, over objections by defendant, to illustrate the testimony of witnesses.

[18] "If a photograph is *relevant and material,* the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible." (Our italics.) Stansbury, North Carolina Evidence, Second Edition, § 34, pp. 66-67; *State v. Porth,* 269 N.C. 329, 337, 153 S.E. 2d 10, 16. But where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. *State v. Foust,* 258 N.C. 453, 460, 128 S.E. 2d 889, 894.

Exhibits 4, 5 and 6, identified as accurate representations of the front door, including the lock and of the interior of the portion of the house from the front door to the bedroom, were properly admitted.

[19] Exhibits 1, 2, 3 and 7 were identified as accurate representations of the clothed (sweater and slacks) dead body of Myrtle, lying on the bed, and the splotch of blood on the portion of the bed where, according to testimony, Jeffrey was lying when the officers arrived. These four photographs, which depict substantially the same scene, were competent to illustrate the testimony. Whether all or a less number should have been admitted was for determination by the trial judge in the exercise of his discretion.

[20] Exhibits 8, 9 and 10 were identified as accurate representations of the dead body of Jeffrey at the funeral home. The boy's lifeless body is shown with projecting probes indicating the point of entry, the course, and the point of exit, of the bullet that caused his death. The evidence was uncontradicted as to the cause of death. Moreover, all the evidence tended to show Jeffrey was lying on the bed when shot. These photographs, depicting scenes which are poignant and inflammatory, have no probative value in respect of any issue for determination by the jury.

Exhibit 11, referred to in the evidence as an accurate representation of the dead body of Ida at the funeral home, is not among the exhibits on file in this Court. While we refrain from explicit ruling with reference thereto, it would seem the observations with reference to the photographs depicting the dead body of Jeffrey would be applicable to this photograph depicting the dead body of Ida.

For the errors 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 in each of the three cases, to be conducted in accordance with the legal principles stated herein.

Error and remanded.

WILLIAM L. HUGHES, JR. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

AND

COLVARD OIL COMPANY, INC. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

AND

FARMERS EQUIPMENT, INC. v. NORTH CAROLINA STATE HIGHWAY COMMISSION

No. 443

(Filed 31 January 1969)

1. Eminent Domain § 13; Lis Pendens— condemnation proceedings by landowner — ineffective as lis pendens

Landowner's special proceeding in the nature of inverse condemnation, which was instituted against Highway Commission and municipality for compensation for land allegedly taken for highway purposes, does not constitute lis pendens under G.S. 40-26 so that persons acquiring title while the action was pending take title subject to the proceeding and the consent judgment entered therein, since (1) both the Commission and the municipality denied a taking by eminent domain and instead alleged that the highway was constructed by agreement with the landowner, (2) the exceptions or reservations appearing in the purchasers' chains of title were insufficient in description to effectively reserve the land in question to the landowner, (3) the

landowner's name did not appear on the defendant, or respondent, side of the indexes or cross-indexes of the public records, nor was the proceeding mentioned in any deeds or muniment of title in subsequent purchasers' chains of title, and (4) there was no map or any evidence in the record to show that the Highway Commission by any sign or overt act ever indicated a claim to the property of greater width than was actually used for highway purposes.

2. Eminent Domain § 15— highway condemnation — time of passage of title

At the time landowner instituted G.S. Ch. 40 proceeding in 1940 for compensation for land allegedly taken by Highway Commission and municipality for highway purposes, title was not divested until the condemnor obtained a final judgment in his favor and paid to the landowner the amount of damages fixed by such judgment, and the landowner could sell the land during the pendency of the special proceeding.

3. Lis Pendens— purpose — notice

The law as to lis pendens, G.S. 1-116 et seq., provides a definite method for giving constructive notice so that a search of known records will convert it into actual notice, and since application of this rule may work hardships in many instances, a strict compliance with its provisions is required.

4. Eminent Domain § 13— action by owner for compensation

The method prescribed by G.S. Ch. 40 for arriving at compensation for condemnation of land for highway purposes is open to the landowner as well as the Highway Commission, although the landowner may not maintain a proceeding under this chapter unless there has been a taking under the power of eminent domain.

5. Eminent Domain § 7— proceeding by condemnor — the petition — description of property

When the condemnor seeks to follow the procedure permitted by G.S. Ch. 40, his petition must contain a description of the property actually in litigation and not merely a description of the entire tract.

6. Estoppel § 3— estoppel by pleadings

Where parties by their pleadings deny the taking of certain land by eminent domain, they are precluded by this denial from maintaining a contrary position at trial or on appeal.

7. Notice § 2— duty of party on notice

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made effort to learn the truth of the matters affecting his interest.

8. Lis Pendens; Notice § 2— accessibility of facts to place on notice

The rigor of the lis pendens rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it, and it follows that this equitable requirement would apply with equal force when a party is charged with notice by means other than lis pendens.

9. Registration § 3— as notice

The purchaser of land is charged with notice of every description, recital, reference and reservation in deeds or muniments in his grantors' chain of title, and if the facts disclosed in such chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed.

10. Registration § 5— parties protected by registration

The examiner of a real estate title is entitled to rely with safety upon an examination of the records and act upon the assurances against all persons claiming under the grantor that what did not appear did not exist.

ON Writ of Certiorari to the North Carolina Court of Appeals to review its decision filed 14 August 1968 and reported in 2 N.C. App. 1.

This case consists of three separate civil actions involving claims against the North Carolina State Highway Commission for alleged damages resulting from the widening of N. C. Highways 268 and 18 in the Town of North Wilkesboro, N. C. By agreement the three actions were consolidated for hearing and were submitted to the Court for judgment based upon an agreed statement of facts. Judgment was rendered by Gwyn, J., at the December 1967 session of Wilkes Superior Court.

Plaintiffs Colvard Oil Company, Inc. (Colvard) and Farmers Equipment, Inc. (Farmers) own certain property located along North Carolina Highways 268 and 18, and plaintiff W. L. Hughes, Jr. (Hughes) is the lessee of the land owned by Colvard, which is the subject of Colvard's action.

In 1911, one Henry T. Blair (Blair) acquired title to a tract of land in Wilkes County, in or near the Town of North Wilkesboro (Town). In 1938, the Highway Commission started its project No. 7806 for the improvement of what are now designated as Highways 268 and 18. A section of this project went through a portion of Blair's land. Construction of the project was completed on 7 July 1940.

On 27 January 1940, Blair instituted a special proceeding before the Clerk of Superior Court for Wilkes County against the Town and the Highway Commission. Blair's complaint alleged, in paragraph 3, as follows:

> "That, during the year 1938, the defendant the Town of North Wilkesboro applied to the petitioner for a right of way through a number of lots owned by said petitioner, advising the petitioner that its codefendant, the State Highway and Public

Works Commission was constructing a new road which would be paved and which would come into the town of North Wilkesboro, the petitioner at that time residing in the State of New York and not being in position to view the proposed location of said highway or highways, and during said year the defendant, the State Highway and Public Works Commission, was engaged in constructing, servicing and maintaining a State system of highways and roads, and while so engaged constructed and built a road through the property of this petitioner which is situate in the corporate limits of North Wilkesboro, constructing not only one (1) road, but three (3) roads through the most valuable part of said property, confiscating the property of the petitioner and taking the right of way, as he is informed and believes, of one hundred (100) feet — this being done over the protest of the petitioner and disregarding any agreement that the petitioner had as to where the road would be constructed and what lots or land would be confiscated.

The Town, in its answer to Blair's allegations, asserted "that the then town officials of the Town of North Wilkesboro applied to the plaintiff for permission for a right of way over certain property owned by the plaintiff in the Town of North Wilkesboro and advised the plaintiff that the State Highway and Public Works Commission had proposed to construct the said road if the Town of North Wilkesboro would acquire the rights of way of the property owners, and that the said State Highway and Public Works Commission would pave the road sought to be constructed through the lands of the plaintiff; that the plaintiff agreed in writing to waive claim for damages on account of the construction of the said highway over his property, provided the said State Highway and Public Works Commission would improve and pave the road through his premises, known as The County Home Road to the Fairplains Road."

The Highway Commission, in answering Blair's petition, alleged: "(A)nswering paragraph 3, it is admitted that during the year 1938 this respondent's codefendant, the Town of North Wilkesboro, applied to the petitioner for a right of way for the proposed highway development through the said property, and that, in response to this request, the petitioner executed a written agreement, agreeing 'to waive claim for damage, provided the highway is properly constructed,' etc. Relying upon this agreement on the part of the petitioner, this respondent, in cooperation with the Town of North Wilkesboro, caused the highway in question to be constructed across the petitioner's property." Except as expressly admitted as indicated above, each answer denied the allegations of Blair's paragraph 3.

Neither the answer of Highway Commission nor the answer of the Town made any mention or assertion to the effect that a right of way of 100 feet was claimed or taken. Nothing in the record showed that there was a posted map or highway signs indicating a claim to a right of way of greater width than was in actual use. It was stipulated by the present plaintiffs and the Highway Commission that after the answers were filed by the defendant Town and the defendant Highway Commission in the Blair suit of 1940, that "the defendant did not file a lis pendens nor did the defendant cross-index the pending suit."

In August, 1945, Blair conveyed certain lands, including the lands in question now owned by Colvard and Farmers, to T. J. Frazier and wife (Frazier). The deed, duly recorded, contained the following language after the description: ". . . being all of the lands of Henry T. Blair lying between the main right of way of Highway 268, the southern connecting road between Highway 268 and Highway 18, not including any part of said highways within said right of way lines." Thereafter, Frazier prepared a subdivision map of the property which was recorded in Wilkes County Registry on 12 July 1946; the map was entitled "Sunset Hills Addition to the Town of North Wilkesboro, Section 1," and indicated the location of Highways 268 and 18 but did not indicate the width of the right of way for the highways.

On 12 July 1946, Frazier conveyed Lot No. 1 as shown on the recorded map to Colvard, and the deed contained the following language: "This deed is made subject to and shall conform with the State Highway right of way." Colvard constructed a gasoline service station on the lot and paved the area from its building to the edge of the highway pavement.

By deed dated 11 July 1946, Frazier conveyed certain lots as shown on the recorded map to one Crawford and Eller; by mesne conveyances, Farmers, in 1962, acquired title to the Crawford and Eller property. At least one of the deeds in the chain of title between Frazier and Farmers contained the following language after the description: "This deed shall conform and is subject to the State Highway right of way."

On 23 November 1951, the Clerk of Wilkes County Superior Court terminated the special proceeding between Blair and the Highway Commission and Town by entering a judgment consented to by Blair, the Highway Commission, the Town, and their attorneys. The judgment, *inter alia,* decreed that the Highway Commission acquired certain easements of rights of way prior to 7 July 1940. The ease-

ments were described by courses and distances showing width of 100 feet. The judgment provided that Blair was to be paid $750.00 as just compensation for the taking.

In February 1964, the Highway Commission let the contract for its Project 6.800573, Wilkes County, which project consisted of grading, draining, widening, surfacing, and installing combination curb and gutters from a point at the intersection of Highways 268 and 18 along Highway 268 for approximately 0.9 miles. The project was completed on 1 November 1964. All of the work done along the property of the plaintiffs was within the 100-foot right of way embraced in the Blair consent judgment.

Present plaintiffs filed separate actions alleging damages due to widening of Highway 268. Colvard and Farmers alleged that the Highway Commission took a portion of their lands for highway purposes. Hughes alleged that he was the lessee of Colvard and that he was damaged by the taking. The Highway Commission filed answer in each of the three cases, denying the taking, and pleaded the Blair judgment as a bar to any recovery.

Plaintiffs contend that the Highway Commission did not own a 100-foot wide right of way, but that it owned only an easement between the two ditches, consisting of property actually being used for highway purposes before the widening of the road in 1964.

The parties stipulated that at no time did the Highway Commission make any demand on Colvard or Farmers not to pave the area from its buildings to the paved portion of the public highway. There was no allegation that the plaintiffs had any actual knowledge of the suit between Blair and the Highway Commission and the Town or the consent judgment between those parties.

After hearing, Judge Gwyn entered the following judgment:

> "Upon the agreed statement of facts the Court is of the opinion that by the Judgment in the Blair case dated November 23, 1951, the plaintiffs were not divested of their title to the lands in controversy;
>
> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the plaintiffs are owners of the lands described in the petition in the Blair case as embraced within the 100-foot right of way, exclusive of so much of the right of way as was used, from ditch to ditch, for the actual construction of the highway. It is further adjudged that the plaintiffs are entitled to compensation for their lands embraced within the 100-foot right of way and which were appropriated for the widening of Highway 268 and Highway 18, as alleged in the pleadings.

"The plaintiffs are permitted to amend their pleadings to make more definite, by metes, bounds and markers, the description of the lands alleged to have been appropriated by the State Highway Commission as embraced within the said 100-foot right of way."

Defendant Highway Commission appealed to the Court of Appeals. The Court of Appeals held that the Commission by virtue of the 1951 judgment in the special proceedings instituted by Blair in 1940 acquired an easement approximately 100 feet wide in the land in question as against plaintiffs, who were not parties to the special proceeding and who acquired their title indirectly from Blair between 1945 and 1951. The Court of Appeals vacated Judge Gwyn's Judgment and remanded the action for judgment consistent with its opinion. Plaintiffs Colvard, Farmers and Hughes petitioned for certiorari to review the judgment of the Court of Appeals pursuant to G.S. 7A-31(c)(3). The petition was allowed.

Thomas Wade Bruton, Attorney General; Deputy Attorney General Harrison Lewis; Trial Attorney Charles M. Hensey; Associate Counsel E. James Moore, and Associate Counsel Porter and Conner, for respondent appellee.

McElwee & Hall and Moore & Rousseau for appellants.

BRANCH, J.

[1, 2] A special proceeding was instituted 27 January 1940 by Blair pursuant to N. C. Gen. Stat. Chap. 40, entitled "Eminent Domain," for compensation for land allegedly taken by the Highway Commission and the Town for highway purposes. At that time title was not divested until the condemnor obtained a final judgment in his favor and paid to the landowner the amount of damages fixed by such final judgment, and the landowner could sell during the pendency of the special proceeding. The person who owned the land when the award was confirmed and final judgment entered was the proper person to be compensated. *Highway Commission v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E. 2d 253. Since the landowner, Blair, was in position to sell prior to final judgment, the question presented is whether subsequent purchasers, who were not parties to the action and who bought the real property while the action was pending or after entry of judgment, were bound by the consent judgment entered in the special proceeding instituted by Blair.

[3] The statutory law as to lis pendens embodied in N. C. Gen. Stats. 1-116 *et seq.*, provides a definite method for giving construc-

tive notice, so that a search of known records will convert it into actual notice. Since the application of this rule may work hardship in many instances, a strict compliance with its provisions is required. *Arrington v. Arrington,* 114 N.C. 151, 19 S.E. 351. The parties to this appeal stipulated that the defendant "did not file a lis pendens, nor did the defendant cross-index the pending suit." It is thus apparent that we need not consider the statutory lis pendens as contained in N. C. Gen. Stats. 1-116 *et seq.,* since there was no attempt to comply with its terms.

N. C. Gen. Stat. 40-26 provides: "When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or other subject matter of the appraisal, or any interest therein, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made."

The Court construed N. C. Gen. Stat. 40-26 in the case of *Caveness v. Charlotte, R. & S. R. R.,* 172 N.C. 305, 90 S.E. 244. There, action was brought against the defendant for permanent damages by reason of construction and operation of a railroad by the defendant on a street which abutted the plaintiff's property. Although none of the plaintiff's land was actually taken, he sought damages for impairment of value to his land which resulted from operation of the railroad. The plaintiff conveyed the land while suit was pending and the defendant contended that the plaintiff thereby lost his right to recover. The Court, in holding for the plaintiff, stated:

> "Under our statute and in condemnation proceedings, Revisal, sec. 2587, the railroad acquires the right to remain upon the land, construct and operate its road on the payment into court of the amount assessed by the appraisers, and the recovery should inure to the one who owns the property at that time. True, provision is made for appeal by either party, and the damages may thereafter be increased or lowered, and the right may be lost by failure to pay the amount ultimately awarded; but the right to enter and construct and operate its road is acquired when the company pays the amount assessed by the first appraisers, and the owner at that time is entitled to the compensation for the easement. In that case, however, if the owner at the time of entry shall have instituted condemnation proceedings, the statute, sec. 2594, expressly provides 'That no change of ownership, by voluntary conveyance or transfer of real estate or any interest therein or of the subject-matter of the appraisal,

shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made.' The proceedings by this section are constituted a *lis pendens,* and, although the grantee, as stated, prior to payment of the amount may be entitled to this compensation, if proceedings have been instituted, he must assert his right by action or appropriate proceedings in the cause. . . ."

[4, 5] The method prescribed by N. C. Gen. Stat. Chap. 40 entitled "Eminent Domain" for arriving at compensation for condemnation of land for highway purposes is open to the landowner as well as the Highway Commission. *Yancey v. Highway Commission,* 222 N.C. 106, 22 S.E. 2d 256. However, the landowner may not maintain a proceeding under this chapter unless there has been a taking under the power of eminent domain, *Penn v. Carolina Virginia Coastal Corp.,* 231 N.C. 481, 57 S.E. 2d 817, and when the condemnor seeks to follow the procedure permitted by this portion of the statute, his petition must contain a description of the property actually in litigation, and not merely a description of the entire tract. The property must "first be located." *Gastonia v. Glenn,* 218 N.C. 510, 11 S.E. 2d 459.

[1] Neither the Highway Commission nor the Town challenged the sufficiency of Blair's pleadings or took action to make the description of the property more certain so as to "locate the property." Neither did they, by cross action, assert their right to proceed with condemnation under the provisions of Chapter 40. Rather, both denied a taking by eminent domain and alleged that the highway through Blair's property was constructed by agreement with Blair, pursuant to which, *inter alia,* he executed a written waiver of claim for damages.

[6] The Highway Commission and the Town by their pleadings in the 1941 special proceeding further denied the taking of 100 feet of Blair's land, and by this denial were precluded from maintaining a contrary position at trial or on appeal. *Hemphill v. Board of Aldermen,* 212 N.C. 185, 193 S.E. 153.

[1] The pleadings in the Blair special proceeding sound of contract and none of the parties proceeded so as to clearly invoke the provisions of N. C. Gen. Stat. 40-26.

The Highway Commission presently contends that the exceptions or reservations appearing in plaintiffs' chains of title were sufficient to effectively reserve the land involved in this litigation to Blair.

We do not agree with this contention. If the reservations or exceptions — which do not describe or delineate the area now claimed by the Highway Commission — affect the land in litigation, it must be that they were sufficient to put subsequent purchasers to inquiry.

Conceding, without so deciding, that the provisions of N. C. Gen. Stat. 40-26 are applicable to instant case and that the language of the exceptions or reservations contained in plaintiffs' chains of title were sufficient to put them to inquiry, we consider the effect of the statute and the reservations and exceptions when applied to instant facts.

[7, 8] A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made effort to learn the truth of the matters affecting his interest. *Hargett v. Lee,* 206 N.C. 536, 174 S.E. 498. However, the rigor of the lis pendens rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it. *Arrington v. Arrington, supra.* It logically follows that this equitable requirement would apply with equal force when a party is charged with notice by means other than lis pendens.

3 Merrill on Notice, § 1159, at 79 (1952) states:

> "Concomitant to the rule that the lis pendens notification is confined to the apparent effect of the pleadings, they must contain a description of the property affected. As has been said, 'the *res* must be sufficiently described in the pleadings.' Hence the lis pendens notification will be confined to the property specified in the papers, and where a partial interest only in the property is asserted to be in issue the lis pendens notification does not extend to the entire interest."

[9] It is further well recognized that the purchaser of land is charged with notice of every description, recital, reference and reservation in deeds or muniments in his grantors' chain of title, and that if the facts disclosed in such chain or title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed. *Morehead v. Harris,* 262 N.C. 330, 137 S.E. 2d 174.

[10] The examiner of a real estate title by his search of the records seeks to determine if the grantors in the chain of title were seized of a marketable title, free of all taxes, liens or encumbrances, at the time such grantor made or intends to make the conveyance.

In making such examination he is entitled to rely with safety upon an examination of the records and act upon the assurances against all persons claiming under the grantor that what did not appear did not exist. *Smith v. Fuller,* 152 N.C. 7, 67 S.E. 48.

Ordinarily, proceedings under Chapter 40 are instituted by the condemnor by petition containing an accurate description of the property which it seeks to condemn, thereby placing the landowner on the defendant's or respondent's side of the indexes and cross-indexes of the public records and furnishing accessible means by which the property may be identified.

[1] Blair instituted a special proceeding in the nature of inverse condemnation by petition which was devoid of description as to the property in litigation, and only contained a reference to an entire subdivision by name and reference to a map "which will be presented at the hearing of this case," together with allegations, upon information and belief, that a right of way of 100 feet was confiscated. Blair's name does not appear on the defendant, or respondent, side of the indexes or cross-indexes of the public records, nor was the special proceeding instituted by Blair mentioned in any of the deeds or muniments of title in plaintiffs' chains of title. The record contains no map or any evidence which would show that defendants by any sign or overt act of any kind ever indicated a claim to the right of way of greater width than was actually used for highway purposes from ditch to ditch. Defendant Highway Commission only exercised dominion over so much of the right of way as it used in construction of the road from ditch to ditch, and allowed Blair's successors in title to erect and maintain improvements up to the area over which it exercised dominion. Thus, had plaintiffs made diligent search of the public records, they would have found nothing to further locate or give notice of any adverse claim beyond the right of way used for construction of a highway, from ditch to ditch. Had plaintiffs directed their inquiry to an actual examination of the area in which the land in litigation was located, they would have found a highway 30 feet in width, extending from ditch to ditch, which would have been entirely consistent with the reservations or exceptions of record and not inconsistent with their grantors' title.

In 3 Merrill on Notice, § 1167, at 89 (1952) it is stated:

> "It may be said that a lawsuit not diligently prosecuted is fraudulently maintained, in so far as the parties urge its pendency as a bar to the acquisition in good faith of interests free of the claims asserted therein. Accordingly, it is held generally that abandonment of the suit or a failure to prosecute it dili-

gently, even after an interlocutory decree, defeats lis pendens notification. Delay to prosecute his claim with dispatch may be as fatal to the cross-complaint relying upon the doctrine of lis pendens as it is to the complainant. . . ."

Certainly the strength of plaintiffs' contentions in the instant case is highly accentuated by the action of the parties to the special proceeding in allowing the special proceeding, to which plaintiffs were not parties, to lie dormant for a period of eleven years before attempting to conclude it by a consent judgment.

Plaintiffs, Blair's successors in title, were not bound by the consent judgment entered in the special proceeding instituted by Blair.

The decision of the trial court was without error, and the decision of the Court of Appeals is

Reversed.

SHARON E. ANDERSON, BY HER NEXT FRIEND, EMERY ANDERSON v. RAWLEIGH W. ROBINSON, D/B/A ROBINSON BROTHERS MOTOR CO., AND JAMES A. JENKINS

No. 110

(Filed 31 January 1969)

1. Negligence § 11— primary and secondary liability

Primary and secondary liability between defendants exists only when (1) they are jointly and severally liable to the plaintiff, and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

2. Pleadings § 19; Negligence § 10; Torts § 2— allegation of joint and concurring negligence

Allegation by plaintiff that defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader and is not admitted by demurrer.

3. Indemnity § 3; Pleadings § 14; Torts § 3— establishing right to indemnity from another defendant

In order for one defendant to establish a right to indemnity from a second defendant, he must allege and prove (1) that the second defendant is liable to plaintiff, and (2) that the first defendant's liability to plaintiff is derivative, that is, based on tortious conduct of the second defendant, or that the first defendant is only passively negligent but is exposed to liability through the active negligence of the second defendant.

4. Negligence § 25; Pleadings § 14; Torts § 3— action in tort — rights inter se of defendants — cross-action for breach of warranty

In an action for personal injuries against an automobile driver and the used car dealer who sold the automobile to the driver, where plaintiff alleged defendant driver was negligent (1) in the actual operation of the automobile and (2) in failing to inspect the brakes to determine whether they were adequate before driving on the highways, defendant driver is not entitled to maintain a cross-action against defendant car dealer based on breach of express and implied warranty that the automobile was free of mechanical defects, since under plaintiff's allegations the driver will not be entitled to indemnification from the car dealer but will be held liable for plaintiff's injuries only because of his own active negligence.

ON writ of *certiorari* to the North Carolina Court of Appeals. Same case below reported in 2 N.C. App. 191, 162 S.E. 2d 700.

This is a civil action commenced by the minor plaintiff against the defendants for alleged injuries which she sustained in an automobile accident on July 19, 1966. Plaintiff was a guest passenger in a 1962 Chevrolet automobile owned and operated by the defendant Jenkins, and purchased by defendant Jenkins from the defendant Robinson, a used car dealer, a few hours before the accident. The accident occurred at about 3 p.m. on a rainy afternoon when the Chevrolet automobile, traveling in a southerly direction on Dockery Road in Buncombe County, left the pavement and overturned near the intersection of Dockery Road and R.P.R. 1003. Plaintiff alleged specific acts of negligence against each defendant.

As to the defendant Jenkins, the driver and owner of the automobile, plaintiff alleged that he drove the automobile upon the highways when he knew or should have known that it had not been inspected as required by State law, and without personally inspecting it for mechanical defects; that he drove at a speed greater than was reasonable and prudent under the circumstances, and failed to reduce speed when approaching an intersection and attempting to make a turn; that he failed to keep his automobile under control and to keep a proper lookout; and that he drove carelessly and recklessly without due regard to the safety of others on the highway. Plaintiff alleged that the negligence of the defendant Jenkins was a proximate cause of the injuries sustained by her.

As to the defendant Robinson plaintiff alleged that he sold the Chevrolet automobile to Jenkins and allowed him to drive it upon the highways of the State when he knew or should have known that the brakes were inadequate and defective; that he sold the car without first having it inspected as required by State law; and that he failed to have the brakes repaired after having been notified of their defective condition.

Plaintiff alleged that the negligence of the defendant Robinson was a proximate cause of the injuries sustained by her.

Plaintiff alleged that the negligence of each defendant "joined in and concurred in force and effect" with the negligence of the other, and that said negligence was the sole proximate cause of the injuries sustained by her. Plaintiff prayed that she have and recover of the defendants, jointly and severally, damages in the sum of $100,000.

Robinson in his answer denied any negligence, and as a further answer and defense alleged that the defendant Jenkins had operated the car several times before he purchased it, that the brakes seemed to be in good condition, and that said automobile was inspected as required by law and said inspection revealed no brake defects.

In his answer defendant Jenkins denied any negligence on his part, and as a first answer and defense alleged that the accident resulted solely from unexpected brake failure, which occurred without prior notice or warning of any kind. As a second further answer and defense and by way of cross-action against his co-defendant, he alleged that Robinson expressly and impliedly warranted said motor vehicle to be free of mechanical defects, and that the accident resulted solely and exclusively from the conduct of the defendant Robinson in failing to properly inspect and service the car when he knew or should have known the defective condition of the brakes. Jenkins alleged that, if he is adjudged liable in any way, he is entitled to recover from Robinson "complete and full indemnification therefor by reason of the representations and warranties hereinabove set forth and by reason of the primary negligence" of Robinson. Jenkins prays that if he be adjudged liable, then he is entitled to recover "indemnification therefor against the co-defendant, . . . and that said co-defendant be adjudged primarily liable to the plaintiff, and this defendant, at most, only secondarily liable."

Defendant Robinson moved to strike all the "second further answer and defense and cross-action" from defendant Jenkins' answer. The motion was allowed by the trial court. Jenkins appealed. In the North Carolina Court of Appeals a panel of the Court rendered a unanimous decision written by Campbell, J., affirming the decision of the lower court. In its opinion the Court of Appeals used this language in substance: This case is clearly within the doctrine and holding of *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82, where all the various views are clearly set forth in the decision written for a divided court by Justice Moore. In closing its opinion the Court of Appeals said this: "We can add nothing to what has

been said in *Greene v. Laboratories* where the subject is covered in complete detail."

Defendant Jenkins filed a petition for a writ of *certiorari* in this Court, which we allowed.

Williams, Williams and Morris by James F. Blue, III, for defendant Jenkins, appellant.

Van Winkle, Buck, Wall, Starnes & Hyde by O. E. Starnes, Jr., and Scott N. Brown, Jr., for defendant Robinson, appellee.

PARKER, C.J.

[1] Jenkins' goal, as alleged in his stricken "second further answer and defense and cross-action," is complete exoneration or indemnity, not contribution under G.S. 1-240. He has alleged that the accident was caused solely and completely by the negligence of his co-defendant. As stated by Sharp, J., in *Edwards v. Hamill,* 262 N.C. 528, 531, 138 S.E. 2d 151, 153: "Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff [citations]; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. [citations]."

[2] Allegation by the plaintiff in her complaint that the defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader, and is not admitted by demurrer. *Ballinger v. Thomas,* 195 N.C. 517, 142 S.E. 761.

[3] Before Jenkins can establish a right to indemnity from Robinson, he must allege and prove (1) that Robinson is liable to plaintiff, and (2) that Jenkins' liability to plaintiff is derivative, that is, based on the tortious conduct of Robinson, or that Jenkins is only passively negligent but is exposed to liability through the active negligence of Robinson. *Hendricks v. Fay, Inc.,* 273 N.C. 59, 159 S.E. 2d 362.

[4] In his answer and cross-claim, Jenkins alleged that the sole cause of the accident was the negligence and breach of warranty by defendant Robinson. Jenkins is entitled to indemnification from Robinson only if he is held liable for an obligation for which Robinson is primarily liable. Plaintiff in her complaint alleged two distinct areas in which Jenkins was negligent: (1) In the actual driving of

the automobile, and (2) in failing to inspect the car before driving it on the highways.

If the jury should find Jenkins liable on the grounds that he was guilty of negligence in driving, that being the proximate cause of the accident, then clearly he would have no cause of action over against Robinson. If the jury should find that Jenkins was negligent in failing to test the brakes and determine that they were adequate before driving on the highways, and that by such testing and inspection he could have discovered the defect, then he would have no right to indemnity from Robinson. On the other hand, if the jury should find that Jenkins was not guilty of negligent driving, and that the condition of the brakes could not reasonably have been discovered by him, then the accident would in fact have been due to "sudden and unexpected brake failure," as alleged in his answer, and Jenkins would not be liable. Thus, if Jenkins is held answerable for the plaintiff's injuries under the facts as alleged it will be because of his own active negligence, and he will therefore not be entitled to indemnification from Robinson.

Any cross-action Jenkins has attempted to allege against Robinson for breach of warranty cannot be litigated in plaintiff's tort action, since it is not germane thereto. *Steele v. Hauling Co.*, 260 N.C. 486, 133 S.E. 2d 197; *Greene v. Laboratories, Inc., supra;* McIntosh, N. C. Practice and Procedure, 2d ed., § 1244.5.

It should be noted that the new Rules of Civil Procedure, effective July 1, 1969, authorize a much wider range of cross-actions between co-parties than heretofore permissible. See Rule 13(g). Compare, e.g., *Greene v. Laboratories, Inc., supra.*

The decision of the Court of Appeals is correct, but we think that it should have been based upon the precise point that we have based our decision on, instead of relying generally upon *Greene v. Laboratories, Inc., supra,* where many different principles of law are discussed.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BYERS v. HIGHWAY COMMISSION

No. 9 PC.

Case below: 3 N.C. App. 139.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 31 January 1969.

DAVES v. INSURANCE CO.

No. 3 PC.

Case below: 3 N.C. App. 82.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 21 January 1969.

ELLISON v. WHITE

No. 6 PC.

Case below: 3 N.C. App. 235.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 January 1969.

JENKINS v. BROTHERS

No. 7 PC.

Case below: 3 N.C. App. 303.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 January 1969.

NEWTON v. STEWART

No. 1 PC.

Case below: 3 N.C. App. 120.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 21 January 1969.

ROBERTS v. STEWART

No. 1 PC.

Case below: 3 N.C. App. 120.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 21 January 1969.

STATE v. BEASLEY

No. 14 PC.

Case below: 2 N.C. App. 323.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 January 1969.

STATE v. CRAWFORD

No. 17 PC.

Case below: 3 N.C. App. 337.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 11 February 1969.

STATE v. HUNSUCKER

No. 8 PC.

Case below: 3 N.C. App. 281.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 January 1969.

STATE v. WILLIAMS

No. 15 PC.

Case below: 3 N.C. App. 463.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 11 February 1969.

REDEVELOPMENT COMM. v. STEWART

No. 10 PC.

Case below: 3 N.C. App. 271.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 31 January 1969.

TRUST CO. v. CONSTRUCTION CO.

No. 5 PC.

Case below: 3 N.C. App. 157.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 31 January 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

YANCEY v. WATKINS

No. 445.

Case below: 2 N.C. App. 672.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 21 January 1969.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1969

STATE OF NORTH CAROLINA v. JAMES CURTIS MOORE, BOBBY RAY DAWSON, AND CARL PATRICK SPEIGHT

No. 8

(Filed 12 March 1969)

1. Criminal Law § 106— nonsuit — corroboration of confession — proof of corpus delicti

When the State offers evidence of the corpus delicti in addition to defendant's confession of guilt, defendant's motion to nonsuit is correctly denied.

2. Arrest and Bail § 3— arrest without warrant

An arrest without a warrant except as authorized by statute is illegal.

3. Arrest and Bail § 3— arrest without warrant — misdemeanor

An arrest without a warrant for misdemeanors not committed in the presence of the arresting officers is illegal. G.S. 15-41.

4. Criminal Law § 75— illegal arrest — subsequent confession

A confession obtained from a person in custody as a result of an illegal arrest is not *ipso facto* inadmissible, voluntariness remaining the test of admissibility, but the facts and circumstances surrounding the illegal arrest and the in-custody statement should be considered in determining whether the confession is voluntary and admissible.

5. Criminal Law § 76— admissibility of confession — voir dire hearing

When a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, should hear evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements.

6. Criminal Law § 76— admissibility of confession — voir dire hearing — necessity for findings of fact

When there is conflicting evidence offered at a voir dire hearing to determine the admissibility of a confession, the trial judge must make findings of fact to show the bases of his ruling on the admissibility of the confession.

7. Criminal Law § 76— admissibility of confession — voir dire hearing — failure of court to find facts

Where the State and defendants offered conflicting evidence at the voir dire hearing to determine the admissibility of defendants' purported confessions, failure of the trial court to make findings of fact to support its conclusion that any confession made by either of the three defendants was made freely and voluntarily entitles each of the defendants to a new trial.

8. Constitutional Law § 31— identity of informer

A defendant is not necessarily entitled to elicit the name of an informer from the State's witnesses.

9. Constitutional Law § 31— identity of informer

The State's privilege against disclosure of an informant's identity must give way where the disclosure of the informant's identity or the contents of his communication is relevant or helpful to the defense of the accused or is essential to fair determination of a cause.

10. Arrest and Bail § 8; Constitutional Law § 31— identity of informer — validity of arrest

While defendants are entitled to question the police as to the reliability of an informer when the constitutional validity of defendants' arrests is challenged, defendants are not prejudiced by refusal of the trial judge to allow defense counsel to question police officers about the identity of an informer who gave the officers information which led to defendants' arrest where the illegality of the arrests has been established.

APPEAL by defendants from decision of the North Carolina Court of Appeals filed on 18 December 1968 and reported in 3 N.C. App. 286.

Defendants James Curtis Moore and Bobby Ray Dawson were each charged in five separate warrants with malicious damage to property, including the charge herein considered. Each of these defendants entered a plea of guilty in Recorder's Court of Wilson, N. C., and was sentenced to two years on each charge, to run consecutively. Each defendant noted an appeal to the Superior Court, and bond for each was set in the amount of $25,000.00.

Defendant Carl Patrick Speight was charged in three separate warrants with malicious damage to property, including the charge herein considered. These cases were also heard in the Wilson Re-

corder's Court and defendant, upon a plea of guilty, was sentenced to two years on each charge, to run consecutively. He noted an appeal to the Superior Court and bond was set in the amount of $25,000.00.

At the 24 June 1968 Criminal Term of the Superior Court of Wilson County before Parker (Joseph W.), J., each defendant was tried upon warrants charging malicious damage to property. The warrants charged that each defendant on or about the 6th day of April, 1968, "did unlawfully, wantonly and maliciously injure and destroy real property of the Bargin (sic) Grocery, owned and operated by B. J. Robbins, said real property being as follows: Breaking out window glasses, and or did aid and abet in the said charge."

Each defendant through counsel entered a plea of not guilty. At trial the State offered evidence which indicated the following: On Saturday night, 6 April 1968, certain stores, including Bargain Grocery, were damaged and looted. Certain members of the Wilson Police Department, including Detective John Ed Davis, investigated the damage to Bargain Grocery, and around 12:00 or 12:30 at night notified the owner, B. J. Robbins. Mr. Robbins found his store looted, the plate glass window smashed, merchandise burned and scattered throughout the store and considerable fire and water damage incurred. Mr. Robbins did not know who had looted his store.

While Detective Davis was testifying, he was asked questions concerning statements made by defendants, and upon objection, the jury was excused and a voir dire hearing held. On voir dire, Detective Davis testified that on Sunday, 7 April 1968, he received information from a certain person that each of the three defendants participated in breaking the windows of Bargain Grocery. Detective Davis did not reveal the name of the informer and made no statement concerning the informer's reliability.

The following Monday, 8 April 1968, Detective Davis and Detective Smith talked with defendant Moore at his apartment, which was some 200 feet from the Bargain Grocery. Detective Davis asked Moore to get into the police car and advised him that he was under arrest for malicious damage to property. Detective Davis further testified that, after giving Moore the *Miranda* warning in the car, Moore stated that he had participated in damaging and looting the store. Detectives Davis and Smith, later in the same day, arrested defendant Speight at the same set of apartments and advised him of his rights. The following day, 9 April 1968, after a night in jail, Speight made a statement implicating himself in the damage to

Bargain Grocery. Defendant Dawson was also arrested on 8 April 1968 by Detective Parks of the Wilson Police Department. On 9 April 1968, also following a night in jail, Dawson, after being advised of his rights, made a statement to Detective Davis implicating himself in the breaking of the glass at Bargain Grocery. Detective Davis testified that none of the inculpatory statements allegedly made by defendants were ever reduced to writing.

On voir dire each defendant gave testimony that conflicted with the testimony of the police. Each defendant denied making any incriminating statement concerning Bargain Grocery to the police officers. Moore testified that he walked out of the house as a group of boys broke out the windows at Parramore Oil Company about 200 feet away and that this was the only thing he had admitted to the police. Speight testified that he admitted he broke a window (not any particular window) due to a promise from the police to lower the amount of his bail. Dawson's testimony was in such conflict that he named both 8 April and 10 April, 1968, as being the first time he made any admission concerning breaking the windows. In a room over the courtroom, in response to Detective Davis' naming of three stores, Dawson stated that he was guilty, but Dawson testified that Bargain Grocery was not in the list and that he had admitted nothing concerning Bargain Grocery. Dawson stated that he pleaded guilty in the Recorder's Court because of a suggestion by the police that he would get a lighter sentence. It is noted, however, that defendants' evidence was not in conflict with the State's evidence concerning the circumstances surrounding the actual arrest.

Following the voir dire examination on the voluntariness of the inculpatory statements made by defendants, the Court found the statements to have been voluntarily made and admitted them into evidence before the jury. Officer Davis then testified, *inter alia,* as to defendants' confessions in presence of the jury.

Officer Smith of the Wilson Police Department testified that he had been acquainted personally with defendants Moore and Dawson for five or six years and that he saw defendants Moore and Dawson sometime between 11 and 2 o'clock on the night of 6 April 1968 running down the street with a crowd of eight to ten boys approximately a block from Bargain Grocery.

Each defendant testified that he had nothing to do with the damage to Bargain Grocery and offered evidence in the nature of an alibi.

All the evidence tended to show that each defendant was ar-

rested without a warrant for misdemeanors not committed in the presence of the arresting officers.

The jury returned a verdict of guilty as to each defendant and the Court sentenced each defendant to two years in prison. Each defendant appealed to the North Carolina Court of Appeals. That Court found no error. Defendants then appealed to this Court pursuant to N. C. Gen. Stat. § 7A-30.1, alleging violation of their constitutional rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 11, 15 and 17 of the North Carolina Constitution.

Attorney General Morgan and Assistant Attorney General Harrell for the State.

Chambers, Stein, Ferguson and Lanning for defendants.

BRANCH, J.

[1] Defendants assign as error the denial of their motions for nonsuit. When the State offers evidence of the corpus delicti in addition to defendant's confession of guilt, defendant's motion to nonsuit is correctly denied. *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558. Here, defendants' confessions with the evidence *aliunde* as to the corpus delicti were sufficient to overrule their motions for nonsuit.

Defendants also assign as error the admission into evidence, over their objections, of the testimony of police officers concerning alleged inculpatory statements made by each of the defendants after their arrest without a warrant and made while each defendant was in custody.

[2] An arrest without warrant except as authorized by statute is illegal. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100.

N. C. Gen. Stat. § 15-41, entitled "When officer may arrest without warrant," in part provides:

> "A peace officer may without warrant arrest a person:
>
> (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;"

[3] Here, each defendant was charged with a misdemeanor and the record clearly discloses that the alleged misdemeanors did not occur in the presence of the arresting officers, and that the arrests

were made without warrants. Thus, the arrest of each defendant must be treated as illegal. We must therefore decide whether, under the circumstances of this case, the alleged inculpatory statements of each defendant must be excluded because of the prior illegal arrest.

[4] In *McNabb v. United States,* 318 U.S. 332, 87 L. Ed. 819, 63 S. Ct. 608 (1943), and *Mallory v. United States,* 354 U.S. 449, 1 L. Ed. 2d 1497, 77 S. Ct. 1356 (1957), a rule dealing with cases of unlawful delay between arrest and arraignment before a United States Commissioner was formulated. This rule states that a confession made during such unlawful delay is held to be *ipso facto* inadmissible. *Mallory v. United States, supra; Upshaw v. United States,* 335 U.S. 410, 93 L. Ed. 100, 69 S. Ct. 170 (1948); *McNabb v. United States, supra.* However, the *McNabb-Mallory* rule is based on rule 5(a) of the Federal Rules of Criminal Procedure, and the U. S. Supreme Court has made it clear that it is a rule of evidence formulated through the exercise of the Court's supervisory authority over the administration of criminal justice in the federal courts and not a constitutional limitation binding upon the State courts. *Ker v. California,* 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963); *Culombe v. Connecticut,* 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S. Ct. 1860 (1961); *Brown v. Allen,* 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953); *Gallegos v. Nebraska,* 342 U.S. 55, 96 L. Ed. 86, 72 S. Ct. 141 (1951).

In *Weeks v. United States,* 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914), the U. S. Supreme Court held that in a federal prosecution the Fourth Amendment barred as "fruit of a poison tree" evidence secured through an illegal search and seizure. This rule was made applicable to the states by *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1960). Appellants rely heavily on the case of *Wong Sun v. United States,* 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963) as extending the "poison fruit" doctrine to verbal statements following an illegal arrest.

In *Wong Sun v. United States, supra,* six or seven federal narcotics officers, acting on information secured from an informer and without procuring a search warrant or arrest warrant, went to the laundry where defendant Toy worked and lived. One of the officers rang the bell and told Toy that he was calling for laundry and dry cleaning. When Toy started to close the door, the officer identified himself as a federal narcotics agent. Toy slammed the door and ran. The officers broke the door open and followed him into the bedroom where his wife and child were sleeping. He was arrested and

handcuffed, and within a very short time he made an inculpatory statement. Toy's confession implicated defendant Wong Sun, who was arrested and later released on his own recognizance. Wong Sun made no inculpatory statement prior to his initial release. Several days later Wong Sun voluntarily returned to the police station and made an inculpatory statement. Excluding the Toy confession as being "fruit of official illegality" and admitting the Wong Sun confession on the basis that the connection between the prior illegal arrest and later confession had "become so attenuated as to dissipate the taint," the United States Supreme Court, *inter alia,* stated:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States,* 365 U.S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States,* (CA1 N.H.), 227 F. 2d 598. 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. See *Neuslein v. District of Columbia,* 73 App. D.C. 85, 115 F. 2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. . . .
>
> "The Government argues that Toy's statements to the officers in his bedroom, although closely consequent upon the invasion which we hold unlawful, were nevertheless admissible because they resulted from 'an intervening independent act of free will.' This contention, however, takes insufficient account of the circumstances. Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.
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> . . .
>
> ". . . 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. . . ."

We find no United States Supreme Court decision on this precise point since the decision in *Wong Sun;* however, the language used by the Supreme Court in *Wong Sun* has been interpreted by the state and lower federal appellate courts so as to produce a definite split of authority.

One line of authority holds that any confession made subsequent to an illegal arrest, regardless of its voluntariness, must be excluded.

In *State v. Mercurio,* 96 R.I. 464, 194 A. 2d 574 (1963), the defendants were arrested without warrants for violation of the gambling statutes, a misdemeanor. The police had information that defendants' automobile was being used in connection with a gambling operation, but while observing the car had no reason to believe that a misdemeanor was being committed in their presence. The Rhode Island Supreme Court stated: "[T]he arrests of defendants having been made without warrants or probable cause, we hold that the moneys, documents and statements taken and elicited from them at the time of their detention were inadmissible. . . ." The Court interpreted *Wong Sun* as saying that "all evidence seized and incriminating statements elicited from one whose arrest had not been made with probable cause were not admissible at his trial."

The District of Columbia Court of Appeals considered this question in the case of *Lyons v. United States,* 221 A. 2d 711 (1966). There, the defendant Lyons was arrested with no probable cause under the narcotics vagrancy statute. He was arrested while sitting in a car with a known narcotics user and thief, who had narcotics in his possession and who was also arrested. Police found needle marks on Lyons' arms and got his admission that he used narcotics. The Court stated: "These items of evidence (the needle marks and the admissions) were obtained as a result of an illegal detention of Lyons and were not admissible against him."

In *Gatlin v. United States,* 326 F. 2d 666 (D.C. Cir. 1963), the defendant was arrested for robbery without probable cause and without a warrant while walking down the street a mile and a half from the scene of the crime. After arriving at police headquarters, a few minutes after the illegal arrest, the defendant confessed. The Court in excluding the confession stated:

> "Verbal evidence obtained from unlawful police action 'is no less the "fruit" of official illegality than the more common tangible fruits of the unwarranted intrusion.' *Wong Sun v. United States.* (Citations omitted) Accord, *Fahy v. Connecticut, supra* (375 US 85). The government's attempt to distinguish *Wong Sun* on the ground that Miller's confession was only an

attenuated fruit of his illegal arrest is not persuasive. In *Wong Sun* the illegal arrest alone made the post-arrest admissions while still in custody poisonous fruit."

In accord with this line of authority are: *Commonwealth v. Young,* 349 Mass. 175, 206 N.E. 2d 694 (1965) (dictum); *State v. Thompson,* 1 Ohio App. 2d 533, 206 N.E. 2d 5 (1965); *State v. Dufour,* 99 R.I. 120, 206 A. 2d 82 (1965).

The other line of authority holds that *Wong Sun* does not require *ipso facto* the exclusion of a confession made following an illegal arrest. However, there is some disagreement as to the exact requirements of *Wong Sun.*

The Connecticut Court in *State v. Traub,* 151 Conn. 246, 196 A. 2d 755 (1963), cert. den. 377 U.S. 960, 12 L. Ed. 2d 503, 84 S. Ct. 1637, interpreted *Wong Sun* as adding a causation test to the established voluntariness test. The Court, in ruling that a confession made by Traub following an illegal arrest was admissible, stated:

"In other words, where, as we are assuming for the purposes of this opinion, a detention is illegal, a confession made during such a detention cannot be admitted unless and until the State proves that (1) the confession was truly voluntary, and (2) it was not caused or brought about by, or the fruit of, the illegal detention. It is the second, or causation factor, which *Wong Sun* added to the voluntariness requirement. If the detention is illegal, then it must be eliminated as an operative factor. If the detention is legal, the causative factor is immaterial if the first requirement of voluntariness is satisfied."

Our research reveals that the Connecticut Court was not departing from their own precedent in inserting the causation element, since in the case of *State v. Zukauskas,* 132 Conn. 450, 45 A. 2d 289 (1945) the Court held that causation was one of the tests in determining the admissibility of a confession following an illegal detention.

Compare *Collins v. Beto,* 348 F. 2d 823, (5th Cir. 1965); *Pennsylvania ex rel Craig v. Maroney,* 348 F. 2d 22 (3rd Cir. 1965), cert. den., 384 U.S. 1019.

A large number of the jurisdictions which interpret *Wong Sun* as not requiring *ipso facto* the exclusion of a confession made following an illegal arrest retain the test of voluntariness as controlling in determining the admissibility of a confession which has been preceded by an illegal arrest.

The following cases are representative of this line of authority:

In the case of *Prescoe v. State,* 231 Md. 486, 191 A. 2d 226 (1963), the defendant, while at his home at 2:30 A.M., was arrested for grand larceny without a warrant. Six hours after his arrest, while at the station house, the defendant made a confession. At his trial the State admitted that the reason a warrant was not obtained for defendant's arrest was that the police did not have sufficient grounds therefor. Thus, the court assumed the arrest to be illegal. However, at the trial the defendant's attorney admitted that the confession was voluntary, but claimed that *Wong Sun* still required its exclusion. The Court found that voluntariness was still the sole test and that defendant was bound by the judicial admission of his attorney.

The rule of *Prescoe v. State, supra,* has been affirmed in *Dailey v. State,* 239 Md. 596, 212 A. 2d 257 (1965), cert. den. 384 U.S. 913; *Mefford v. State,* 235 Md. 497, 201 A. 2d 824 (1964), cert. den. 380 U.S. 937; *Peal v. State,* 232 Md. 329, 193 A. 2d 53 (1963); *Stewart v. State,* 232 Md. 318, 193 A. 2d 40 (1963).

In *People v. Freeland,* 218 Cal. App. 2d 199, 32 Cal. Rptr. 132 (1963), the evidence disclosed that the defendant was arrested without a warrant and charged with burglary. The court found the arrest to be illegal. After several hours of questioning at police headquarters, the defendant confessed. Holding the confession to be admissible into evidence, the court stated:

> "[A]bsence of coercion and inducement continues to be the sole criterion of confession admissibility in California criminal prosecutions; illegal detention is only one of the factors which determine whether the statement is voluntary. (Citations omitted)
>
> . . .
>
> "As to the particular kind of evidence at issue, a confession, the ultimate test of admissibility remains that of volition in fact. If the individual's 'will was overborne', if his confession was not 'the product of a rational intellect and his free will,' it is inadmissible because coerced. (citations omitted) If the individual confesses his offense because he wills to confess, his statement is the product of his own choice, not that of the illegal restraint. To borrow a phrase from another area of the law, the choice of the accused becomes an independent, intervening cause of his confession, and his illegal restraint becomes only a collateral circumstance, not a cause."

In *Burke v. United States,* 328 F. 2d 399 (1st Cir. 1964), cert. den. 379 U.S. 849, the defendant Leo Burke was prosecuted for mail

robbery. He was arrested without a warrant or without probable cause. He was taken to the police station but was not immediately questioned because he appeared to have been drinking heavily. About eight hours after his arrest he was questioned by federal postal authorities who had fully advised him of his rights. The District Court found that the conversation and surrender of certain property by the defendant were admissible since it was made "deliberately and voluntarily on the basis of an intervening, independent act of his own free will, and that they were not made under the compulsion of the illegal arrest." The Circuit Court of Appeals, affirming the decision of the District Court, stated: "[N]ot every statement or surrender of property made during an illegal arrest is created inadmissible because of the illegal arrest."

In *United States v. Close*, 349 F. 2d 841 (4th Cir. 1965), cert. den. 382 U.S. 992, the defendant was suspected of bank robbery, but was arrested by the Roanoke police on a vagrancy charge while the investigation was underway on the robbery. The defendant contended that statements made by him to federal officers while in jail on the vagrancy charge were inadmissible. The Court, finding the arrest to be legal, stated:

> "Assuming, *arguendo,* that the initial arrest by the Roanoke police was illegal, we construe *Wong Sun* as holding, in effect, that not all oral statements are the fruit of the 'poisonous tree' simply because they would not have been made but for the illegal actions of the police. We think the Court in *Wong Sun* clearly indicates the view that a statement which is shown to have been freely and voluntarily made without coercion, either physical or psychological, may be thereby purged of any stigma of illegality and the statement is admissible."

Although this statement was dictum, it clearly represents the view of the Fourth Circuit Court of Appeals and the line of authority here being considered.

In the case of *Hollingsworth v. United States,* 321 F. 2d 342 (10th Cir. 1963), defendant was arrested in his room on a vagrancy charge after the police had received a tip that he had committed a burglary. He was thereafter charged with unlawful possession of a firearm. Defendant contended that his statement made to the police was inadmissible because of an asserted illegal arrest. The Tenth Circuit Court of Appeals, in affirming defendant's conviction and holding the statement to be admissible, stated: "The fact that a confession was obtained from a person during his custody under an unlawful arrest does not ipso facto make it involuntary and in-

admissible, but the fact that a confession was obtained during such custody and the attendant circumstances should be considered in determining whether the confession was voluntary, but the voluntariness still remains as the test of admissibility."

In accord with the view accepting voluntariness as the controlling test are: *Reeves v. Warden,* 346 F. 2d 915 (4th Cir. 1965) (construing Maryland law); *United States v. McGavic,* 337 F. 2d 317 (6th Cir. 1964), cert. den. 380 U.S. 933; *Ralph v. Pepersack,* 335 F. 2d 128 (4th Cir. 1964) (dictum), cert. den. 380 U.S. 925; *United States v. McCarthy,* 249 F. Supp. 199 (E. D. N. Y. 1966); *State v. Kitashiro,* 48 Hawaii, 204, 397 P. 2d 558 (1964); *State v. Portee,* 46 N.J., 239, 216 A. 2d 227 (1966); *State v. Hodgson,* 44 N.J. 151, 207 A. 2d 542 (1965), cert. den. 384 U.S. 1021; *State v. Jackson,* 43 N.J. 148, 203 A. 2d 1 (1964), cert. den. 379 U.S. 982; *State v. Hooper,* 10 Ohio App. 2d 229, 227 N.E. 2d 414 (1966), cert. den. 389 U.S. 928; *Commonwealth v. Bishop,* 425 Pa. 175, 228 A. 2d 661 (1967), cert. den. 389 U.S. 875; *Jarvis v. State,* 429 S.W. 2d 885 (Tex. Crim. 1968); *Pearson v. State,* 414 S.W. 2d 675 (Tex. Crim. 1967); *Lacefield v. State,* 412 S.W. 2d 906 (Tex. Crim. 1967); *State v. Keating,* 61 Wash. 2d 452, 378 P. 2d 703 (1963).

Justice Frankfurter, speaking for the Court in the case of *Culombe v. Connecticut, supra* (367 U.S. 568, 601), stated the elements of a voluntary confession in these words:

> "No single litmus-paper test for constitutionally impermissible interrogation has been evolved. . . .
>
> ". . . The ultimate test remains that which has been the only clearly established test in Anglo-American courts for 200 years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

We do not interpret *Wong Sun* to hold that every confession made subsequent to an illegal arrest is inadmissible since there the court, in approving the confession of the defendant Wong Sun, stated that because "Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had become so attenuated as to dissipate the taint." Nor is it reasonable that the cathartic effect of

subsequent attenuating circumstances should affect the admissibility of a confession following an illegal arrest any more than a showing that there were no oppressive or traumatic circumstances accompanying the arrest in the first place which would tend to overbear the will of the person making the confession. Rather, it seems that the decision in *Wong Sun v. United States, supra,* rested on the oppressive circumstances surrounding the arrest. This conclusion is substantiated by this language from *Wong Sun, supra:* "The Government argues that Toy's statements to the officers in his bedroom, although closely consequent upon the invasion which we hold unlawful, were nevertheless admissible because they resulted from 'an intervening independent act of a free will.' This contention, however, takes *insufficient account of the circumstances.* Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. *Under such circumstances* it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." (Emphasis added)

We condemn any illegal act by police officers. However, when viewed in the narrow field of voluntary confession, we fail to see why an illegal arrest — unaccompanied by violent or oppressive circumstances — would be more coercive than a legal arrest.

[4] Both reason and weight of authority lead us to hold that every statement made by a person in custody as a result of an illegal arrest is not *ipso facto* involuntary and inadmissible, but the facts and circumstances surrounding such arrest and the in-custody statement should be considered in determining whether the statement is voluntary and admissible. Voluntariness remains as the test of admissibility.

[5, 6] In this jurisdiction, when a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, hears evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, cert. den. 386 U.S. 911; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. The general rule is that after such inquiry, when there is conflicting evidence offered at the voir dire hearing, the trial judge shall make findings of fact to show the bases of his ruling on the admissibility of the evidence offered. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569.

In the case of *State v. Conyers, supra,* the trial judge held a

voir dire hearing as to the voluntariness of defendant's confession and at the conclusion of the voir dire hearing made the following entry: "Let the records show that the Court finds the statement and admissions to Officer Munn and Officer Watkins were made freely and voluntarily by the defendant without reward or hope of reward, or inducement, or any coercion from said officers." There, the Court, in granting a new trial, stated: "The court did not make findings of fact. The statements in the court's ruling are conclusions."

[7] In the case before us, upon objection of defendants to the offer of their respective purported confessions, the Court conducted a voir dire hearing. The evidence of each of the defendants was in sharp conflict with the evidence offered by the State.

At the conclusion of the preliminary hearing the trial judge made the following entry. (R p 45)

> "Let the record show that the motions by the defendants' attorney in regard to all three defendants, the motions are denied. The court finds as a fact that any statement made by either of the three defendants were made freely and voluntarily and understandingly, without promise or hope of reward, without threat, coercion, duress, or any other undue influence, and that the evidence in regard to same is competent in this criminal action. To the foregoing ruling of the court, the defendants in open court except."

We are unable to distinguish instant case from *State v. Conyers, supra.* Thus, we hold that since the court did not make findings of fact, but only entered conclusions, there is error which entitles each of the defendants to a new trial.

[8, 9] The only remaining assignment of error warranting discussion involves the refusal of the trial judge to allow the defense counsel to question the police about the identity of their informer. A defendant is not necessarily entitled to elicit the name of an informer from the State's witnesses. *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476. The Government's privilege against disclosure of an informant's identity is based on the public policy of "the furtherance and protection of the public interest in effective law enforcement." *Roviaro v. United States,* 353 U.S. 53, 1 L. Ed. 2d 639, 77 S. Ct. 623. However, the privilege must give way "[w]here the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause. . . ." *Roviaro v. United*

States, supra. In the instant case there was no showing that the identity of the informer would be relevant or helpful to defendants' cases.

[10] We recognize that defendants are entitled to question the police as to the reliability of the informer when the constitutional validity of the arrest is challenged. *McCray v. Illinois,* 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056; *Beck v. Ohio,* 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223. However, in the cases before us the invalidity of the arrests has been established and new trials granted on other grounds. This contention should not arise at the new trials. This assignment of error is overruled.

Because of error affecting the trial of each of the defendants, 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 each of the defendants, to be tried in accordance with the principles herein enunciated.

Error and remanded.

H. T. JACKSON, ROY BUMPASS, G. C. SMITH, AND SANFORD SMITH, APPELLANTS v. GUILFORD COUNTY BOARD OF ADJUSTMENT UNDER THE ZONING ORDINANCE OF GUILFORD COUNTY, DR. ROBERT M. FOX, CHAIRMAN; S. R. STAFFORD, PAUL PHIPPS, ORVIE HAYWORTH, HOWARD S. WAYNICK, REGULAR MEMBERS; WILLIAM H. LANIER, R. MACK PEOPLES, ALTERNATE MEMBERS; AND LESTER O. JONES, APPELLEES

No. 6

(Filed 12 March 1969)

1. Municipal Corporations § 30; Injunctions § 7; Nuisance § 6— use of land — rights of adjoining landowners — standing to sue

The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use; but where the proposed use is unlawful, the owner of adjoining or nearby lands who will sustain special damage from the proposed use through a reduction in the value of his own property does have a standing to maintain such proceeding.

2. Municipal Corporations § 31— exercise of zoning powers — role of courts

The courts, at the suit of a landowner threatened with injury, may not compel a city or other governmental unit to exercise a zoning authority

conferred upon it by statute or prevent it from amending or repealing a valid zoning ordinance previously adopted by it.

3. Municipal Corporations § 30— zoning ordinance — invalid amendment — remedy of adjoining landowner

If purported zoning ordinance amendment permitting a use of property forbidden by the original ordinance is itself invalid, the prohibition upon the use remains in effect; the owner of other land who will be specially damaged by such proposed use has standing to maintain a proceeding in the courts to prevent it.

4. Municipal Corporations § 30— zoning — board of adjustment — effect of unlawful order

Order of a zoning board of adjustment purporting to grant an exception to a valid zoning ordinance, which order is in excess of the authority of such board, leaves the proposed use within the prohibition of the ordinance and, therefore, unlawful.

5. Counties § 5— county zoning — board of adjustment — order granting special exception

Landowners *are held* proper parties to attack validity of an order of a county zoning board of adjustment granting special exception for a mobile home park in an A-1 Agricultural District, where basis of the landowners's contention is that the county zoning ordinance forbids the proposed use without a properly granted exception and the board has no authority to grant the exception.

6. Counties § 5— county zoning — derivation of authority

Counties have no inherent authority to enact zoning ordinances but derive their authority from Article 20B, Ch. 153, of the General Statutes, which expressly confers such power upon the boards of county commissioners.

7. Constitutional Law § 8; Municipal Corporations § 29; Counties § 2— delegation of legislative powers — municipalities — counties

The authority of the General Assembly to delegate to municipal corporations the power to legislate concerning local problems, such as zoning, is an exception to the general rule that legislative powers, vested in the General Assembly by Art. II, § 1, of the N. C. Constitution, may not be delegated by it; this exception extends, as to other types of local matters, to a like delegation to counties and other units established by the General Assembly for local government.

8. Counties § 5— county zoning — delegation of powers to county commissioners

Notwithstanding Art. II, § 1, of the N. C. Constitution, the General Assembly may confer upon county boards of commissioners power to adopt zoning ordinances otherwise valid.

9. Counties § 5— county zoning — delegation of zoning power to board of adjustment

A county zoning ordinance may not delegate zoning powers to the county board of adjustment. G.S. 153-266.10, G.S. 153-266.11, G.S. 153-266.17.

10. Counties § 5— county zoning ordinance — delegation of administrative powers

Provision of county zoning ordinance that the board of adjustment is to grant a permit to establish a mobile home park in an A-1 Agricultural District "in accordance with the principles, conditions, safeguards and procedures specified in this ordinance" or is to deny the permit "when not in harmony with the purpose and intent of this ordinance" relates to matters of administration and is not invalid as a delegation of the legislative power to change or add to the law as fixed in the ordinance.

11. Counties § 5— county zoning ordinance — unlawful delegation of power to board of adjustment

Provision of county zoning ordinance which requires board of adjustment to deny a permit for the establishment of a mobile home park in an A-1 Agricultural District unless it finds that "the granting of the special exception will not adversely affect the public interest" is invalid under statute providing that county zoning ordinance may authorize board of adjustment to permit special exceptions to the zoning regulations in accordance with the principles, conditions, and safeguards specified in the ordinance. G.S. 153-266.17.

12. Statutes § 5— rule of construction

When a statute or ordinance prescribes two or more prerequisites to official action, the presumption is that none of them is a mere repetition of the others.

13. Statutes § 5— rule of construction

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair or reasonable intendment.

14. Statutes § 4— rule of construction — separability of valid from invalid provisions

If the valid provisions of a statute or ordinance are separable from invalid provisions therein, so that if the invalid provisions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent.

15. Statutes § 4— rule of construction — legislative intent — giving effect to valid provision of statute

When the statute or ordinance could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone.

APPEAL from the Court of Appeals.

A comprehensive zoning ordinance of Guilford County divides all of the county, outside the zoning jurisdictions of incorporated municipalities, into nine districts, including the A-1 Agricultural District, as to which the ordinance provides:

Section 1-3: "A-1 Agricultural District. Primarily for agricultural purposes with provisions for single family residences and mobile homes and two family residences on large lots."

Section 5-1: "The A-1 Agricultural District is established as a district in which the principal use of land is for general agricultural purposes. In promoting the general purposes of this ordinance the specific intent of this Section is: to encourage the continued use of land for agricultural purposes; to prohibit scattered commercial and industrial uses of land; to prohibit any other use which would interfere with an integrated and efficient development of the land for more intensive use as the county population increases; and to discourage any use, which because of its character or size, would create unusual requirements and costs for providing public services, such as law enforcement, fire protection, water supply and sewage disposal before such services are generally needed."

Lester O. Jones applied to the County Board of Adjustment for a special exception permitting him to establish a mobile home park with capacity for 25 mobile homes upon land owned by him in the A-1 Agricultural District. The board fixed a time for a hearing upon the application and gave notice thereof. The appellants and others appeared before the board at such hearing and testified in opposition to the application, they being the owners of residences in the district and contending that the establishment of the proposed mobile home park would adversely affect the values of their properties and would injuriously affect the further development of the area as a residential community. The board, accompanied by the parties, viewed the proposed site and the surrounding area. It then issued its order containing its findings of fact and granting the special exception applied for, subject to certain conditions not presently material.

The only provisions in the ordinance specifically referring to the establishment of a mobile home park anywhere in the county are in Sections 3-10 and Article IV. Section 3-10 provides:

"A mobile home park may be established as a special exception in certain districts as prescribed by Article IV of this ordinance subject to the following conditions:" (Then follows a series of detailed specifications concerning the site plan, dimensions of the park and of each mobile home space therein, driveways, parking spaces, recreation space, and the like, plus a provision for any other reasonable requirements, necessary to

accomplish the purpose of the ordinance, which the Board of Adjustment may specify.)

Article IV of the ordinance is a detailed tabulation of permitted uses of land within the several districts. It provides that within certain districts, including the A-1 Agricultural District, permitted uses include:

"Mobile home parks *as a special exception,* subject to the provisions of Section 6-13B and operated in accordance with the provisions of Section 3-10 and the Guilford County Board of Health's regulations relating to the establishment and operation of mobile home parks." (Emphasis added.)

Section 6-13B authorizes the Board of Adjustment to grant special exceptions "in accordance with the principles, conditions, safeguards, and procedures specified in this ordinance, or to deny special exceptions when not in harmony with the purpose and intent of this ordinance," but then provides that such an exception shall not be granted by the board unless a written application therefor is submitted, a public hearing is had following a notice thereof and "the Board shall make a finding that it is authorized and empowered to grant a special exception under the section of this ordinance described in the application *and that the granting of the special exception will not adversely affect the public interest.*" (Emphasis added.)

Section 7-1 of the ordinance provides:

"In their interpretation and application the provisions of this Ordinance shall be held to be the *minimum requirements* for the promotion of the public safety, health, convenience, prosperity, and general welfare. * * * All variances and special exceptions granted by the Board of Adjustment and all terms, conditions, and obligations imposed by the Board of Adjustment shall be binding as though explicitly provided in this Ordinance." (Emphasis added.)

Section 7-2 of the ordinance provides:

"Should any section, sentence, clause or phrase of this Ordinance be held invalid or unconstitutional by the Courts, such decision shall not affect the validity of the remaining portions of this Ordinance."

Section 1-1 of the ordinance states its over-all purpose as follows:

"The zoning regulations and districts as herein set forth have been made in accordance with a comprehensive plan and are

designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provisions of transportation, water, sewerage, schools, parks, and other public requirements. These regulations have been made with reasonable consideration, among other things, as to the character of each district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. Further, these regulations have been made with reasonable consideration for the expansion and development of each municipality within the county so as to provide for their orderly growth and development."

The order of the Board of Adjustment granting the special exception applied for was reviewed by the Superior Court of Guilford County upon certiorari. Lupton, J., remanded the matter to the board for the reason that in its order it had not made a finding of fact that the granting of the special exception would not adversely affect the public interest, and directed the board to hold a further hearing and to make a finding of fact upon that question.

Thereupon, the board held a further hearing, at which the applicant and the appellants introduced further evidence. The board then issued its second order, finding as a fact that "the granting of the special exception to permit Lester O. Jones to construct a mobile home park as applied for will not adversely affect the public interest" and granting the special exception.

The matter was again reviewed by the Superior Court of Guilford County upon certiorari. Crissman, J., entered judgment overruling all of the appellants' exceptions to the order of the board and affirming its order. This judgment of the superior court recites that when the matter came on for hearing in that court the appellants asserted that the order of the board should be vacated for three reasons: (1) There was not sufficient evidence before the board to sustain its finding that to grant the special exception will not adversely affect the public interest; (2) the board put upon the appellants the burden of showing that the public interest would be adversely affected; and (3) the delegation to the board of authority to grant special exceptions is "an unlawful and unconstitutional delegation of power and authority to the Board of Adjustment."

From the judgment of Crissman, J., the appellants appealed to

the Court of Appeals, assigning as error, among others, the holding that the delegation to the board of authority to grant special exceptions was constitutional and lawful.

The Court of Appeals affirmed the judgment of the superior court, its opinion being reported in 2 N.C. App. 408. The appellants thereupon appealed to this Court, asserting that the provision of the ordinance purporting to confer upon the board the authority to grant a special exception is a delegation of legislative power in violation of Article II, Section 1, of the Constitution of North Carolina.

Cannon, Wolfe, Coggin & Taylor for plaintiff appellants.

J. Howard Coble and David I. Smith for defendant appellees.

LAKE, J.

[1] The mere fact that one's proposed lawful use of his own land will diminish the value of adjoining or nearby lands of another does not give to such other person a standing to maintain an action, or other legal proceeding, to prevent such use. *Harrington & Co. v. Renner,* 236 N.C. 321, 72 S.E. 2d 838; 1 Am. Jur. 2d, Adjoining Landowners, § 2. If, however, the proposed use is unlawful, as where it is prohibited by a valid zoning ordinance, the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have a standing to maintain such proceeding. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325; *Harrington & Co. v. Renner, supra.*

[2, 3] The courts, at the suit of a landowner so threatened with injury, may not compel a city or other governmental unit to exercise a zoning authority conferred upon it by statute, or prevent it from amending or repealing a valid zoning ordinance previously adopted by it. *Zopfi v. City of Wilmington, supra; In Re Markham,* 259 N.C. 566, 131 S.E. 2d 329; *McKinney v. High Point,* 239 N.C. 232, 79 S.E. 2d 730. If, however, that which purports to be an amendment permitting a use of property forbidden by the original ordinance is, itself, invalid, the prohibition upon the use remains in effect. In that event, the owner of other land, who will be specially damaged by such proposed use, has standing to maintain a proceeding in the courts to prevent it. See: *Zopfi v. City of Wilmington, supra; Crozier v. County Commissioners of Prince George's County,* 202 Md. 501, 97 A. 2d 296, 37 A.L.R. 2d 1137; Annot., 37 A.L.R. 2d 1143.

[4, 5] Similarly, the order of a board of adjustment purporting

to grant an exception to a valid zoning ordinance, which order is in excess of the authority of such board, leaves the proposed use within the prohibition of the ordinance and, therefore, unlawful. Thus, the appellants are proper parties to attack in this proceeding the validity of the order of the Board of Adjustment. Their contention is that the county zoning ordinance forbids the proposed use of the Jones land without a properly granted exception and the Board of Adjustment has no authority to grant the exception.

[6] Counties have no inherent authority to enact zoning ordinances. In *Harrington & Co. v. Renner, supra,* this Court conceded, for the purpose of the question then before it, that the General Assembly may, under the Constitution of North Carolina, empower a county board of commissioners to enact ordinances providing for zoning districts in the rural areas of the county, but expressly stated it did not decide that question since, at that time, the General Assembly had not undertaken to do so. Subsequently, the General Assembly enacted Article 20B, Ch. 153, of the General Statutes, which expressly confers such power upon the boards of county commissioners. County ordinances, adopted pursuant to this Act of the General Assembly, have been treated as valid legislative enactments in at least three decisions of this Court, in none of which was the authority of the General Assembly to delegate the power questioned. *Michael v. Guilford County,* 269 N.C. 515, 153 S.E. 2d 106; *Austin v. Brunnemer,* 266 N.C. 697, 147 S.E. 2d 182; *Durham County v. Addison,* 262 N.C. 280, 136 S.E. 2d 600.

[7, 8] In *Harrington & Co. v. Renner, supra,* this Court recognized that "the General Assembly may delegate power to a municipal corporation to enact zoning ordinances in the exercise of police power of the State," and innumerable decisions of this Court have recognized such power in cities and towns by virtue of G.S. 160-172, et seq. The authority of the General Assembly to delegate to municipal corporations power to legislate concerning local problems, such as zoning, is an exception (established by custom in most, if not all, of the states) to the general rule that legislative powers, vested in the General Assembly by Art. II, § 1, of the Constitution of North Carolina, may not be delegated by it. 16 Am. Jur. 2d, Constitutional Law, §§ 250, 251. This Court has held that this exception to the doctrine of non-delegation is not limited to a delegation of such legislative authority to incorporated cities and towns, but extends, as to other types of local matters, to a like delegation to counties and other units established by the General Assembly for local government. *Efird v. Comrs. of Forsyth,* 219 N.C. 96, 12 S.E. 2d 889; *Tyrrell County v. Holloway,* 182 N.C. 64, 108 S.E. 337;

Smith v. School Trustees, 141 N.C. 143, 53 S.E. 524. See also, *State v. Smith,* 265 N.C. 173, 143 S.E. 2d 293. We perceive no basis for a distinction in this respect between municipal corporations and counties. We, therefore, hold that the General Assembly may, notwithstanding Art. II, § 1, of the Constitution of North Carolina, confer upon county boards of commissioners power to adopt zoning ordinances otherwise valid.

G.S. 153-266.10, "for the purpose of promoting health, safety, morals, or the general welfare," confers upon the board of county commissioners of any county the power "to regulate and restrict * * * the location and use of buildings, structures, and land for trade, industry, residence or other purposes, except farming." It further provides:

> "Such regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and *in accordance with general or specific rules therein contained.* Such regulations may also provide that the board of adjustment or the board of county commissioners may issue special use permits or conditional use permits in the classes of cases or situations and *in accordance with the principles, conditions, safeguards, and procedures specified therein,* and may impose reasonable and appropriate conditions and safeguards upon such permits." (Emphasis added.)

G.S. 153-266.11 provides that the board of county commissioners for such purposes "may divide the county, or portions of it * * * into districts * * * and within such districts *it* may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures or land." (Emphasis added.)

G.S. 153-266.17 provides that if the board of commissioners exercises these powers, it "shall provide for the appointment of a board of adjustment" and that "the zoning ordinance may provide that the board of adjustment may permit special exceptions to the zoning regulations in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures *specified in the ordinance.*" (Emphasis added.)

[9] These provisions are substantially the same as those in G.S. 160-172, et seq., conferring zoning powers upon municipal corporations. Under those statutes, this Court has held that the legislative body of the municipal corporation may not delegate to the municipal board of adjustment the power to zone; that is, the power originally vested in the General Assembly to legislate with reference to the

use which may be made of land and the structures which may be erected or located thereon. *In Re O'Neal,* 243 N.C. 714, 91 S.E. 2d 189; *James v. Sutton,* 229 N.C. 515, 50 S.E. 2d 300. In *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, it is said that G.S. 160-172, et seq., confer no legislative authority upon such municipal board of adjustment and thus such board "is not left free to make any determination whatever that appeals to its sense of justice." It follows that a county zoning ordinance may not delegate such legislative powers to the county board of adjustment.

Admittedly, the line dividing administrative powers which may be delegated from legislative powers which may not be delegated is not sharp and clearly defined. Consequently, decisions by this Court and by other courts as to its location have not been entirely harmonious. However, the governing principle, applicable to the delegation of powers by the General Assembly to State agencies, is also applicable to determine what powers may be conferred by a city or county upon its board of adjustment in a zoning ordinance. That principle has been thus stated in *Coastal Highway v. Turnpike Authority,* 237 N.C. 52, 74 S.E. 2d 310:

> "Since legislation must often be adapted to complex conditions involving numerous details with which the Legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the Legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the Legislature shall apply.
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> "Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances.
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> "In short, while the Legislature may delegate the power to find facts or determine the existence or non-existence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its

absolute or unguided discretion. 11 Am. Jur., Constitutional Law, Sec. 234. * * *

"[B]y the decided weight of authority, the rule is that 'if the statute requires or authorizes the court or other agency to pass upon questions of public policy involved, * * * there is an attempted delegation of legislative power and the statute is invalid.' 37 Am. Jur., Municipal Corporations, Sec. 8. * * *

"Manifestly, the power to determine whether the construction and operation of a toll road or toll bridge in any given instance will be 'in the public interest' is purely a legislative question to be resolved only in the exercise or under the direction of legislative powers of guidance and control."

When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions do exist. The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist and may require a permit from such officer, or board, to be issued when he or it so determines, as a further condition precedent to the right to erect such structure in such area. Such permit is not one for a variance or departure from the statute or ordinance, but is the recognition of a right established by the statute or ordinance itself. Consequently, the delegation to such officer, or board, of authority to make such determination as to the existence or nonexistence of the specified conditions is not a delegation of the legislative power to make law.

Delegation to an administrative officer, or board, of authority to issue or refuse a permit for the erection of a specified type of structure in a given area, dependent upon whether such officer, or board, considers such structure in such area, under prevailing conditions, conducive to or adverse to the public interest or welfare is a different matter. Such delegation makes the determinative factor the opinion of such officer, or board, as to whether such structure in such area, under prevailing conditions, would be desirable or undesirable, beneficial to the community or harmful to it. This is a delegation of the power to make a different rule of law, case by case. This power may not be conferred by the legislative body upon an administrative officer or board.

Section 3-10 of the ordinance here in question is not an enumeration of conditions which, when met, bring into operation the excep-

tion; that is, confer upon the landowner the right to establish a mobile home park upon his land. This section is a list of regulations and specifications to which the park must conform if and when the permit to establish it is issued. The last of its provisions confers upon the Board of Adjustment authority to impose further requirements. This authority is, however, expressly limited to such further requirements as may reasonably be deemed necessary to accomplish the purposes of the ordinance, which purposes are, in turn, specifically fixed and declared in the ordinance. Consequently, this authorization does not set the Board of Adjustment free to roam at large within its own concept of what is best for the public. It is not, upon its face, an unlawful delegation of legislative power. We are not presently called upon to determine the validity of any requirement imposed by the Board of Adjustment under the authority of this section.

[10] To ascertain the circumstances, under which the Board of Adjustment is to issue a permit to establish a mobile home park in the A-1 Agricultural District, we must turn to Section 6-13B of the ordinance. There we find the board is to grant such permit "in accordance with the principles, conditions, safeguards and procedures specified in this ordinance," or is to deny the permit "when not in harmony with the purpose and intent of this ordinance." Thus far, it is the ordinance, not the Board of Adjustment which determines the circumstances, the existence of which calls into play the provision for the exception, the board having authority to determine only the existence or absence of those circumstances. This determination is a matter of administration, not a delegation of the legislative power to change or add to the law as fixed in the ordinance.

[11] Section 6-13B does not stop there, however. It goes on to provide that the Board of Adjustment shall grant no permit for the establishment in this district of a mobile home park unless the board receives a written application, conducts a public hearing after due notice and thereupon finds: (1) It is authorized, by the section of the ordinance designated in the application, to grant such permit — i.e., the circumstances specified by the ordinance itself exist; and (2) the granting of the permit "will not adversely affect the public interest" — i.e., in the opinion of the Board of Adjustment, the establishment of the proposed mobile home park will not be detrimental to the public good.

[12, 13] The Court of Appeals apparently regarded the second of these required findings as limited to a finding that the proposed mobile home park will not violate conditions specified in or con-

flict with purposes declared in the ordinance itself. We do not so construe this provision of Section 6-13B. So construed, it would be surplusage, a mere repetition of the first required finding. When a statute or ordinance prescribes two or more prerequisites to official action, the presumption is that none of them is a mere repetition of the others. "All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable intendment." Strong, North Carolina Index 2d, Statutes, § 5, and cases therein cited.

Section 7-1 of the ordinance provides that the provisions set out in the ordinance itself shall be interpreted "as the minimum requirements for the promotion of the public safety, health, convenience, prosperity, and general welfare." This is a further indication that Section 6-13B was intended to permit the Board of Adjustment to go further than the declared objectives of the ordinance in determining what will adversely affect the "public interest."

[11] G.S. 153-266.17 provides that a county zoning ordinance may authorize the county board of adjustment to "permit special exceptions to the zoning regulations in classes of cases or situations and in accordance with the principles, conditions, safeguards and procedures *specified in the ordinance.*" (Emphasis added.) The provision of Section 6-13B of the Guilford County ordinance, requiring the Board of Adjustment to deny the permit if it finds the granting of it will adversely affect the public interest, is in excess of the authority which this statute permits to be so conferred upon the board.

So much of Section 6-13B of this ordinance as requires the Board of Adjustment to deny a permit for the establishment of a mobile home park in the A-1 Agricultural District unless it finds "that the granting of the special exception will not adversely affect the public interest" is, therefore, beyond the authority of the Board of County Commissioners to enact and so is invalid. This, however, does not invalidate the action of the board. It did not deny a permit. It granted one.

[14, 15] There is nothing in the ordinance to suggest that the Board of County Commissioners intended that the invalidity of this requirement would make impossible the establishment anywhere in Guilford County of a mobile home park. On the contrary, Section 7-2 of the ordinance expressly provides that if "any section, sentence, clause, or phrase of this Ordinance be held invalid * * * such decision shall not affect the validity of the remaining portions

of this Ordinance." It is well settled that if valid provisions of a statute, or ordinance, are separable from invalid provisions therein, so that if the invalid provisions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent. *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Power Co. v. Clay County,* 213 N.C. 698, 197 S.E. 603. "The invalidity of one part of a statute [or ordinance] does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature [or board of county commissioners] to enact the part that is valid." *Bank v. Lacy,* 188 N.C. 25, 123 S.E. 475. When the statute, or ordinance, could be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone. *Commissioners v. Boring,* 175 N.C. 105, 111, 95 S.E. 43. Here, the legislative body, the Board of County Commissioners, has expressly declared in the ordinance that it would have done so. Therefore, the effect of the ordinance is to permit the Board of Adjustment to issue the permit in question without any finding as to the effect of it upon the public interest. It is interesting to note that this is precisely what the board did prior to the first order of the superior court, so there can be no question as to what the board would have done in this specific case had the ordinance not contained the invalid requirement.

It follows that the Court of Appeals was correct in affirming the judgment of the superior court which sustained the order of the Board of Adjustment granting the "special exception" permit.

Affirmed.

STATE OF NORTH CAROLINA v. KENNETH CALVIN ANDERSON

No. 7

(Filed 12 March 1969)

1. Constitutional Law § 11— exercise of police power — test of validity

Statute requiring the operator of a motorcycle on a public highway to wear a protective helmet is a valid exercise of the police power only if it contributes in any real and substantial way to the safety of other travelers.

2. Statutes § 4— presumption of constitutionality

The Supreme Court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears.

3. Automobiles § 140; Constitutional Law § 13— constitutionality of statute requiring motorcycle operators to wear helmets

The requirement of G.S. 20-140.2(b) that the operator of a motorcycle on a public highway wear a protective helmet *is held* constitutional as a valid exercise of the police power since the statute bears a real and substantial relationship to public safety.

APPEAL by defendant, Kenneth Calvin Anderson, from the decision of the North Carolina Court of Appeals affirming his conviction in the Superior Court of Guilford County upon a charge of violating G.S. 20-140.2(b).

The defendant was first charged by warrant in the Municipal County Court of Greensboro for operating a motorcycle upon the city streets without wearing the required safety helmet. Before plea, he moved for a jury trial. "Pursuant to such motion" the Municipal County Court "forwarded the case to the Superior Court of Guilford County".

In the Superior Court the Grand Jury returned a true bill charging that the defendant operated a motorcycle on the public highway without wearing a protective helmet, in violation of G.S. 20-140.2(b). Before pleading to the charge, he moved to quash the indictment upon the ground the section of the statute under which it is drawn is unconstitutional in that it violates the due process, the equal protection, and the right to privacy provisions of the Ninth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 1 and 17 of the Constitution of North Carolina.

The court overruled the motion to quash and submitted the case to the jury. From the verdict of guilty and judgment thereon, the defendant appealed to the North Carolina Court of Appeals. The decision is reported in 3 N.C. App. 124. Because of the constitutional questions involved, the defendant, as he had a right to do, appealed to this Court.

Thomas Wade Bruton, Attorney General; William W. Melvin, Assistant Attorney General; T. Buie Costen, Staff Attorney, for the State.

Douglas, Ravenel, Hardy & Crihfield for the defendant.

HIGGINS, J.

The General Assembly, by Chapter 674, Session Laws of 1967, rewrote Subsection (b) of G.S. 20-140.2 to read as follows:

> "(b) No motorcycle shall be operated upon the streets and highways of this State unless the operator and all passengers thereon wear safety helmets of a type approved by the Commissioner of Motor Vehicles."

The Act became effective on January 1, 1968. The defendant was arrested on January 21, 1968 and charged with operating a motorcycle on the public streets of Greensboro without the required protective helmet.

Before plea, the defendant moved to quash the indictment upon the ground the statute creating the offense violated his rights under Article I, Section 17, Constitution of North Carolina and under the Fourteenth Amendment of the Constitution of the United States. The defendant contended the statute regulated his private conduct without any showing of such public interest or purpose as would promote or contribute to the public health, morals, safety or welfare. He concedes he has no defense to the charge if the General Assembly had the constitutional power to pass the Act under which the charge is laid.

[1] If the section of the statute here challenged imposes an unreasonable, arbitrary and capricious restriction on an operator of a motorcycle on the public highway without contributing in any reasonable or substantial way to the safety of travel on the highway, the regulation was outside the police power of the state, and the motion to quash should have been allowed. *State v. Brown,* 250 N.C. 54, 108 S.E. 2d 74; *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731; *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854; *State v. Brockwell,* 209 N.C. 209, 183 S.E. 378. The rule is succinctly stated by the Supreme Court of the United States in the case of *Liggett Co. v. Baldridge,* 278 U.S. 105, 73 L. Ed. 204:

> "The police power may be exercised in the form of state legislation where otherwise the effect may be to invade rights granted by the Fourteenth Amendment only when such legislation bears a real and substantial relationship to the public health, safety, morals or some other phase of the public welfare."

If the requirement that the operator of a motorcycle on a public highway wear a protective helmet contributes in any real or substantial way to the safety of other travelers, then the regulation is

a constitutional exercise of police power by the General Assembly, and the motion to quash was properly denied. *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768; *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660.

[2] In passing upon the constitutional question involved, this Court must assume that acts of the General Assembly are constitutional and within its legislative power until and unless the contrary clearly appears. *State v. Brockwell, supra;* Strong's N. C. Index 2d, Constitutional Law, Vol. 2, Sec. 6, p. 190.

> ". . . All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it. 11 Am. Jur., 619 — Constitutional Law." *Lassiter v. Board of Elections,* 248 N.C. 102, 102 S.E. 2d 853.

[3] For the reasons hereinafter discussed, we think the requirement that a motorcycle operator wear the required safety helmet bears a real and substantial relationship to public safety. The General Assembly, therefore, had ample authority, under its police power, to enact the section of the statute here challenged and to make its violation a criminal offense. We are fortified in this view by many considerations, among them the fact that a majority of our sister states has enacted a similar statute. Michigan's act was passed in 1948, Georgia's in 1962, and New York's effective January 1, 1967. The others have been enacted since 1966. As this Court said in *State v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860:

> "Great weight must be attached to the fact that so many separate jurisdictions have, within a short space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective."

The recent passage of so many state statutes requiring motorcycle operators to wear the helmet seems to have been triggered by the Act of Congress approved September 9, 1966 (15 U.S.C.A. 1381, et seq) known as "National Traffic and Motor Vehicle Safety Act of 1966". The preamble to the Act recites:

> ". . . That Congress hereby declares that the purpose of this Act is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety

standards for motor vehicles and equipment in interstate commerce; . . ."

Section 104 provides:

"(a) The Secretary shall establish a National Motor Vehicle Safety Advisory Council, a majority of which shall be representative of the general public, including representatives of State and local governments, and the remainder shall include representatives of motor vehicle manufacturers, motor vehicle equipment manufacturers, and motor vehicle dealers."

Section 103 provides:

"(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * *

(d) Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal Standard."

The National Safety Council has promulgated rules, among them the following:

"Each state, in cooperation with its political subdivisions and local governments, must have a motorcycle safety program.

A. *Criteria*

* * *

2. Protective Headgear

a. Motorcycle operators and their passengers should be required to wear approved protective headgear whenever the vehicle is in motion."

The defendant was indicted in the state court for a violation of state law. The constitutionality of that law is challenged on the ground its passage was beyond the police power of the state. The Act of Congress referred to, and the regulations promulgated under its authority, are clearly applicable to travel in interstate commerce. The same highways carry both interstate and intrastate travel. Uniformity of rules is clearly contemplated and is clearly desirable. The General Assembly no doubt was advertent to the Act of Congress and was well within its constitutional authority in passing the challenged traffic requirement.

The constitutionality of acts requiring motorcycle operators to wear helmets has been passed on by a number of courts. Insofar as our investigation has disclosed, only one (unreversed) appellate decision has held the helmet statute unconstitutional. In *American Motorcycle Association v. Davids,* 158 N.W. 2d 72, decided July 23, 1968, the three judges constituting Division 2 of the Court of Appeals of Michigan held the statute unconstitutional, reversing a contrary holding by the trial judge. Division 2 of the Court of Appeals concluded:

> "The precedential consequences of 'stretching our imagination' to find a relationship to the public health, safety and welfare, require the invalidation of this statute." [Leave to appeal was denied.]

In *Commonwealth v. Howie,* 238 N.E. 2d 373, the Supreme Judicial Court of Massachusetts affirmed a conviction of a motorcycle operator for failure to wear the protective headgear required by the Massachusetts statute, saying:

> "It lies within the power of the Legislature to adopt reasonable measures for the promotion of safety upon public ways in the interests of motorcyclists and others who may use them. . . . The act of the Legislature bears a real and substantial relation to the public health and general welfare and is thus a valid exercise of the police power. . . . A recent Michigan decision to the contrary is not persuasive."

In *People v. Carmichael,* 288 N.Y. 2d 931, decided February 29, 1968, Judge Morton construed the New York statute which required the operator of a motorcycle to wear protective headgear. Judge Morton's opinion recites the results of a special study reported by the State Department of Motor Vehicles to the Legislature and considered by it in passing the act requiring motorcycle operators to wear approved protective headgear. Judge Morton held the New

York statute constitutional, and reversed a contrary holding by the Special Sessions Court of the Town of Oakfield.

The Supreme Court of Rhode Island, in *State v. Lombardi,* 241 A. 2d 625, decided May 8, 1968, passed on the constitutionality of the Rhode Island helmet statute. The Court said:

> "However, it is our unqualified judgment that the purpose sought to be achieved by requiring cyclists to wear protective headgear clearly qualified as a proper subject for legislation.
>
> * * *
>
> (T)he requirement of protective headgear for the exposed operator bears a reasonable relationship to highway safety generally. It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown tree branches . . . against which the operator of a closed vehicle has some protection, could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway."

On December 10, 1968 the Supreme Court of Louisiana upheld the constitutionality of the New Orleans city ordinance (passed under its home rule charter) requiring the operator of a motorcycle upon the public streets of New Orleans to wear the prescribed protective headgear. (This decision reversed a Circuit Court decision rendered in the case of *Everhardt v. New Orleans,* 208 S. 2d 423.) The Court found the decision of the Supreme Court of Rhode Island in *Lombardi,* and the Supreme Court of Massachusetts in *Howie* persuasive. Contra, the decision of Division 2, Michigan Court of Appeals in *Davids.*

Valid reasons exist for requiring motorcycle operators to wear helmets. Motorcycle operators occupy positions of extreme exposure which are not shared by automobile and truck drivers. The latter operate in closed vehicles protected by steel and shatterproof glass. Their vehicles have a minimum of four wheels and operate with more stability than two wheeled motorcycles. Any very slight head or hand injury by gravel, small stones, or other objects thrown backward could easily cause a motorcyclist to veer from his course into the travel lane of other vehicles on the highway, or into the path of pedestrians on or near the highway.

The records and briefs in the Court of Appeals and here failed to take note of, or to discuss, the "National Traffic and Motor Vehicle Safety Act of 1966" or the safety rules promulgated thereunder,

although the Act required the Secretary (first of Commerce, later of Transportation) ". . . to advise, assist and cooperate with . . . State and other interested public and private agencies . . . in development of (1) motor vehicle safety standards." It is a permissible inference that, as a part of the State's cooperation, the General Assembly rewrote (b) of G.S. 20-140.2.

We think the opinion of the North Carolina Court of Appeals in this case is supported by sound reason and by abundant authority. The decision is

Affirmed.

STATE v. JOE C. BROOKS, SR., AND WIFE, ANNE BROOKS; THELMA B. McEACHERN, SINGLE; JIM BROOKS, AND WIFE, ALENE W. BROOKS; FRANCES B. FURLONG, SINGLE; MARY BROOKS, SINGLE; LULA BROOKS, SINGLE

No. 9

(Filed 12 March 1969)

1. Appeal and Error § 4— theory of case

The theory on which a case was tried in the Superior Court must be the theory of the case on appeal.

2. Adverse Possession § 2— hostile possession

The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity but only that the one in possession of the lands claims the exclusive right thereto.

3. Adverse Possession § 23— burden of proof

The party claiming title by adverse possession must carry the burden on that issue.

4. Adverse Possession § 25; Waters and Watercourses § 7— title to marshlands — sufficiency of evidence

In this civil action by the State for trespass on realty, for removal of cloud on title and for removal of objects placed by defendants in navigable waters of marshlands allegedly owned by the State, defendants' evidence is insufficient to show thirty years adverse possession of marshlands where defendants stipulated that they do not claim title to the bottoms of the navigable waters located on the property and defendants' evidence either related to acts of possession in navigable waters or was unclear as to whether it related to property not in navigable waters, defendants having failed to show hostile possession of the property in question.

5. Adverse Possession § 25— correlating lines on ground to map

Testimony that the lines on the ground are as shown by a map introduced into evidence is insufficient to show adverse possession for thirty

years where there is no evidence as to how long the lines had been on the ground as shown by the map or that any kind of marker was placed at the boundaries of the lands claimed and had been there for thirty years.

6. Adverse Possession § 24— fitting description on paper-writing to land's surface

Those having the burden of proof of adverse possession must locate the land they claim title to by fitting the description contained in a paper-writing offered as evidence of title to the land's surface.

7. Adverse Possession § 25— use of unenclosed land for grazing — exclusive possession

One cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during the statutory period, even without his consent, since his possession is not exclusive.

8. Adverse Possession § 25— grazing cattle

Defendants have failed to show thirty years adverse possession of marshlands by grazing cattle on the property where their evidence shows that others made similar use of the unenclosed marshlands until a fence was erected by defendants in 1917, and there is no evidence that defendants used the marshlands for grazing cattle after the inland waterway was cut through the area in 1932, the period of 1917 to 1932 not being thirty years.

9. Adverse Possession § 24— sale of adjacent land

Evidence that those claiming property by thirty years adverse possession had sold property adjacent to the property claimed is not evidence of adverse possession of the *locus in quo*.

10. Adverse Possession § 24— evidence of listing and payment of taxes on the land

It is competent for a person claiming title by adverse possession to introduce evidence that he listed and paid taxes on the land for the purpose of showing his possession was adverse and in the character of owner.

11. Adverse Possession § 1— definition

Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser; it must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that the possessor is exercising thereon the dominion of owner.

12. Adverse Possession § 1— occupation of the land

An adverse possessor of land without color of title cannot acquire

title to any greater amount of land than that which he has actually occupied for the statutory period.

13. Adverse Possession § 25— sufficiency of evidence

In this civil action by the State for trespass on realty, for removal of cloud on title and for removal of objects placed by defendants in navigable waters of marshlands allegedly owned by the State, defendants' evidence is insufficient to go to the jury on their counterclaim that they are the owners of the *locus in quo* by reason of thirty years adverse possession.

14. Appeal and Error § 24— necessity for objections, exceptions and assignments of error

The Supreme Court ordinarily will not consider questions not properly presented by objections duly made, exceptions duly entered, and assignments of error properly set out.

15. Waters and Watercourses § 6; Trial § 31— removal of objects in navigable waters — directed verdict

In this civil action by the State for trespass on realty, for removal of cloud on title and for removal of objects placed by defendants in navigable waters of marshlands allegedly owned by the State, the State is not entitled to a directed verdict on the issue of obstructing navigable streams.

ON writ of *certiorari* to the North Carolina Court of Appeals. Same case below reported in 2 N.C. App. 115, 162 S.E. 2d 579. Docketed and argued as Case No. 688, Fall Term 1968, and docketed as Case No. 9, Spring Term 1969.

Civil action for trespass on realty, for removal of cloud on title, and for removal of objects placed by defendants in navigable waters of marshlands allegedly owned by the plaintiff. By amendment to the complaint plaintiff was allowed to pray for issuance of a mandatory injunction requiring defendant Joe C. Brooks, Sr., to remove the objects placed in the navigable streams of marshlands. Defendant answered denying plaintiff's title and alleging title to the marshlands in themselves.

The case came on for hearing before Hall, J., at the October 1967 Civil Session of Brunswick. Both sides introduced evidence.

The following issues were submitted to the jury and answered as appears of record:

"(1) Are the defendants the owners and entitled to possession of the lands described in the Complaint, except that portion thereof covered by navigable waters?

"ANSWER: Yes.

"(2) Is the plaintiff, the State of North Carolina, the owner and entitled to immediate possession of the lands as described in the Complaint?

"ANSWER: .....

"(3) If so, have the defendants trespassed on said land, as alleged in the Complaint?

"ANSWER: .....

"(4) Have the defendants obstructed navigable waters of the State of North Carolina as alleged in the Complaint?

"ANSWER: No."

From a judgment in accordance with the verdict, plaintiff appealed to the Court of Appeals. On appeal the Court of Appeals, sitting in a panel of three, affirmed the judgment below. This Court in conference on 9 October 1968 allowed the petition for a writ of *certiorari* to review the decision of the Court of Appeals.

Attorney General T. Wade Bruton, Assistant Attorney General Millard R. Rich, Jr.; John Richard Newton and George Rountree, Jr., of counsel for the plaintiff appellant.

Herring, Walton, Parker & Powell by Ray H. Walton, and E. J. Prevatte for defendant appellees.

PARKER, C.J.

This Court being of the opinion that the subject matter of the appeal, the acquiring of title to marshlands within the State by alleged adverse possession for thirty years, has significant public interest as set forth below, issued a writ of *certiorari* to the Court of Appeals.

This is said in 46 N.C.L.Rev. 779:

"The vast estuarine areas of North Carolina — 'those coastal complexes where fresh water from the land meets the salt water of the sea with a daily tidal flux' — are exceeded in total area only by those of Alaska and Louisiana. Estuarine areas include bays, sounds, harbors, lagoons, tidal or salt marshes, coasts, and inshore waters in which the salt waters of the ocean meet and are diluted by the fresh waters of the inland rivers. In North Carolina, this encompasses extensive coastal sounds, salt marshes, and broad river mouths exceeding 2,200,000 acres. These areas are one of North Carolina's most valuable resources."

[1] The theory on which the case was tried in the Superior Court must be the theory of the case on appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 4. As correctly stated in the decision of the Court of Appeals, the case was tried in the Superior Court on the theory of thirty years adverse possession under known and visible lines and boundaries and not under the theory of adverse possession for twenty-one years under color of title.

Defendants in their joint answer, after denying title in plaintiff, aver in their further answer and defense merely "that they are the owners of the lands described in the complaint," and do not mention adverse possession under color of title of the *locus in quo* nor was it mentioned in the evidence or charge of the court.

Plaintiff assigns as error that the evidence of defendants does not suffice to show adverse possession for thirty years within the purview of G.S. 1-35(1).

The evidence as summarized in the decision of the Court of Appeals does not mention two stipulations entered into by and between the parties at the trial. These two stipulations are: ". . . (T)his map [Plaintiff's Exhibit 1] which I will offer in evidence is the map duly recorded in this County of the property claimed by the Defendants and the Plaintiff"; (2) ". . . (T)he defendants will stipulate they do not contend that they own the bottoms of navigable waters located on the subject property. . . ." "THE COURT: It is stipulated that Still Creek, Simmons Creek, the Eastern Channel, and the Cut Off Creek as shown in Plaintiff's Exhibit No. One are navigable waters."

[4] The Court of Appeals in its decision stated as evidence of adverse possession a summary of the testimony of Joe C. Brooks, Sr., as follows: "That a portion of the property was leased to International Paper Company for the purpose of building a dock extending into the waterway for the unloading of pulpwood from about 1937 to 1956; . . . that he had fished the creeks and had seen others fishing in them until the dredge came in to clean out the waterway and dumped mud in the upper part and had seen people oystering in there in boats; . . . that he put chicken crates and myrtle bushes in the creeks 'up on the sides of the creek' and next to the grass in 1966, and erected signs indicating oyster gardens and shellfish areas; that the signs were put at the four corners of the property." If Joe C. Brooks, Sr., as he testified, "put chicken crates and myrtle bushes in the creeks 'up on the sides of the creek' and next to the grass in 1966, and erected signs indicating oyster gardens and shellfish areas; that the signs were put at the four

corners of the property," and even if these objects were not placed in navigable waters, this evidence still does not show adverse possession of the property for anything like thirty years.

The Court of Appeals in its decision stated as evidence of adverse possession its following summary of the testimony of James F. Brooks: "(T)hat his father and uncle conducted a general mercantile and naval store business on the property; that their dock extended out from the mainland into Still Creek; that they bought and sold clams and had schooners coming in and loading and unloading at Tubbs Inlet and the mainland; that the dock reached into Still Creek about halfway of what is now the inland waterway; that the dock was there when he first remembered it when he was about 15 years of age. . . ." This is no evidence of adverse possession by defendants of this property which was in navigable waters in the light of the second stipulation quoted above, for the simple reason that its possession by defendants was not hostile and held under a claim of exclusive right thereto.

The Court of Appeals in its opinion stated this: "Mr. Robert J. Sommerset testified that he is 62 years of age; that George Brooks and J. W. Brooks had a warehouse and dock extending into Still Creek used for cargo boats bringing in fertilizer and taking out rosin and turpentine . . .; that the Brooks family had a fish stand on the eastern channel on the beach side adjoining the marsh and on the other side a fishing stand, and one just below the mouth of Simmons Creek; that these fishing points were operated from the time he was about 12 years old until the inland waterway was cut and the places filled in to the point they were no longer used; that his father operated one of the points and he helped him; that when the fish were divided, one share was laid out for Mr. Brooks. . . ."

[2-4] The requirement that possession must be hostile in order to ripen title by adverse possession does not import ill will or animosity but only that the one in possession of the lands claims the exclusive right thereto. *Dulin v. Faires*, 266 N.C. 257, 145 S.E. 2d 873; *Brewer v. Brewer*, 238 N.C. 607, 78 S.E. 2d 719, 40 A.L.R. 2d 763; 1 Strong, N. C. Index 2d, Adverse Possession, § 2. It seems clear from the testimony that we have quoted above from the decision of the Court of Appeals that the testimony of Joe C. Brooks, Sr., James F. Brooks, and Robert J. Sommerset relates to acts of possession by defendants in navigable waters in the swampland claimed by them; or if any part of the premises in the possession of defendants was not in navigable waters, it is impossible to determine from the record before us what part of it was in non-nav-

igable waters. It is well settled law that the party asserting title by adverse possession must carry the burden of proof on that issue. *Thomas v. Hipp,* 223 N.C. 515, 27 S.E. 2d 528; *Barrett v. Williams,* 217 N.C. 175, 7 S.E. 2d 383; *Power Co. v. Taylor,* 194 N.C. 231, 139 S.E. 381. Defendants stipulated that they do not contend that they own the bottoms of the navigable waters located on the subject property and they then further stipulate that Still Creek, Simmons Creek, the Eastern Channel, and the Cut Off Creek as shown in plaintiff's Exhibit No. 1 are navigable waters. Certainly, in the light of those stipulations, any acts of possession as narrated above by the defendants lack the essential element that their possession was hostile, which is an essential element to ripen title by adverse possession.

[5] The decision of the Court of Appeals summarizes the testimony of Joe C. Brooks, Sr., a part of which is as follows: ". . . (T)hat he knows the lines are on the ground as shown by the map agreed to; that the property is bounded on the east by D. S. Frink or the D. S. Frink estate, on the south by Ocean Isle Beach, on the west by M. C. or Manley Gore." From an examination of the testimony in the record, it appears that the map referred to was plaintiff's Exhibit No. 1. The record shows that this map was made 14 April 1964. There is no evidence in the record as to how long the lines had been on the ground as shown by this map. There is no evidence in the record that iron stakes or any kind of stake or monument or marker was placed at the boundaries of lands claimed by defendants and had been there for thirty years.

[6] The Court of Appeals seemed to think that the Frink line on the east and the Gore line on the west of the property as stated by defendants Joe C. Brooks, Sr., and James Brooks had been established by the evidence. There is no evidence where those lines were on the ground during the claimed thirty years of adverse possession. If the defendants had desired to claim adverse possession under color of title, which they do not here, the proper way to prove those lines would have been to put in evidence the Gore and Frink deeds, and those of their predecessors in title, and establish those lines on the ground for the thirty-year period. This was not done. It is well established that those having the burden of proof, as defendants do on the first issue here, must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. G.S. 8-39; *Andrews v. Bruton,* 242 N.C. 93, 86 S.E. 2d 786; *Locklear v. Oxendine,* 233 N.C. 710,

65 S.E. 2d 673. Surely, the map, plaintiff's Exhibit No. 1, under the circumstances here lends no strength to defendants' case.

V. W. Herlevich, a witness for defendants, was found by the trial court to be an expert in the field of land surveying. One of the counsel for defendants read to Mr. Herlevich a description in a deed from J. F. Sommerset and wife to George E. Brooks dated 5 September 1907 and properly recorded, and asked him if he knew whether or not the property shown on plaintiff's Exhibit No. 1 is included within that description just read to him. Mr. Herlevich answered: "Yes. It encompasses some of the area. I wouldn't say all of it, but it covers a portion of the area." This is an illustration of the uncertainty and confusion in defendants' evidence.

[7, 8] Defendants offered evidence tending to show, as stated in the decision of the Court of Appeals, that George E. Brooks and J. W. Brooks used the *locus in quo* for a cattle and hog range ever since they could remember until the cutting of the inland waterway in 1932. The evidence shows that Robert J. Sommerset's grandfather had a drove of cattle grazing on the *locus in quo* and one or two other persons had a cow or two there. This is a part of the testimony of Robert J. Sommerset:

"Q. Mr. Sommerset, state what use, if any you know, the marsh land was put to South of this dock by the late George Brooks and/or J. W. Brooks?

"A. Well, they used it for pasture and fishing purposes.

"Q. Now, what type of pasture? What was pastured on the property?

"A. Well, principally, cows, and some ponies.

"Q. Do you remember when, with reference to your age, how far back can you remember that, Mr. Sommerset?

"A. Well, I would say 50 years.

"Q. Do you remember — Was there any fencing?

"A. Sir?

"Q. Did they have fencing within the boundaries of Plaintiff Exhibit One? Did Mr. Brooks have any fencing on the property?

"A. Well, at one time on the marsh land, no, and at one time, yes.

"Q. Well, now when? Was your father — Was your grand-

father at one time — State whether or not your grandfather at one time was interested in this property with them?

"A. Yes, sir.

"Q. State whether or not your grandfather had used cattle on this property?

"A. Yes, sir.

"Q. State whether or not he continued to use and range cattle on there after the fencing was built and state what, if you will?

"A. Well, at one time it was open range. Any body had cattle on it. The fields was fenced and the range was open. Later when the stock law become effective, Mr. Brooks fenced an area of marsh and hill land, and at that time my grandfather took his cattle out and if anybody else. . . .

"Q. Why did your grandfather take his out, if you know?

"A. Well, he didn't want to absorb the cost of the fencing.

"Q. How close did the fencing come down to the marsh?

"A. Well, it come down to the marsh and generally the way it was handled was to take a soft place, soft enough the cows wouldn't attempt to go around the fence — in other words, they would bog to the point that they wouldn't go around."

According to defendants' testimony, Robert J. Sommerset's grandfather and others made similar use of the unenclosed marshlands for grazing as defendants or their lineal ancestors did. It seems to be settled law that one cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during the statutory period, even without his consent, since his possession is not exclusive. *Whitney v. United States,* 167 U.S. 529, 42 L. Ed. 263; *Bergere v. United States,* 168 U.S. 66, 42 L. Ed. 383; Annot. 170 A.L.R. 845-46.

The evidence in the record shows that the fence was erected in 1917 and stayed there until the inland waterway was cut in 1932. There is no evidence of defendants' using the marshlands for grazing cattle after the inland waterway was cut. From 1917 to 1932 is not thirty years.

[4] The Court of Appeals stated this evidence introduced by defendants as tending to show adverse possession: ". . . (T)hat a portion of the property was leased to International Paper Company for the purpose of building a dock extending into the waterway for

the unloading of pulpwood from about 1937 to 1956; that from his father's death in 1942 he and his brothers and sisters got oysters and clams out of the area; . . . that his father gave the Conservation and Development Department, using PWA labor, permission to plant oysters one year, but refused permission the next year and after his refusal they did not attempt to plant oysters." It is apparent that these acts by defendants were in respect to navigable waters and by reason of the second stipulation these acts were not acts tending to show adverse possession.

[9] Defendants introduced evidence that they had sold lands immediately south of the black line as shown on the map, plaintiff's Exhibit No. 1. The sale of this land does not show adverse possession of the *locus in quo*.

Plaintiff on 10 February 1967, pursuant to notice given, took the deposition of Joe C. Brooks, Sr., one of the principal defendants. During the trial plaintiff introduced in evidence this adverse examination. A part of the testimony of Joe C. Brooks, Sr., given on this adverse examination is set forth below showing the vagueness and the uncertainty of defendants' contention that they had acquired title to the *locus in quo* by adverse possession for thirty years:

"Q. All right, sir. Mr. Brooks, are you claiming ownership to these creeks, Still Creek and Horse Foard Creek and Simmons Creek?

"A. Yes sir, I am claiming ownership to that piece of property.

"Q. Everything within the boundaries as marked on State's Exhibit 1-A?

"A. Yes sir.

"Q. Well, on what do you base your claim of ownership?

"A. I base my claim of ownership on the deed.

"Q. What deed is that?

"A. We have always —

"Q. Well, what deed?

"A. We have always thought we owned it, all our lives.

"Q. Well, what deed?

"A. We had cattle on it.

"Q. Well, what deed is that?

"A. Ever since I can remember.

"Q. What deed is that?

"A. I partly had it fenced off at one time.

"Q. What deed is that?

"A. What deed?

"Q. Yes sir.

"A. The deed that we have now.

"Q. Well, where is that deed recorded? Where did you get the deed, from whom?

"A. What the deed?

"Q. Yes sir.

"A. I got the deed from the rest of the heirs.

"Q. The rest of what heirs, Mr. Brooks?

"A. My brothers and sisters.

"Q. Well, from whom did they claim as heirs?

"A. They all claim they own it.

"Q. Well, on what did you base your claim, that is what I want to know?

"A. What basis?

"Q. Yes sir, what is the basis of your claim?

"A. The basis according to the deeds and what I was told.

"Q. Well, what deeds are they?

"A. The deed that I got.

"Q. Well, from whom?

"A. I got it from the heirs.

"Q. The brothers and the sisters?

"A. The brothers and sisters.

"Q. Who are these brothers and sisters?

"A. Jim —

"Q. Jim Brooks?

"A. Yes. George Brooks, Lula Brooks, Zelda Brooks, Mary Brooks, Mamie Orrell, Sig Goodman and Thelma McEachern.

"Q. Who is Sig Goodman?

"A. He is a lawyer up here in Wilmington, don't you know him?

"Q. No sir. Well from whom do these brothers and sisters claim, under whom do they claim as heirs, these heirs that signed the deed? On what do they base their claim?

"A. Well, I guess they based it on because we own it.

"Q. Well, what I want to know is what is your proof of ownership?

"A. Well, I'd say we owned it, because we have always had it, ever since I can remember, we have always used it and the same piece of land that Mr. Gore got around there come out of it.

"Q. Out of what?

"A. Out of the same piece that we sold him.

"Q. Well, where did that come from?

"A. It come from us.

"Q. Well, where did you all get it?

"A. It come from the Roy G. Brooks Estate.

"Q. Well, where did you get it originally?

"A. Originally?

"Q. Yes sir.

"A. Well, I couldn't tell you that, cause I don't know. It came from the George E. Brooks Estate.

"Q. It came from the George E. Brooks Estate?

"A. Yes sir and my mother.

"Q. Who was your mother?

"A. She was Stella E. Leonard."

[10] It is significant that defendants offered no evidence as to the listing and paying of taxes on the *locus in quo* claimed by them, which evidence, if they had listed and paid their taxes, would be competent in evidence to show that their possession was adverse and in the character of owner. *Corbett v. Corbett,* 249 N.C. 585, 107 S.E. 2d 165.

[11] In *Mallet v. Huske,* 262 N.C. 177, 136 S.E. 2d 553, Rodman, J., made this quotation from *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347, a very clear definition of adverse possession written by the eminent Justice Platt D. Walker, and quoted many times in our reports:

"It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner."

[12] This is said by Ervin, J., for the Court in *Carswell v. Morganton,* 236 N.C. 375, 72 S.E. 2d 748:

"An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. *Land Co. v. Potter,* 189 N.C. 56, 127 S.E. 343; *Rhodes v. Ange,* 173 N.C. 25, 91 S.E. 356; *Anderson v. Meadows,* 162 N.C. 400, 78 S.E. 279; *May v. Manufacturing Co.,* 164 N.C. 262, 80 S.E. 380; *Berryman v. Kelly,* 35 N.C. 269, 2 C.J.S., Adverse Possession, section 181. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. *Logan v. Fitzgerald,* 87 N.C. 308; *Bynum v. Thompson,* 25 N.C. 578."

The reason for the rule restricting one who holds adversely without color of title to the amount of land actually occupied by him was well stated by the eminent Chief Justice Ruffin in *Bynum v. Thompson,* 25 N.C. 578, as follows:

"But the question is, what is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, *prima facie,* and is so deemed in realty, unless some other person has possession of a part, either actually or by virtue of the title. But when one enters on land, without any conveyance, or other thing, to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation *de facto?* To allow him to say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action there-

for. One cannot thus make in himself a possession, contrary to the fact."

[13] Testing defendants' evidence of adverse possession by the accepted standard, it is apparent that considering the evidence of defendants in the light most favorable to them and giving to them every reasonable inference to be drawn therefrom, they have not adduced sufficient evidence to carry the case to the jury and their counterclaim averring that they were the owners of the *locus in quo* should have been nonsuited.

[14, 15] Plaintiff asserts that one of its two points raised by its appeal is as follows:

> "2. Where the evidence shows that the Defendants placed from fifteen hundred to two thousand chicken crates and other obstacles at the edges of the admittedly navigable streams running through the marsh, which obstacles were covered by the tide at high water, was not the Plaintiff entitled to a directed verdict on the issue of obstructing navigable streams?"

This contention has no exception and assignment of error to support it. It is well settled that the Supreme Court ordinarily will not consider questions not properly presented by objections duly made, exceptions duly entered, and assignments of error properly set out. 1 Strong, N. C. Index 2d, Appeal and Error, § 24. We agree with the Court of Appeals in saying that this point contended by plaintiff is without merit for the reason set forth in the opinion of the Court of Appeals, even if the question had been properly before the Court for decision.

The fact that defendants did not offer any evidence tending to show adverse possession for thirty years does not mean that the plaintiff, the State of North Carolina, is the owner and is entitled to immediate possession of the lands described in the complaint. That issue is still to be determined by a jury at a succeeding term of court.

The result is this: The judgment for defendants on their counterclaim is reversed. The judgment in the Court of Appeals decreeing that the defendants have not obstructed navigable waters of the State of North Carolina, as alleged in the complaint, is affirmed. This case is remanded back to the Court of Appeals which will remand it to the Superior Court for further proceedings to determine whether or not the plaintiff, the State of North Carolina, is the

owner and entitled to the immediate possession of the lands described in the complaint.

Reversed in part,

Affirmed in part, and

Remanded with directions.

NEWMAN MACHINE COMPANY, INC. v. GEORGE F. NEWMAN, JR., TRUSTEE

No. 1

(Filed 12 March 1969)

1. Pleadings § 19— demurrer — sufficiency of pleadings

A demurrer tests the sufficiency of a pleading, admitting, for that purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom.

2. Pleadings § 19— demurrer — liberal construction of pleadings

When pleadings are challenged by demurrer, they are to be liberally construed with a view to substantial justice between the parties. G.S. 1-127, G.S. 1-151.

3. Pleadings § 19— demurrer

A demurrer admits the facts alleged but not the pleader's legal conclusions.

4. Pleadings § 19— demurrer — fatally defective complaint

A complaint must be fatally defective before it will be rejected as insufficient.

5. Declaratory Judgment Act § 2— proceedings — sufficiency of complaint

If a complaint sets forth a genuine controversy justiciable under the Declaratory Judgment Act, it is not demurrable even though plaintiff may not be entitled to prevail on the facts alleged in the complaint, since the court is not concerned with whether plaintiff's position is right or wrong but with whether he is entitled to a declaration of rights with respect to the matters alleged.

6. Quieting Title § 1; Property § 2— personal property — equitable remedy to quiet title

In this State a cause of action to quiet title or to remove cloud on title to personal property may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law.

7. Quieting Title § 2— action to quiet title to personalty — sufficiency of pleadings

Complaint properly states a cause of action to quiet title to shares of corporate stock where there are allegations that (1) plaintiff corporation purchased shares of its stock from defendant who owned the stock individually and as trustee for his minor children, (2) defendant through his attorney now asserts that the consideration paid to him, individually and as trustee, was grossly inadequate and that he is entitled to disaffirm and rescind the transactions or to sue for damages, (3) defendant's repeated threats and demands have seriously jeopardized plaintiff's corporate existence and affected plaintiff in the conduct of its business, (4) the president of plaintiff corporation, who will be a material witness in any litigation, is 70 years old and his evidence should be preserved, and (5) defendant's threats of legal action constitute a cloud on plaintiff's title to the shares of stock.

8. Quieting Title § 1— quieting title to realty — nature of remedy

The statutory action to quiet title to realty was designed to avoid some of the limitations imposed upon the remedies formerly embraced by a bill of peace or a bill *quia timet*, and to establish an easy method of quieting titles of land against adverse claims. G.S. 41-10.

ON *certiorari* to review decision of the Court of Appeals reported in 2 N.C. App. 491, 163 S.E. 2d 279.

The hearing below was on demurrer. The complaint contains fifty-two numbered paragraphs. When stripped of nonessentials, the allegations may be summarized as follows:

1. Plaintiff is a North Carolina corporation with its principal place of business in Greensboro, and defendant is a citizen and resident of Greensboro, North Carolina.

2. George F. Newman, Jr., was a member of the Board of Directors of Newman Machine Company, Inc., from January 1937 until December 31, 1963; vice-president and manager of its Sales Department from January 1937 until May 1948; president of the Company from May 7, 1948, until December 31, 1960; and vice-president of the Company in 1961, 1962 and 1963 until he voluntarily resigned effective December 31, 1963.

3. George F. Newman, Jr., owned 64.77% of all the issued and outstanding shares of capital stock of plaintiff corporation. In March 1950 he made a gift of certain of his shares to himself as trustee for his children. Thereafter and until February 6, 1959, he owned individually 53.299% of the capital stock and owned *as trustee for his children* 11.477% of said shares. In addition, he also owned individually 65% of the outstanding shares of capital stock of three affiliated corporations.

4. In the trust instrument of March 1950 by which George F. Newman, Jr., gave 11.477% of the outstanding shares of stock in Newman Machine Company, Inc., to himself as trustee for his children, he was authorized "to manage, convert, sell, assign, alter, invest and reinvest, lease and otherwise deal with said trust properties and use the proceeds from the same as he, in his discretion, shall deem to be for the best interest for the trust estate, to the same extent that he might do if he were the individual owner of the trust estate." The declaration of trust also provided that "the trust is to be administered free of the control and direction of and without accounting to or reporting to any court."

5. On February 6, 1959, George F. Newman, Jr., sold to the plaintiff corporation at $135.25 per share all of its shares of stock which he owned. This included both the 53.299% he owned individually and the 11.477% he owned as trustee. The total purchase price was $785,802.50.

6. At all times prior to December 31, 1960, George F. Newman, Jr., had access to all the financial records of plaintiff corporation, was in position to know the fair market value of its assets, business, and business potential so that he knew the fair market value of the corporate stock when he sold it to the plaintiff on February 6, 1959.

7. As a part of the total transaction the plaintiff and George F. Newman, Jr., entered into an employment contract dated February 7, 1959, under the terms of which it was agreed that the said Newman should continue to serve plaintiff corporation as its president at a salary of $100,000.00 per year for the years 1959 and 1960 and at a salary of $50,000.00 per year for the years 1961, 1962, 1963 and 1964. The said Newman terminated this contract voluntarily as of December 31, 1963, and, at his request, served plaintiff corporation in a very limited capacity during 1964 and 1965.

8. On February 5, 1965, defendant notified plaintiff by letter that defendant's attorneys were investigating the transaction involving the sale of the stock. On August 27, 1965, defendant requested copies of plaintiff's audit report for the years 1957, 1958, 1959 and 1960; and on November 17, 1965, defendant's attorneys examined copies of said audit reports at plaintiff's offices. Thereafter, on March 24, 1966, defendant's attorneys wrote plaintiff the following letter:

"Mr. W. M. York, Sr.,
President,
Newman Machine Company,
507 Jackson Street,
Greensboro, North Carolina.

Re: George F. Newman, Jr., Individually and as Trustee, vs. Newman Machine Company, et al

Dear Mr. York:

We have completed an analysis of our notes on the financial information which you permitted us to examine on November 17, 1965, and we have also examined certain public records in the Guilford County Courthouse. In addition, Mr. Newman has delivered to us, and we have studied, all documents in his possession relating to the transactions in early 1959 under which Newman Machine Company, its affiliates, and members of your family acquired all interests of Mr. Newman in these companies and all interests of Mr. Newman, as Trustee for his minor children, in these companies and in the land and buildings in which these companies conducted their operations. Based upon the foregoing information, we have concluded that, in our opinion, the consideration paid to Mr. Newman, individually and as Trustee, for the properties acquired by Newman Machine Company, et al, was grossly inadequate and represented only a minor fraction of the fair market value of the properties. We have so advised Mr. Newman.

In view of the facts and circumstances attendant upon and inherent in the transactions, including the financial and other information in documentary form and the facts as related to us by Mr. Newman, we have further concluded that, in our opinion, Mr. Newman, individually and as Trustee for his minor children, has the legal right to either disaffirm and rescind the transactions or to sue for damages, and we have advised Mr. Newman accordingly. Moreover, we are of the opinion that Mr. Newman, in his capacity as Trustee for his minor children, is legally obligated by reason of his duty as a fiduciary to assert his claim as Trustee and that his failure to do so would amount to a breach of his obligations as a fiduciary, for which he could later be held personally liable. We have stated this opinion to Mr. Newman.

Mr. Newman, individually and as Trustee, has requested that we take appropriate and prompt action to enforce his

rights arising out of the transactions mentioned above. Before commencing legal action or actions for the enforcement of these rights we will be glad to discuss, without prejudice, the entire matter with you or your attorneys, preferably the latter, if you wish to explore the possibilities of a mutually satisfactory compromise settlement of the claims of our client. Please let us hear from you within ten days.

Yours very truly,
JORDAN, WRIGHT, HENSON & NICHOLS
By: Welch Jordan

WJ;c
cc: Mr. George F. Newman, Jr."

9. Defendant, through his attorneys, continued to make demands on plaintiff and to threaten legal action against plaintiff, including threat of receivership. These threats have seriously jeopardized plaintiff's corporate existence, hampered long-range planning, and seriously affected plaintiff in the conduct of its business affairs.

10. William M. York, Sr., President of plaintiff corporation, is 70 years of age and will be a material witness in any litigation. His evidence should be preserved.

11. A real controversy exists between plaintiff and defendant. The threats constitute a cloud on the title to the shares of stock purchased by plaintiff from George F. Newman, Jr., Trustee, and this action is brought for the purpose of settling the controversy and removing the cloud on plaintiff's title to the stock in question. The sale and purchase of said stock was an arm's-length transaction with both parties having full knowledge of the facts. Plaintiff paid fair market value for the shares of stock and obtained a good title to them. Defendant has no further rights arising out of said transaction, and plaintiff has no further obligations to the defendant by reason of it.

12. Plaintiff prays the court for judgment declaring that it has good title to the 11.477% of its shares of stock purchased from defendant trustee and for costs of the action.

Defendant's demurrer was overruled by the trial judge. *Certiorari* was allowed and the Court of Appeals reversed, sustaining the demurrer. We allowed *certiorari* to review decision of that Court.

Charles T. Hagan, Jr., and McNeill Smith, Attorneys for the plaintiff appellant.

McLendon, Brim, Brooks, Pierce & Daniels, by Hubert Humphrey, Attorneys for defendant appellee.

HUSKINS, J.

[1-5] A demurrer tests the sufficiency of a pleading, admitting, for that purpose, the truth of factual averments well stated and such relevant inferences of fact as may be deduced therefrom. When pleadings are thus challenged they are to be liberally construed with a view to substantial justice between the parties. G.S. 1-127; G.S. 1-151; *McKinney v. High Point,* 237 N.C. 66, 74 S.E. 2d 440 (1953). A demurrer admits the facts alleged but not the pleader's legal conclusions. *Gillispie v. Service Stores,* 258 N.C. 487, 128 S.E. 2d 762 (1963). A complaint must be fatally defective before it will be rejected as insufficient. *Woody v. Pickelsimer,* 248 N.C. 599, 104 S.E. 2d 273 (1958). Demurrers in declaratory judgment actions are controlled by the same principles applicable in other cases. Even so, it is rarely an appropriate pleading to a petition for declaratory judgment. If the complaint sets forth a genuine controversy justiciable under the Declaratory Judgment Act, it is not demurrable even though plaintiff may not be entitled to prevail on the facts alleged in the complaint. This is so because the Court is not concerned with whether plaintiff's position is right or wrong but with whether he is entitled to a declaration of rights with respect to the matters alleged. 22 Am. Jur. 2d, Declaratory Judgments, § 91; *Walker v. Charlotte,* 268 N.C. 345, 150 S.E. 2d 493 (1966); *Woodard v. Carteret County,* 270 N.C. 55, 153 S.E. 2d 809 (1967).

The complaint and demurrer present these questions:

(1) Does the complaint state a cause of action justiciable under the Declaratory Judgment Act?

(2) Does the complaint state a cause of action in equity to quiet title to personal property?

Plaintiff contends for an affirmative answer to both questions, while defendant argues that an action to quiet title to personalty cannot be maintained in this jurisdiction because there is statutory provision for such suits only with respect to real property. G.S. 41-10. Defendant further contends that the type of dispute pictured by the complaint does not qualify for consideration under the Declaratory Judgment Act because (a) a genuine controversy does not exist, (b) the action does not include all necessary parties, (c) the action involves primarily issues of fact rather than questions of law, and (d) the object of the action is "to bag" in advance an impending lawsuit by becoming plaintiff now so as to avoid becoming defendant later.

The excellent briefs of the parties are largely devoted to dis-

cussions of whether the complaint states a cause of action justiciable under the Declaratory Judgment Act. We find it unnecessary to decide the first question, however, in view of the conclusion we have reached on the second.

[6, 7] We hold that the complaint states a cause of action to remove cloud and quiet title to personalty and that such action may be maintained in this State. Since the courts generally apply the same principles when title to personalty is involved as they do when title to land is clouded, McClintock, Principles of Equity, Sec. 197 (2d ed. 1948), brief reference to some of the requirements in equity suits to remove cloud and quiet title to realty prior to enactment of G.S. 41-10 is helpful to an understanding of the question before us.

Under the old equity practice, "[a] bill *quia timet* was intended to prevent future litigation, by removing existing causes which might affect the plaintiff's title. If one in possession of land under a legal title knew that another was claiming an interest in the land under a title adverse to him, there was no adequate remedy at law for such occupant to test the validity of such claim. Being in possession, he could not sue at law, and the adverse claimant would not sue, so that the adverse claim might be asserted at some future time when the evidence to rebut it might be lost, or at any rate the existence of such claim cast a cloud upon his title which would affect its value. His remedy was a bill in equity against the adverse claimant to have the cloud removed by a decree of the court and thereby quiet his title." McIntosh, N. C. Practice and Procedure in Civil Cases § 986 (1929); *Holland v. Challen,* 110 U.S. 15, 3 S. Ct. 495, 28 L. Ed. 52 (1883).

It is stated in *Hardware Co. v. Cotton Co.,* 188 N.C. 442 at 445, 124 S.E. 756 at 758 (1924), that "'[a] bill *quia timet* is in the nature of a writ of prevention, and is entertained as a measure of precaution, justice, and to forestall wrongs or anticipated mischiefs, as where a guardian or other trustee is squandering an estate, or where one in possession of property which another unjustly claims is likely to lose the evidence of his title by delay in asserting and testing the hostile claim. *Bailey v. Briggs,* 56 N.Y. 407, 415.'"

Prior to 1893, in equity suits to remove cloud or quiet title to realty plaintiff was required to allege and show: (1) that he had no adequate remedy at law, *Byerly v. Humphrey,* 95 N.C. 151 (1886); (2) that he was in rightful possession of the land in question, *Peacock v. Stott,* 104 N.C. 154, 10 S.E. 456 (1889), *McNamee v. Alexander,* 109 N.C. 242, 13 S.E. 777 (1891); and (3) that the defendant's adverse claim was such as to affect plaintiff's title injuriously,

Murray v. Hazell, 99 N.C. 168, 5 S.E. 428 (1888). In *Busbee v. Macy,* 85 N.C. 329 (1881), plaintiff sought to remove a cloud upon the title to land alleging that a deed under which defendant claimed was void on its face by reason of the uncertain description of the land therein contained. The court held that since the illegality of defendant's deed appeared upon its face, a court of equity should dismiss the action and decline to declare an instrument to be a void deed which upon its face is no deed at all. In *Busbee v. Lewis,* 85 N.C. 332 (1881), plaintiff sought to remove a cloud upon his title and was denied equitable relief because a valid legal objection was apparent on the face of the record. ". . . [A] court of equity will not take jurisdiction of an action to remove a claim upon the ground of its being a cloud upon the title of another, when the claim is based upon a deed alleged in the complaint to be void upon its face, since, if it really be so, the party has always at hand a certain defense against the deed, whenever it may be urged against him."

[8] Because the General Assembly considered the two *Busbee* decisions, *supra,* an inconvenient or unjust application of the equitable doctrines involved, it enacted Chapter 6, Public Laws of 1893, now codified as G.S. 41-10, providing, *inter alia,* that "[a]n action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims. . . ." *Rumbo v. Manufacturing Co.,* 129 N.C. 9, 39 S.E. 581 (1901). That enactment was designed to avoid some of the limitations imposed upon the remedies formerly embraced by a bill of peace or a bill *quia timet,* and to establish an easy method of quieting titles of land against adverse claims. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16 (1952).

Since we have no statute regarding suits in equity to remove cloud or quiet title to personalty, we apply to such suits the same principles which obtained prior to enactment of G.S. 41-10 when title to land was involved.

Although such suits were usually brought only in cases involving real property, "the generally accepted view is that a bill to quiet the title or to remove a cloud on the title to personal property may be maintained in equity, in the absence of statutory authorization, where, by reason of exceptional circumstances, there is no adequate remedy at law." Annot., 105 A.L.R. 291 (1936). In *Loggie v. Chandler,* 95 Maine 220, 49 A. 1059, it was held that a cloud upon the title to personal property in the form of a recorded chattel mortgage could not be removed; but Pomeroy says ". . . there seems no good reason for thus restricting the jurisdiction, and the instances

are not infrequent where it has been exercised, in cases of void recorded chattel mortgages, spurious issues of shares of stock, etc." 5 Pomeroy, Equity Jurisprudence § 2151 (4th ed. 1919). To like effect is *Thompson v. Emmett Irr. Dist.*, 227 F. 560, (9th Cir. 1915), where plaintiff, a purchaser of bonds issued by an irrigation district, alleged that defendant had defaulted in the payment of interest on all of the bonds on the ground that some of the bonds, without designating such bonds by number or otherwise, had been sold without consideration. Defendant demurred and moved to dismiss. Held: The allegations of the bill state a case for the removal of a cloud upon the title to personal property and such a case is within the jurisdiction of a court of equity. Accord, *Sherman v. Fitch,* 98 Mass. 59 (1867); *Magnuson v. Clithero,* 101 Wis. 551, 77 N.W. 882 (1899); *Voss v. Murray,* 50 Ohio St. 19, 32 N.E. 1112 (1893).

In *Dittmar v. Alamo Nat. Co.,* 91 S.W. 2d 781 (Tex. Civ. App. 1936), defendants by cross action sought to have their title quieted to certain corporate stock allegedly purchased by defendants from plaintiff. There, as here, it was contended that there was no such action as one to quiet title or remove cloud from title to personal property. Held: "There seems to be no good reason for so restricting the remedy of an action to quiet title. This is especially true in Texas, where the distinctions between law and equity do not obtain. . . . We see no reason why in this state the owner of personalty, in possession, should not be permitted to maintain a suit to quiet his title as against an adverse claimant." It will be noted that in North Carolina, as in Texas, the old technical distinctions between actions at law and suits in equity have been abolished. G.S. 1-9; *In Re Estate of Smith,* 200 N.C. 272, 156 S.E. 494 (1931); *Woodall v. Bank,* 201 N.C. 428, 160 S.E. 475 (1931).

In *Ellis v. Dixie Highway Special Road & Bridge Dist.,* 103 Fla. 795, 138 So. 374 (1931), plaintiff sought to be adjudged owner and holder of certain highway district bonds which defendant claimed had been stolen. Plaintiff could not negotiate the bonds under rules of the New York Stock Exchange until title was established. Held: "Suits in equity to quiet title to personalty are infrequently brought, but a court of equity will give relief in respect of personalty and quiet title thereto when, owing to exceptional circumstances, there is no adequate remedy at law."

In *Earle v. Maxwell,* 86 S.C. 1, 67 S.E. 962 (1910), the Court said: "While some authorities hold otherwise, we think there can be no doubt that a complaint to remove a cloud on the title to personal property may be maintained. . . . Any distinction between

real estate and personal property in this respect must be purely artificial and tend to hinder the practical administration of justice."

[6, 7] Even though there is no statute in North Carolina authorizing suits to quiet title to personalty, we adhere to the general rule that such suits may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law. Here, plaintiff is in possession of the stock it purchased from defendant trustee, and defendant is claiming an interest in it adverse to plaintiff. Being in possession plaintiff cannot sue at law, and defendant will not sue — at least he has not done so during almost two years of threats and demands. His adverse claim may be asserted in court at some future time when plaintiff's evidence to rebut it may be lost. The existence of such a claim casts a cloud upon plaintiff's title to the stock and may adversely affect its value. Under these circumstances plaintiff is entitled to invoke the equitable assistance of the court to remove this cloud and quiet the title to ownership of said stock when defendant, for whatever reasons of his own, continues to threaten but refuses to act. With the ever increasing importance of personal property in the business world of today, especially stocks, bonds, and other intangibles, there is no sound reason why this equitable remedy should not be available to quiet title to personalty as well as realty.

For the reasons stated the decision of the Court of Appeals sustaining the demurrer is reversed. Let the Court of Appeals so certify it to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. SAMUEL NICK MOORE

No. 4

(Filed 9 April 1969)

1. Homicide § 21— first degree murder — nonsuit

State's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the first degree of his wife.

2. Homicide § 4— elements of first degree murder

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. G.S. 14-17.

3. Homicide § 4— elements of first degree murder

The three essential elements of murder in the first degree — premeditation, deliberation and malice — concur if defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention and not because of any legal provocation on her part deliberately and intentionally shoots her.

4. Homicide § 4— elements of first degree murder — malice

Malice exists as a matter of law whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstances.

5. Homicide §§ 17, 18— first degree murder — evidence of malice and premeditation

In a prosecution for murder in the first degree, evidence that just a few minutes before his wife was shot defendant had announced his intention to kill her tends to show premeditation and deliberation as well as malice.

6. Homicide § 15; Criminal Law § 34— first degree murder — competency of evidence — prior assaults on victim

In a prosecution charging defendant with the first-degree murder of his wife, evidence that on various occasions during approximately three and one-half years prior to her death defendant had intentionally inflicted personal injuries upon his wife is admissible as bearing on intent, malice, motive, premeditation and deliberation on the part of defendant.

7. Homicide § 15; Criminal Law § 34— first degree murder — competency of evidence — prior assault on third person

In a prosecution charging defendant with the first degree murder of his wife, evidence of defendant's fight with another person at a county fair some two and one-half years prior to the homicide is admissible where the fight immediately preceded and precipitated defendant's attack upon his wife.

8. Constitutional Law § 31— right of confrontation of witnesses

The right of confrontation guaranteed to every defendant in a criminal prosecution affirms the common law rule that the witnesses must be present before the triers of fact and the accused so that they are put face to face, and also includes the more important privilege of defendant's being present in person at every stage of the trial. N. C. Constitution, Art. I, § 11; U. S. Constitution, VI and XIV Amendments.

9. Constitutional Law § 37— defendant's waiver of right to be present at trial — capital felony

An accused cannot waive his right to be present at every stage of his trial upon an indictment charging him with a capital felony.

10. Constitutional Law § 37— waiver of right to confront witnesses — non-capital felonies and misdemeanors

The right of accused to confront the State's witness is a personal privilege which he may waive either by express consent or by a failure to assert in apt time.

11. Constitutional Law § 37— waiver of right to confront witnesses — capital case

Even in a capital case the constitutional right of an accused to be confronted by the witness against him is a personal privilege which he may waive.

12. Homicide § 27— instructions on voluntary and involuntary manslaughter

In a prosecution charging defendant with the homicide of his wife, issue of defendant's guilt of voluntary manslaughter does not arise where there is no evidence that (1) defendant killed his wife while fighting in self-defense or that (2) defendant killed her in the heat of passion; but issue of involuntary manslaughter does arise where defendant's testimony would support a finding that his culpable negligence in handling a shotgun caused her death.

13. Criminal Law § 115— instructions on lesser degrees of the offense charged

Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit defendant's guilt of the lesser included offense to the jury; if he fails to do so, the error is not cured by a verdict convicting defendant of the offense charged.

14. Homicide § 11— defense — accidental killing

A defendant's assertion of accidental killing is not an affirmative defense.

15. Homicide § 14— burden of proof of unlawful slaying

In a prosecution for unlawful homicide, the burden is always on the State to prove an unlawful slaying.

16. Homicide §§ 21, 27— instructions on involuntary manslaughter — sufficiency of evidence

In a prosecution charging defendant with the homicide of his wife, defendant is entitled to have the specific question of his guilt of involuntary manslaughter submitted to the jury where his testimony is to the effect that as he was leaving the home with clothes over his left arm and a rifle and shotgun underneath his right arm, defendant "throwed the guns over his left arm" to reach with his right for cigarettes on a table and that a gun went off.

17. Homicide § 6— involuntary manslaughter — reckless use of firearms

One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter.

18. Criminal Law § 89— impeachment of negative testimony

In a prosecution for first degree murder, where defendant's witness denied on cross-examination that defendant told him on the day of the homicide that he had shot his wife, it was error to allow the State to offer for purpose of impeachment and contradiction the testimony of a deputy sheriff as to what the witness told him defendant had said.

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19. Criminal Law § 89— impeachment of negative evidence

If a party interrogates a witness about a fact which would be favorable to the examiner if true, and receives a reply which is merely negative in its effect on examiner's case, the examiner may not by extrinsic evidence prove that the first witness had earlier stated that the fact was true as desired by the enquirer.

APPEAL by defendant from *Cowper, J.,* 19 August 1968 Regular Criminal Session of BEAUFORT.

Defendant was tried and convicted upon an indictment which charged that, on 7 March 1968, he "feloniously, wilfully, and of his malice aforethought, did kill and murder Joanne Woolard Moore," his wife. Upon the jury's recommendation the court imposed the mandatory life sentence. Defendant appealed, assigning as error the court's failure to allow his motion for nonsuit, the admission of certain evidence, and portions of the charge.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Tharrington & Smith and McMillan & McMillan for defendant appellant.

SHARP, J.

Defendant's assignments of error 1 and 2 are that the court erred in overruling his motions for nonsuit. In his brief he argues that the court should have entered "a judgment of nonsuit as to the offenses of first and second degree murder."

Evidence for the State tended to show: On 7 March 1968, defendant and Joanne Woolard Moore (Joanne) had been married nine years; they had three children, aged 6 years, 4 years, and 14 months. The family was living in a trailer about 200 yards from the home of Joanne's parents, Mr. and Mrs. Bill Woolard. The two older children spent the night of 6 March 1968 with their grandparents. The following morning, soon after 7:30, defendant telephoned his mother-in-law and said: "Mrs. Woolard, I am going to kill myself and Joanne. Come up and get the baby." When Mrs. Woolard attempted to remonstrate with him, he said, "Yes, Ma'am," and hung up. After attempting to telephone defendant's two brothers, Mrs. Woolard finally reached her husband at work. About 20-25 minutes after his telephone call, defendant appeared at Mrs. Woolard's door with the baby. Defendant appeared nervous and angry, and the child was unwrapped. He said that he couldn't talk to

Joanne because of the baby's crying and that he was going back to the trailer to talk to her. He then left in his truck.

Mrs. Woolard immediately rang her daughter's telephone 12-15 times but got no answer. After again telephoning her husband she went to the trailer and entered the living room about 8:15 a.m. There she first saw a man's bloody tracks "headed down toward the bedroom" to the left. When she looked to the right and saw Joanne's body on the kitchen floor, she fled screaming from the trailer. Her screams awakened Mrs. Marie Beddard, who lived across the road. Leaving Mrs. Woolard at her house, Mrs. Beddard went to the trailer. She saw Joanne, clothed in a robe and bedroom slippers, lying on her back in a pool of blood behind the bar, which separated the kitchen and the living room. The right side of her face and head had been blown away. Mrs. Beddard went back to her house and procured a friend to call the sheriff and the rescue squad.

Within minutes thereafter, Mr. Woolard and a companion arrived at the trailer. The sheriff arrived between 8:30 and 8:45 a.m. The odor of gunpowder pervaded the trailer. He followed the bloody footprints, which led from the body, across the living room into the first bedroom. On the bed was a 12-gauge Remington shotgun (State's Exhibit 5), containing two live shells. Behind the sofa in the living room he found an empty shotgun shell (State's Exhibit 9). Blood, hair, and brain tissue were on the ceiling and all over the kitchen area.

In the opinion of E. B. Pearce, Ballistics Expert of the S. B. I., the shell (Exhibit 9) had been fired from the shotgun (Exhibit 5). The doctor who examined the body at 11:40 a.m. found no powder burns on the face. In his opinion, death, which was instantaneous, had resulted from a gunshot wound.

On the morning of 7 March 1968, at 7:45, William King went to work shrubbing a ditch behind the trailer. A few minutes thereafter, he saw defendant leave the trailer with the baby in his arms and drive to the Woolard residence. He observed that defendant remained there "just a few minutes" and then returned to the front of the trailer, where he disappeared from King's view. In a few minutes he saw defendant leave again and drive toward Griffin's store, which is about 2½ miles from the trailer in the opposite direction from the Woolard home. About 8:10 a.m. defendant entered Griffin's store and purchased two packs of cigarettes. Griffin noticed nothing unusual in his appearance.

Defendant was arrested at 1:55 a.m. on Saturday, 9 March 1968, in the Washington Police Station.

Sometime after Christmas 1967, defendant had told Mr. and Mrs. Woolard that if Joanne ever left him he would kill her. On the Monday night preceding 7 March 1968, defendant made a similar statement to Mr. and Mrs. Bullock. On Wednesday afternoon, 6 March 1968, defendant went to Bullock's place of employment and informed him that he had some time facing him and that he would be in jail before Monday morning. Bobby Harmon, who was present on Wednesday afternoon when defendant talked to Bullock, testified as a witness for defendant that defendant said "he was in a little trouble"; that he was on probation and if his wife got a warrant for him he would be locked up before Monday morning.

The State introduced — over defendant's objection — evidence tending to show: (1) On one occasion during watermelon time in 1965, defendant had slapped his wife several times, knocked her down, torn her clothes from her body down to the waist, and "snatched her out on the porch by the hair of her head"; (2) In October 1965, at the close of the Beaufort County Fair, after he got into a fight with a man named "Butterball," defendant became incensed because his wife had thrown away the pistol he gave her to hide. He beat her and knocked her to the ground, where he tore off her blouse. A highway patrolman found her there unconscious. The next morning, when defendant got out of jail, he found Joanne at the home of his mother and hit her again in the presence of his mother; (3) On 23 December 1967, defendant hit Joanne in the side with a bottle of whiskey and beat her in the face until she fell unconscious to the floor from the sofa. The next day her face and arms were badly bruised; (4) On Saturday night, 2 March 1968, at a restaurant, where defendant and his wife were eating with Mr. and Mrs. Clarence Bullock, defendant took two gasoline credit cards from his wife's purse, tore them up, and said that he was going to put a stop to her going so much. He also took her wallet. (5) On Sunday morning, 3 March 1968, the woman who lived directly across the highway from the Moore trailer heard Joanne give three or four loud screams. That afternoon Mrs. Bullock observed that Joanne's eyes were bruised and that a cut on her nose was bleeding. Defendant told Clarence Bullock that he had whipped his wife that morning. The following Monday her eyes were black and her face swollen.

The admission of the foregoing testimony is the basis of defendant's assignments of error Nos. 27, 29, 34, and 35.

On 5 August 1968, fourteen days prior to the commencement of

the term at which defendant was tried, the solicitor for the State and defendant, individually and by his counsel, stipulated that Dr. Clyde Potter, a physician and surgeon, if present, would testify that on Wednesday, 6 March 1968, he examined Joanne Moore's face; that she had two black eyes and her nose was severely bruised, swollen, and sore. The parties also stipulated that this statement could be admitted in evidence without objection during defendant's trial. When the State offered the stipulation in evidence, defendant objected — not "to the form of the statement" — but "to the evidence contained therein." The admission of the foregoing stipulation constitutes defendant's assignment of error No. 41.

The testimony of defendant as a witness for himself tended to show: During nine and a half years of married life he and Joanne had had only "a few minor quarrels"; that he had always loved his wife and had never threatened to harm her. He had never beaten her, blacked her eyes, knocked her unconscious, or torn her clothes from her person. He had, however, slapped her with his open hand on two occasions: (1) at the fair in October 1965 because, instead of putting his pistol in the automobile as he had directed, she had thrown it in a ditch and lost it; and (2) on 23 December 1965, when she had insisted upon going with Mr. and Mrs. Clarence Bullock to Rocky Mount, when the four of them had been drinking. On 3 March 1968, he had had to fight her when she attacked him, and she got a black eye. The night before, he had torn up Joanne's credit cards because she was charging too much gas. That night he slept on the sofa in the living room. About 6:30 a.m., in attempting to get into bed, he awakened Joanne, who accused him of being out all night. She began to fight and in order to protect himself, he jumped back, and she fell off the bed. She herself had scratched her nose on her diamond engagement ring. The next day, in consequence of this set-to, she had two black eyes. At her request, he bought her sunglasses. He also gave her credit cards to replace the two he had destroyed, and there was no argument between them on Monday. On Tuesday, he took a trailer to Virginia. On Wednesday evening, upon his return, she told him she had been to see Dr. Potter and had consulted an attorney, Mr. LeRoy Scott. He did not know what Joanne wanted. Her mother wanted her to leave him, but Joanne did not want separation papers. He was not angry with his wife, and they had slept together that night. The next morning, however, he told her she must decide during the day whether she wanted him or her mother. He directed her to call him at his mother's that night and give him her decision.

From the bedroom closet he removed several suits, a rifle, and a shotgun, which he had decided to sell to repay some company money he had spent. He put the clothes over his left arm and the guns underneath his right arm and started to take the articles out to his truck while Joanne finished cooking his breakfast. As he walked down the little hall into the living room, he saw a pack of cigarettes on a little table to his right. Joanne was then standing in front of the stove 12-15 feet away cooking his breakfast. She was facing him. He "throwed the guns" over his left arm and reached with his right for the cigarettes. The gun went off, and he "didn't know who it hit." He did not intentionally shoot his wife. The baby cried, and before the smoke cleared he went to it. After that he remembers nothing until about midnight, when he found himself in West Virginia. He does not know how long he stayed there but, "realizing what had happened," he decided to come on back home. He arrived late at night and went to the police station.

On the morning of 7 March 1968, defendant went to the home of his brother, Ray Moore (Ray) about 8:30 and borrowed $12.00 from him. Ray described defendant as pale, very excited, and in a state of shock. As he left, Ray asked him where he was going, and he said he did not know.

On cross-examination, defendant testified that he had been convicted of breaking and entering, reckless driving, speeding, simple assault, resisting arrest, assault with a deadly weapon, drunken driving, manufacturing whiskey, forcible trespass, and being drunk and disorderly.

After three two-hour examinations of defendant, made in April and June 1968, Dr. Thomas E. Curtis, a psychiatrist employed by defendant, came to the conclusion that on the morning of 7 March 1968, defendant had suffered the blackout which he had described and that, to have suffered such a "traumatic blackout," defendant "would have had to have known that the discharge from his gun had hit his wife."

Other evidence for defendant tended to show: On each occasion upon which witnesses for the State had testified that they had observed cuts or bruises upon the person of Joanne, members of defendant's family had also seen her and had observed no wounds, discolorations, or anything unusual about her appearance.

[1-4] The preceding resumé demonstrates the sufficiency of the evidence to withstand defendant's motions for nonsuit and to sustain the jury's verdict of murder in the first degree. Murder in the

first degree is the unlawful killing of a human being with malice, premeditation, and deliberation. G.S. 14-17; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769, *cert. denied,* 368 U.S. 851, 7 L. Ed. 2d 49, 82 S. Ct. 85. If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention, and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first degree — premeditation, deliberation, and malice — concurred. "Malice is not only hatred, ill-will, or spite, as it is ordinarily understood — to be sure that is malice — but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Benson,* 183 N.C. 795, 799, 111 S.E. 869, 871. Malice exists as a matter of law "whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance." *State v. Baldwin,* 152 N.C. 822, 829, 68 S.E. 148, 151.

[5] The transcript contains plenary evidence from which the jury could find that defendant, motivated by ill will and express malice toward his wife, shot her with deliberation after having premeditated the deed. The evidence that, just a few minutes before she was shot, defendant had announced his intention to kill her, tended to show premeditation and deliberation as well as malice. Defendant's motions for nonsuit were properly overruled, and defendant was not entitled to an instruction that he was guilty of murder neither in the first nor in the second degree.

[6] The evidence that, on various occasions during approximately three and one-half years prior to her death, defendant had intentionally inflicted personal injuries upon his wife "was admissible as bearing on intent, malice, motive, premeditation and deliberation on the part of the prisoner." *State v. Gales,* 240 N.C. 319, 82 S.E. 2d 80. *See State v. Horne,* 209 N.C. 725, 184 S.E. 470. In *State v. Kincaid,* 183 N.C. 709, 110 S.E. 612, the trial judge admitted evidence tending to show the defendant's maltreatment of his wife "during a period of several years next preceding her death." Upon appeal, this Court said, "The evidence was offered for the purpose of showing intermediate and recurring misconduct of the defendant, and while its weight was to be determined by the jury, the question of its competency was properly decided by the court." *Id.* at 716, 110 S.E. at 616. The opinion quoted, and adopted, the following rationale of Justice Nash in *State v. Rash,* 34 N.C. 382, 384:

"Ordinarily, the eye of suspicion cannot turn upon the husband as the murderer of his wife; and when charged upon him, in the

absence of positive proof, strong and convincing evidence — evidence that leaves no doubt on the mind that he had towards her that *mala mens* which alone could lead him to perpetrate the crime — is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity? . . . In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long continued course of brutal conduct shows a settled state of feeling inimical to the object. . . . [M]alice may be proved as well by previous acts as by previous threats, and often much more satisfactorily."

In *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348, the defendant, indicted for the murder of his wife, "contended that the court erred in allowing the prosecution to go back over his entire married life with the deceased" (8 years) "to show frequent quarrels, separations, reconciliations and ill-treatment of deceased by defendant throughout most of their married life." Stacy, C.J., speaking for the Court, said, "This evidence was competent as tending to show malice on the part of the defendant or a settled state of feeling inimical to the deceased, and the decisions so hold." *Id.* at 670, 51 S.E. 2d at 354. *Accord, State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484; *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233.

In *State v. Hawkins,* 214 N.C. 326, 199 S.E. 284, the defendant contended evidence, that for 3-4 years prior to her death he had beaten, bruised, and whipped his wife, was too remote. "The remoteness goes to the weight, and not to the competency of the testimony," said the Court. *Id.* at 333, 199 S.E. at 288.

[7] The evidence of defendant's fight with Butterball at the county fair in October 1965, had it been an isolated instance, would clearly have been incompetent. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. This fight, however, immediately preceded and precipitated defendant's attack upon his wife. It was a component of the same aggressive action, and its admission was not error.

Defendant's assignments of error Nos. 27, 29, 34 and 35 are overruled.

Defendant's assignment of error No. 43 attacks the introduction of the stipulation with reference to the testimony which Dr. Potter

was prepared to give. Defendant concedes (1) that he and his three attorneys signed the writing which stipulated that if Dr. Potter were present at the trial he would testify that on the day before her death Joanne's face was cut and bruised and that the stipulation could be admitted in evidence without objection, and (2) that at the trial he objected "to the evidence contained therein" and not to the form of the statement. Yet he now asserts that he is entitled to a new trial because the "constitutional right of confrontation" cannot be waived in a capital case.

[8] N. C. Const. Art. I § 11 provides: "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony. . . ." The Sixth Amendment to the U. S. Constitution, made obligatory upon the states by the Fourteenth Amendment, gives an accused this same protection. *Pointer v. Texas,* 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). The provision affirms the common-law rule that the witness must be present before the triers of fact and the accused so that they are " 'put face to face.' " *State v. Dixon,* 185 N.C. 727, 117 S.E. 170. It also includes "the more important privilege of being present in person" at every stage of the trial. *State v. Hartsfield,* 188 N.C. 357, 360, 124 S.E. 629, 631.

[9, 10] While it is well established in this State that an accused cannot waive his right to be present at every stage of his trial upon an indictment charging him with a capital felony, *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666, and cases cited therein, this Court has not heretofore answered the question whether a defendant in a capital case can waive his right to be confronted with the witnesses against him. The cases upon which defendant bases his contention that he cannot waive this right either relate to a *defendant's presence* (or temporary absence) at the trial or were prosecutions for misdemeanors. In appeals involving misdemeanors and felonies less than capital, this Court has said that the right for accused to confront the State's witness is a personal privilege which he may waive either by express consent or by a failure to assert in apt time. *State v. Hartsfield, supra; State v. Mitchell,* 119 N.C. 784, 25 S.E. 783. *See also Miller v. State,* 237 N.C. 29, 74 S.E. 2d 513. On this point, "The authorities are practically uniform." Annot., 129 Am. St. Rep. 23, 45 (1908); *accord,* 23 C. J. S. *Criminal Law* § 1009 (1961). The rationale is that the court's power to try a defendant is not dependent upon his exercise of his constitutional right to be confronted by the State's witness. This right is a personal privilege

for the benefit of the accused which does not affect the general public. *The State v. Polson,* 29 Iowa 133, 135; *State v. Wagner,* 78 Mo. 644; *Blagg v. State,* 36 Okla. Cr. 337, 254 P. 506; *State v. Mortensen,* 26 Utah 312, 73 P. 562; *Williams v. State,* 61 Wis. 281, 21 N.W. 56. Defendant's presence at his trial for a capital felony, however, is a matter of public as well as private concern, 16 C. J. S. *Constitutional Law* § 9 (1956). Public policy requires his attendance at such a trial.

We agree with the Kentucky court, which pointed out in *Bonar v. Commonwealth,* 180 Ky. 338, 202 S.W. 676, that there are "no sound or other than sentimental reasons" for holding that the privilege cannot be waived where the felony charged is a capital one. In *People v. Dessauer,* 38 Cal. 2d 547, 241 P. 2d 238, *cert. denied,* 344 U.S. 858, 97 L. Ed. 666, 73 S. Ct. 96, a case in which the death penalty was affirmed, the defendant stipulated that the *People's* case might "'be submitted to the Court on the testimony taken at the preliminary examination'" with the "'same force and effect as though those witnesses were here, sworn and testified, the defendant waiving his right . . . to be confronted by those witnesses. . . .'" In holding that the defendant had effectively waived his right to confrontation, the court said: "The right to be confronted by witnesses, whether assured by Constitution or statute, may be waived. . . ." *Id.* at 552, 241 P. 2d at 241. *Accord, People v. Schultz-Knighten,* 277 Ill. 238, 115 N.E. 140; *People v. Murray,* 52 Mich. 288, 17 N.W. 843.

In *State v. Mortensen, supra,* the defendant, appealing a death sentence, had stipulated with the prosecution that if a particular witness were present he would give certain testimony upon appeal. To his contention that he could not waive his constitutional right of confrontation, the Utah Supreme Court replied: "The main reason for the confrontation of witnesses is to afford the accused an opportunity for cross-examination, and this is a privilege which he may waive." *Id.* at 326, 73 P. at 566. In *State v. Harris,* 181 N.C. 600, 107 S.E. 466, a case in which this Court affirmed a death sentence, Clark, C.J., said: "The right to confront witnesses necessarily includes the right to cross-examine them, but this is a right which the prisoner's counsel could waive." *Id.* at 605, 107 S.E. at 468.

During the course of the trial of *Commonwealth v. Petrillo,* 340 Pa. 33, 16 A. 2d 50, the defendant, charged with murder, changed his plea of "not guilty" to "guilty." Two other judges were then called in to aid the trial judge in determining the degree of the defendant's guilt and fixing his punishment. With the defendant's ex-

press consent, they considered "the testimony of a cross-examined witness unseen and unheard by them." In affirming a death sentence, the Supreme Court said:

"Appellant's proposition that triers of fact are 'completely incapacitated from judging the credibility of' witnesses they did not see or hear, is untenable. If it were sound, dying declarations and many other forms of hearsay testimony as well as depositions and testimony given on former trials would all have to be excluded in the trial of capital and other criminal cases." *Id.* at 46, 16 A. 2d at 57.

In *Blagg v. State, supra,* in holding that the defendant was bound by his stipulation, the court said it would not do " 'to say that because the state has a peculiar interest in protecting the citizen accused of crime to the extent of his constitutional rights that he shall in no case be allowed to waive them, for in some cases it may be to his interest to waive them, and the denial of the right to do so would defeat the very object in view when the rights were given, and cause them to operate to the injury rather than to the benefit of the accused.' " *Id.* at 343, 254 P. at 508.

[11] We hold the constitutional right of an accused to be confronted by the witness against him is a personal privilege, which he may waive even in a capital case. Assignment of error No. 43 is overruled.

Defendant assigns as error certain of the court's instructions to the jury (assignments of error 6, 8, 9, 12, 18, 19, and 20). He asserts (1) that the charge as it related to his testimony with reference to the circumstances surrounding his wife's death was an inadequate application of the law pertaining to a killing by misadventure and to manslaughter, and (2) that the court erred in failing (a) to distinguish between the two degrees of manslaughter and (b) to submit to the jury the issue of defendant's guilt of involuntary manslaughter. These assignments must be sustained.

[12] At the beginning of his charge the judge instructed the jury that it could return a verdict of guilty of murder in the first degree, murder in the second degree, *manslaughter,* or not guilty. Then, after having defined both voluntary and involuntary manslaughter in general terms, the court gave the following mandate:

"[W]hen you come to consider his guilt or innocence on the charge of manslaughter, I instruct you that you should ask yourselves these questions: 1. Did the defendant shoot and kill his wife, Joanne Moore? 2. Did he kill her intentionally? 3. Did he

kill her unlawfully, in the heat of passion, by reason of anger suddenly aroused and before sufficient time had elapsed for passion to subside and reason to resume its sway and habitual control? If you find from the evidence and beyond a reasonable doubt that the truth requires an affirmative answer to all three of these questions; that they should all three be answered 'Yes,' beyond a reasonable doubt, then it would be your duty to convict the defendant of manslaughter in the case. If the State has failed to so satisfy you or if you are not satisfied beyond a reasonable doubt that all three of these questions should be answered 'Yes,' it would be your duty to return a verdict of not guilty to the charge of manslaughter."

The confusion in the foregoing excerpt is manifest. If defendant shot his wife intentionally, he would be guilty of murder in the first degree or murder in the second degree unless he could rebut the presumption of malice arising from an intentional shooting, and thereby reduce the crime to voluntary manslaughter. He could do so only by proving to the jury's satisfaction one of the following defenses: (a) While fighting in self-defense he killed his wife by using excessive force. (If he used no more force than reasonably appeared to him to be necessary to defend himself, he committed no crime.) (b) He killed her in the heat of passion. In the entire transcript there is no evidence of either defense, nor does defendant contend that he killed his wife in self-defense or in the heat of passion. The issue of defendant's guilt of voluntary manslaughter, therefore, does not arise. The issue of involuntary manslaughter, however, is presented since defendant's testimony would support a finding that he did not intentionally shoot his wife but that his culpable negligence caused her death. A charge which made his guilt of *manslaughter* depend upon whether he killed his wife in the heat of passion when there was no evidence of such a killing, but there was evidence that her death resulted from his culpable negligence, constitutes prejudicial error.

If the jury should fail to be convinced beyond a reasonable doubt that defendant intentionally shot his wife, under the evidence presented, the verdict would necessarily be either "guilty of involuntary manslaughter" or "not guilty." Defendant was, therefore, entitled to have the specific question of his guilt of involuntary manslaughter submitted to the jury.

[13] Where there is evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit defendant's guilt of the lesser included offense to the jury; if he fails to do so, the error is not cured by a verdict convicting defendant of

the offense charged. *State v. Davis,* 242 N.C. 476, 87 S.E. 2d 906; 3 N. C. Index 2d *Criminal Law* § 115. The reason for the rule was stated by Stacy, C.J., in *State v. DeGraffenreid,* 223 N.C. 461, 463-64, 27 S.E. 2d 130, 132: "[T]he defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in respect of the lesser offense is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a lesser degree of the same crime if the different views, arising on the evidence, had been correctly presented by the trial court."

[14, 15] A defendant's assertion of accidental killing is not an affirmative defense. In a prosecution for unlawful homicide, the burden is always upon the state to prove an unlawful slaying. *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889; *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337. If the State is unable to prove an intentional shooting, no presumption of malice arises, and, in order to convict this defendant of unlawful homicide, the State must satisfy the jury beyond a reasonable doubt that defendant's culpable negligence proximately caused the death of his wife. Otherwise, defendant would be entitled to an acquittal.

[16] Defendant's testimony, that as he was leaving the trailer with clothes over his left arm and a rifle and shotgun underneath his right arm "he throwed the guns over his left arm" to reach with his right for cigarettes on a table, required the court to submit the issue of his guilt of involuntary manslaughter to the jury. Although defendant does not admit in so many words that he shot his wife, it is implicit in his testimony that she was killed by a discharge from the shotgun which he was handling at the time. His contentions are: (1) The gun discharged accidentally, without design or culpable negligence on his part, and his wife's death was an excusable homicide. (2) If he is criminally responsible for her death, it is solely because he was handling the gun in a culpably negligent manner at the time of its discharge, and the most serious crime of which he could be convicted is involuntary manslaughter.

[17] One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter. *State v. Griffin, supra; State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354. *See also* the authorities cited in the opinions in these two cases.

For these errors in the charge there must be a new trial. We

therefore deem it necessary to discuss only one other (No. 52) of defendant's assignments of error.

[18] Ray Moore, on cross-examination, said that when defendant came by his home on the morning of 7 March he did not tell him that he had shot his wife. Thereafter, over defendant's objection, Deputy Sheriff E. O. Davis, a witness for the State, was permitted to testify that on the morning of 7 March 1968, Ray had informed him that defendant had told Ray there had been a disturbance and Joanne had been shot accidentally; that Joanne had the gun, passed it to defendant, and said, "Shoot me"; and that "during the transaction the gun went off." (Ray returned to the stand to deny making the statement to Davis.)

Davis' testimony as to what Ray Moore told him defendant had said was, of course, *double* hearsay. Stansbury, N. C. Evidence (3d Ed. 1963) § 138. The State contends, however, that it was competent to contradict or impeach Ray. Conceding that Ray's statement was inconsistent with his testimony and that it tended to impeach him, we nevertheless hold it incompetent. Had Ray testified that defendant had made the disputed statement to him, it would have been substantive evidence, competent as an admission. *Id.* at § 167. Ray, however, denied that defendant told him he had shot his wife. This denial did not tend to establish any material fact in the case; it was negative testimony which proved nothing. Yet, by Davis' testimony, to which defendant entered a general objection, the State was given the benefit of hearsay evidence — material but incompetent —, which tended to show that defendant, knowing his wife had been shot after a "disturbance" and in "a transaction" with him, had fled the scene. The judge made no attempt to restrict this evidence to the impeachment of Ray. Had he done so, however, the character of the evidence made it highly improbable that the jury would have restricted it. In short, the prejudicial effect of such evidence outweighs its legitimate use and requires its exclusion.

[19] McCormick, Law of Evidence (1954) § 36 states the rule applicable to the situation here presented: "[I]f a party interrogates a witness about a fact which would be favorable to the examiner if true, and receives a reply which is merely negative in its effect on examiner's case, the examiner may not by extrinsic evidence prove that the first witness had earlier stated that the fact was true as desired by the enquirer. An affirmative answer would have been material and subject to be impeached by an inconsistent statement, but a negative answer is not damaging to the examiner, but merely disappointing, and may not be thus impeached. In this situation, the

policy involved is not the saving of time and confusion, . . . but the protection of the other party against the hearsay use by the jury of the previous statement."

Miller v. Commonwealth, 241 Ky. 818, 45 S.W. 2d 461, applies the foregoing rule. Witness *H* was asked if she had not heard the defendant say that he was going to kill deceased. She stated that she had not. The prosecution was then permitted to offer the testimony of witness *J* that *H* told him the defendant had said he was going to kill deceased. In awarding the defendant a new trial, the court said: "[A] witness who fails to testify to substantive facts cannot be contradicted by asking him if he had not stated such facts to another person out of court, and then proving by such person that the witness had made the statements out of court. Such procedure transforms mere hearsay into substantive evidence." *Id.* at 821, 45 S.W. 2d at 462.

An analogous case is *Woodroffe v. Jones,* 83 Me. 21, 21 A. 177. The plaintiff sued for personal injuries sustained in a fall on a defective walk. On cross-examination, the plaintiff's husband, who had given testimony material to her case, was asked if he had not previously warned the plaintiff about wearing high heels. He denied that he had done so. Whereupon, the defendant called a witness who, over objection, testified that the husband had said immediately after the accident " 'that he had told his wife about wearing such high-heeled boots.' " *Id.* at 21, 21 A. at 177. In awarding a new trial for the admission of this evidence, the court said:

"The testimony admitted is incompetent to prove, either that the plaintiff wore high-heeled shoes, or that her husband had cautioned her about wearing them, because it is hearsay; and yet, although it does not tend to prove any material fact in the case, and may, therefore, be said to be immaterial, it is of that mischievous character likely to be taken by the jury to prove both, and cannot be considered harmless. . . . Nor is the testimony admissible as contradicting the denial of the witness, and thereby tending to impeach his credibility; for the witness testified to a negative that had no probative force in the case; and his testimony, sought to be contradicted, was entirely irrelevant and immaterial. . . ." *Id.* at 21-22, 21 A. at 177.

New trial.

COLONIAL PIPELINE COMPANY v. I. L. CLAYTON, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 10

(Filed 9 April 1969)

1. Taxation §§ 9, 31— sales tax — interstate transaction

A sales tax on interstate transactions violates the commerce clause of the Federal Constitution and is therefore void and uncollectible.

2. Taxation §§ 9, 15— sales tax — use tax — interstate commerce

A sales tax is a tax on the *freedom* of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and violates the commerce clause of the Federal Constitution; conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character.

3. Taxation §§ 9, 15, 31— use tax — interstate commerce

A use tax does not discriminate against interstate commerce since it is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce.

4. Taxation §§ 15, 31— use tax — constitutionality

The constitutionality of a use tax has long been established.

5. Taxation §§ 15, 31— purpose of use tax

The purpose of the use tax is to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the state.

6. Taxation §§ 15, 31— sales tax — use tax

A sales tax is assessed on the purchase price of property and is imposed at the time of sale; a use tax is assessed on the storage, use or consumption of property and takes effect only after such use begins.

7. Taxation §§ 15, 31— use tax — taxable event

Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption.

8. Taxation §§ 15, 31— use tax — transportation charges

Since the taxable event for assessment of the use tax occurs after purchase and after transportation into the taxing state for storage, use or consumption, the state is at liberty to include transportation charges in the use tax base and has done so by enactment of G.S. 105-164.12.

9. Taxation §§ 15, 31— sales tax — taxable event

The taxable event for assessment of the sales tax occurs at the time of sale and purchase within the state. G.S. 105-164.4(1).

10. Taxation §§ 15, 31— sales tax — transportation charges

The retail price upon which the sales tax is paid by the purchaser necessarily takes into account the transportation charges that have been paid on the goods to bring them to the retail outlet in North Carolina where the sale takes place.

11. Taxation §§ 15, 31— sales tax — use tax — transportation charges

The net effect of including interstate transportation charges in the use tax base and excluding intrastate transportation charges from the sales tax base is to equalize the burden of the tax on property sold locally and property purchased out of state.

12. Taxation §§ 9, 15, 31— use tax on transportation charges — constitutionality

Statute providing for the inclusion in the use tax base of transportation charges paid by a purchaser for transporting tangible personal property from the point of purchase outside North Carolina to a point of use within this State when the purchaser takes title to the purchased property at the point of origin outside the State does not place a discriminatory burden on interstate commerce and is constitutional. G.S. 105-164.12.

13. Statutes § 5— construction of statutes

Where 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 in doubt, judicial construction is required to ascertain the legislative intent.

14. Taxation § 23— construction of tax statute

Where the meaning of a tax statute is doubtful, it should be construed against the state and in favor of the taxpayer unless a contrary legislative intent appears.

15. Taxation §§ 15, 31— use tax — cash discounts

Prior to July 1, 1967, the effective date of the amendment to G.S. 105-164.3(4) by 1967 Session Laws, ch. 1110, § 6, cash discounts allowed a purchaser for payment within a specified time were not properly included in the use tax base.

16. Statutes § 5— administrative interpretation

Where there is a conflict between the interpretation of an administrative agency and that of the courts, the latter will prevail.

17. Taxation § 23— construction of amendment to tax statute

In case of an isolated, independent amendment to the tax law, the presumption is fairly strong that a change in substance, not a clarification, was intended.

18. Limitation of Actions § 2— applicability to sovereign

The statute of limitations set forth in G.S. 105-241.1(e) runs against the sovereign since it is expressly named therein.

19. Taxation § 31— underpayment of use taxes — statute of limitations

Where taxpayer filed timely use tax returns and remitted the amounts covered by the returns, G.S. 105-241.1(e) bars an action by the Commissioner of Revenue for underpayment of use taxes which accrued more than three years prior to the date that notice of assessment for underpayment of use taxes was furnished to the taxpayer.

PLAINTIFF appealed to the Court of Appeals from judgment of *Hobgood, J.,* at the September 1968 Non-Jury Civil Assigned Session, Superior Court of WAKE County. Thereafter, plaintiff petitioned that the case be certified for transfer to the Supreme Court before determination by the Court of Appeals. We allowed the petition pursuant to the provisions of G.S. 7A-31.

Plaintiff conceded at the trial, following an audit and after certain adjustments, that no relief was due it upon its original complaint. Defendant asserted a counterclaim based on the audit, and the contest is now confined solely to defendant's right to recover thereon. The facts, most of which have been stipulated, may be summarized as follows:

1. Plaintiff is a Delaware corporation with its principal office in Atlanta, Georgia. It is engaged in the business of interstate transportation of petroleum products by pipeline.

2. Defendant is the Commissioner of Revenue of the State of North Carolina.

3. During October, November and December of 1962 and April and May of 1963, plaintiff purchased large quantities of steel pipe to be used in the construction of a petroleum products pipeline in the State of North Carolina.

4. The purchases of steel pipe were made in states other than North Carolina, and, under the terms of purchase, title to said pipe passed to plaintiff at points of origin outside North Carolina. The costs of transporting said pipe into North Carolina were paid by plaintiff. The suppliers billed plaintiff for the full amount of the sales price but allowed a discount therefrom only in case plaintiff paid for the merchandise within a specified period of time. In many instances, plaintiff availed itself of this discount by paying the bills within the specified time.

5. Plaintiff filed timely use tax reports for the months of October 1962 through May 1963 and made timely use tax payments to the State of North Carolina for said months as follows:

Month Reported	*Report Date*	*Total Tax Paid*
October 1962	11-12-62	$41,145.24
November 1962	12-11-62	69,155.67
December 1962	1-14-63	7,093.45
April 1963	5-14-63	76,191.91
May 1963	6-12-63	66,181.56

6. On or about November 14, 1965, plaintiff applied to defendant for a refund of the following amounts of tax paid on transportation charges during the months indicated:

Month Reported	*Date Tax Payment Due*	*Use Tax Paid on Transportation Charges*
October 1962	November 15, 1962	$ 2,355.28
November 1962	December 15, 1962	3,695.91
December 1962	January 15, 1963	138.61
April 1963	May 15, 1963	3,070.62
May 1963	June 15, 1963	3,765.89

7. On or about April 7, 1966, the defendant, after hearing, denied said application for refund. Plaintiff thereupon instituted this action to recover the use tax paid on transportation charges.

8. Defendant conducted an audit of plaintiff's records whereby it was determined that plaintiff had underpaid its sales and use tax to the State during the period of October 1962 through May 1966. Plaintiff was furnished a copy of the audit and agreed that certain amounts were due and payable and thereupon paid the additional sum of $26,934.53 as sales and use tax incurred during that period. This left an unpaid balance on the claim of the State in the amount of $28,503.33, representing the State's asserted use tax on transportation charges and cash discounts for said period. Defendant amended his answer to allege a counterclaim for this amount, and plaintiff abandoned its original claim.

9. On November 16, 1966, following the audit of plaintiff's books, defendant sent plaintiff the following notice:

"NOTICE OF SALES and/or USE TAX ASSESSMENT

TAXPAYER: DATE NOVEMBER 16 1966
PERIOD 10 1 62/5 31 66

COLONIAL PIPELINE CO FILE NUMBER 901 9 101 6102
3390 PEACHTREE ROAD NE COUNTY FOREIGN
ATLANTA GA

TYPE OF ASSESSMENT:

AS PER AUDIT COPY FURNISHED TAXPAYER

11 10 66 BY MESSRS F A LOVE D O WILLIAMSON & B C MCLAMB

TAX DUE	$488,786.44
LESS TAX PREVIOUSLY PAID	$434,110.92
BALANCE TAX DUE	$ 54,675.52S
PLUS PENALTY	$ 5,746.16
PLUS INTEREST	$ 11,223.32
TOTAL TAX, PENALTY & INTEREST DUE	$ 71,645.00S
LESS PAYMENT ON COMPLETION OF AUDIT	$.....
BALANCE DUE	$ 71,645.00*

.....

AUDIT ADJ TO CORRECT ERROR FOR MAY 1966

You are hereby notified that an assessment for sales/or use tax, plus penalty and interest is proposed to be made against you in the amount indicated above.

This assessment is proposed pursuant to G.S. 105-241.1. If you desire a hearing before the Commissioner of Revenue on this assessment, the request for such hearing must be submitted in writing to the Director of the Sales and Use Tax Division within 30 days after the date on which this notice was mailed or, if served upon you by a representative of the Commissioner of Revenue, within 30 days after the date of such personal service. The application for hearing MUST BE MADE IN WRITING and must set forth in detail the bases for your objections to the assessment. Unless such application for hearing is filed within the time stated, this proposed assessment shall become final and conclusive."

The audit on which this notice of assessment was based was amended January 9, 1967, to indicate that the balance due for said period was $63,014.32, and a copy of the amended audit was furnished plaintiff on that date. Defendant waived the penalties previously

asserted and plaintiff paid the adjusted assessment except the portion based on transportation charges and cash discounts.

10. Defendant asserts in his counterclaim that $21,609.69 is due as use tax on transportation charges and $6,893.64 is due as use tax on cash discounts, a total of $28,503.33. These sums constitute the full net amount now at issue in this case exclusive of interest. The total figure is not in dispute, but plaintiff contends the entire amount is illegal and uncollectible.

11. Plaintiff and defendant have stipulated that if the transportation charges and cash discounts are properly includable in the North Carolina use tax base, then plaintiff has underpaid its use tax liability to the State for the period October 1, 1962, through May 31, 1966, by the sum of $28,503.33; in which case, defendant is entitled to recover that amount plus interest as provided by law, subject only to such adjustments, if any, as may be required by any applicable statute of limitations. If such transportation charges and cash discounts are not properly includable in the North Carolina use tax base, then plaintiff has paid in full its use tax liability to the State for the period in question and defendant is not entitled to recover anything in this action.

Plaintiff contends (1) that imposition of the use tax on transportation charges places an unequal burden on interstate commerce and contravenes both the State and Federal Constitutions; (2) that imposition of the use tax on cash discounts is not authorized by G.S. 105-164.3(4); and (3) that more than three years elapsed after the date upon which a tax return was required by law to be filed and before an assessment was made and therefore that portion of the claim based on transactions prior to November 16, 1963, is barred by the three-year statute of limitations.

Jury trial was waived by both parties. The trial court heard oral testimony in addition to the stipulations, found facts and made conclusions of law. Judgment was thereupon entered decreeing that plaintiff's action be dismissed and that defendant Commissioner of Revenue have and recover of plaintiff the sum of $28,503.33 with interest thereon as provided by law and court costs. From this judgment plaintiff appealed.

Jordan, Morris and Hoke by John R. Jordan, Jr.; Jack Vickery and Howard D. McCloud (Atlanta, Georgia), Attorneys for plaintiff appellant.

Robert Morgan, Attorney General, and Myron C. Banks, Assistant Attorney General, for the defendant appellee.

HUSKINS, J.

The determinative questions involved in this action are primarily questions of law and may be stated as follows:

1. Are transportation charges paid by a purchaser for transporting tangible personal property from the point of purchase outside North Carolina to a point of use within this State properly includable in the North Carolina use tax base when the purchaser takes title to the purchased property at the point of origin outside the State, causes said property to be transported into the State and stores, uses or consumes said property so as to become liable for North Carolina use tax?

2. Are cash discounts properly includable in the North Carolina use tax base when the seller bills the purchaser for the full amount of the sales price but allows a cash discount when goods are paid for within a specified period of time, and the purchaser takes the discount by paying for the goods within the time specified and uses, stores, or consumes the property in this State so as to become liable for the North Carolina use tax?

3. Is any portion of defendant's counterclaim barred by any applicable statute of limitations?

The statute which imposes a sales and use tax on transportation charges reads as follows: "Freight delivery, or other like transportation charges connected with the sale of tangible personal property are subject to the sales and use tax if title to the tangible personal property being transported passes to the purchaser at the destination point. Where title to the tangible personal property being transported passes to the purchaser at the point of origin, the freight or other transportation charges are not subject to the sales tax. For the purposes of this section it is immaterial whether the retailer or purchaser actually pays for any charges made for transportation, whether the charges were actually paid by one for the other, or whether a credit or allowance is made or given for such charges. Nothing in this section shall operate to exclude from the use tax any freight delivery or other like transportation charges. *Such charges shall be included as a portion of the cost price and subject to the use tax.*" (Emphasis ours.) G.S. 105-164.12.

[1, 2] The commerce clause of the Federal Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8. A sales tax on interstate

transactions violates the commerce clause and is therefore void and uncollectible. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546, 115 A.L.R. 944; *McLeod v. Dilworth Co.,* 322 U.S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023. "While a sales tax and a use tax in many instances may bring about the same result, they are different in conception. They are assessments upon different transactions and are bottomed on distinguishable taxable events. . . . A sales tax is a tax on the freedom of purchase and, when applied to interstate transactions, it is a tax on the privilege of doing interstate business, creates a burden on interstate commerce and runs counter to the commerce clause of the Federal Constitution. . . . Conversely, a use tax is a tax on the enjoyment of that which was purchased after a sale has spent its interstate character." *Johnston v. Gill, Comr. of Revenue,* 224 N.C. 638, 643, 32 S.E. 2d 30, 33.

[3] A use tax "does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end." *McGoldrick v. Berwind-White Co.,* 309 U.S. 33, 49, 84 L. Ed. 565, 60 S. Ct. 388.

[4] In *Henneford v. Silas Mason Co.,* 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524, a Washington statute subjected every retail sale of tangible personal property made in that state to a 2% sales tax. It also imposed a compensating tax on the privilege of using within the state any article of tangible personal property purchased at retail, at the rate of 2% of the purchase price, *including in such price the cost of transportation from the place where the article was purchased.* But the use tax did not apply to the use of any article which had already been subjected by the laws of Washington or any other state to a sales or use tax equal to or in excess of 2%. If the article had already been taxed at less than 2%, the Washington use tax rate was measured by the difference. This statute was attacked on the ground that it taxed the operations of interstate commerce and discriminated against such commerce unlawfully. Held: "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. Things acquired or transported in interstate commerce may be subjected to property tax, non-discriminatory in its operation, when they have

become part of the common mass of property within the state of destination. . . . For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. . . . The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. . . . A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate." Accord, *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 85 L. Ed. 888, 61 S. Ct. 586, 132 A.L.R. 475. See also Annot.: 129 A.L.R. 222. Thus, the constitutionality of a use tax has long been determined.

Here, however, plaintiff complains that transportation charges *are not* included in the sales tax base when a sales tax is imposed on in-state sales with title passing at point of origin, while transportation charges *are* included in the use tax base when a use tax is imposed on the use, storage or consumption in this state of property purchased out of state with title passing at point of origin. Plaintiff contends this results in an unconstitutional discrimination against interstate commerce. We now examine the validity of this contention.

[5] Loss of business by local merchants because residents in the taxing state went outside to make tax-free purchases caused many states, including North Carolina, to resort to the use tax. 47 Am. Jur., Sales and Use Taxes, § 42. The legislative history of our sales and use tax discloses that when our sales tax was imposed in 1933, it tended to encourage residents to make out-of-state purchases to escape payment of the tax. As a result, the legislature enacted the use tax in 1937 intending by it to impose the same burdens on out-of-state purchases as the sales tax imposes on purchases within the state. *Robinson & Hale, Inc. v. Shaw, Comr. of Revenue,* 242 N.C. 486, 87 S.E. 2d 909; *Johnston v. Gill, supra.*

[6-8] A sales tax is assessed on the purchase price of property and is imposed at the time of sale. A use tax is assessed on the storage, use or consumption of property *and takes effect only after such use begins. Hosiery Mills v. Clayton, Comr. of Revenue,* 268 N.C. 673, 151 S.E. 2d 574. Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. *McGoldrick v. Berwind-*

White Co., supra. The property has then come to rest, forms a part of the common mass of property within the taxing state, and the taxable moment is at hand. *Watson Industries v. Shaw, Comr. of* Revenue, 235 N.C. 203, 69 S.E. 2d 505; *Southern Pacific Co. v. Gallagher,* 306 U.S. 167, 83 L. Ed. 586, 59 S. Ct. 389. Thus, the taxable event for assessment of the use tax occurs after purchase and after transportation of the property into the taxing state for storage, use or consumption. Hence, the state is at liberty, if it pleases, to include transportation charges in the use tax base and has done so by enactment of G.S. 105-164.12. Such inclusion was approved in principle in *Henneford v. Silas Mason Co., supra.*

[9-11] On the other hand, the taxable event for assessment of the sales tax occurs at the time of sale and purchase within the state. G.S. 105-164.4(1). No transportation charges have been incurred by the *purchaser* at that moment. The retail price upon which the sales tax is paid by the purchaser necessarily takes into account the transportation charges that have been paid on the goods to bring them to the retail outlet in North Carolina where the sale takes place. *Gee Coal Co. v. Dept. of Finance,* 361 Ill. 293, 197 N.E. 871, 102 A.L.R. 766; *State v. Menefee Motor Co.,* 18 La. App. 694, 139 So. 61; Annot.: 102 A.L.R. 768. Thus, the net effect of including interstate transportation charges in the use tax base and excluding intrastate transportation charges in the sales tax base is to equalize the burden of the tax on property sold locally and property purchased out of state. "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford v. Silas Mason Co., supra* at 584.

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 10 L. Ed. 2d 202, 83 S. Ct. 1201, relied on by plaintiff, is distinguishable on the facts. There, Halliburton manufactured certain oil well equipment at its place of business in Oklahoma and assigned the equipment to field camps in Louisiana for use. In its Louisiana tax returns, Halliburton paid use taxes upon the value of the raw materials and semi-finished and finished articles used in manufacturing the equipment units. *The value of labor and shop overhead attributable to assembling the units was not included.* It was admitted by stipulation of the parties that there would have been no Louisiana sales tax or use tax due upon the labor and shop overhead had the units been assembled in Louisiana rather than in Oklahoma. Never-

theless, the Louisiana Collector of Revenue assessed a deficiency of $36,238.43 in taxes, including interest, on the labor and shop overhead costs of assembling the units. The court held that "[e]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out of state. . . . The inequality of the Louisiana tax burden between in-state and out-of-state manufacturer-users is admitted. Although the rate is the same, the appellant's tax base is increased through the inclusion of its product's labor and shop overhead." The use tax was thereupon held invalid as discriminating against interstate commerce.

[12] The facts in *Halliburton* are not analogous to the facts in this case. Here, transportation charges are necessarily a part of the price a retailer pays for his goods. In turn, such charges become a part of the retail price upon which a sales tax is imposed. In such fashion transportation charges are part of the sales tax base. Equality is attained with respect to the use tax when transportation charges on out-of-state purchases are included as a part of the use tax base. The Constitution permits a state to distribute its tax requirements as it sees fit if the result, "taken in its totality is within the state's constitutional power." *Gregg Dyeing Co. v. Query,* 286 U.S. 472, 480, 76 L. Ed. 1232, 52 S. Ct. 631, 84 A.L.R. 831. Plaintiff has failed to show any substantial discrimination in fact. G.S. 105-164.12 is constitutionally sound and places no discriminatory burden on interstate commerce. We hold that the transportation charges here in question were properly included in the use tax base.

[15] This brings us to the second issue raised by plaintiff. Are cash discounts properly includable in the North Carolina use tax base when the seller bills the purchaser for the full amount of the sales price but allows a cash discount for payment within a specified period to time? G.S. 105-164.6(1), under which defendant seeks to tax cash discounts, imposes a use tax at the rate of 3% of the cost price of each item; and cost price is defined by G.S. 105-164.3(4) as "the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor or service costs, transportation charges or any expenses whatsoever." This statutory definition of cost price omits "cash discounts" from the factors *not* to be deducted in arriving at the cost price. The General Assembly rewrote the statute, effective July 1, 1967, and inserted "cash discounts" as one of the nondeductible items. Sess. Laws, ch. 1110, § 6 (1967). G.S. 105-164.3(4) now provides

that " 'cost price' means the actual cost of articles of tangible personal property without any deductions therefrom on account of the cost of materials used, *cash discounts,* labor or service costs, transportation charges or any expenses whatsoever." (Emphasis ours.) Plaintiff concedes that from and after the effective date of this amendment, cost price must be determined without deduction for cash discounts but contends that prior to July 1, 1967, the language of the statute required the use tax to be based upon the *actual cost,* as distinguished from the sale price, of articles used by plaintiff. We now examine the validity of this contention.

We are not concerned with whether the particular transaction in question constituted a "discount" as in cases involving trading stamps, trade-in allowances, trade discounts, and the like. Here, a *cash discount* was admittedly allowed in consideration of payment within a prescribed time. The question, then, is whether such cash discount should be deducted from the full amount of the sales price and excluded from the base on which the use tax is calculated. The answer is yes.

[13] In construing and interpreting the language of a statute we must be guided by the primary rule of construction that the intent of the legislature controls. 50 Am. Jur., Statutes, § 223; *Watson Industries v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505. Where the language of a statute is clear and unambiguous judicial construction is not necessary. Its plain and definite meaning controls. *Davis v. Granite Corp.,* 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.,* 229 N.C. 360, 49 S.E. 2d 797; *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2.

[14] Where the meaning of a tax statute is doubtful, it should be construed against the state and in favor of the taxpayer unless a contrary legislative intent appears. 51 Am. Jur., Taxation § 316; *State v. Campbell,* 223 N.C. 828, 28 S.E. 2d 499; *Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1; *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754. "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the

citizen." *Gould v. Gould,* 245 U.S. 151, 153, 62 L. Ed. 211, 38 S. Ct. 53.

[15-17] Considered in light of these rules, we hold that when G.S. 105-164.6(1) and G.S. 105-164.3(4) are read aright they mean that a use tax at the rate of 3% of *the actual cost,* as distinguished from the initial sales price, shall be assessed with no deductions allowed for cost of materials used, labor or service costs, transportation charges or any other expenses. This seems to be the meaning, purpose and intent of these statutes. Cash discounts are not a part of the statutory tax base. To say, then, that *the actual cost* of an article includes the sum embraced in a cash discount which is neither paid by the purchaser nor received by the seller is to interpolate rather than interpret. Such interpretation would extend these statutes beyond the clear import of their language and resolve a doubtful meaning, if such it be, against the taxpayer. This is contrary to law. We are not unmindful of an administrative interpretation permitting the use tax to be applied to cash discounts. Such interpretations often provide significant aid to statutory construction and may be considered by the courts. Even so, they are not controlling. *Rubber Co. v. Shaw, Comr. of Revenue,* 244 N.C. 170, 92 S.E. 2d 799; *Bottling Co. v. Shaw, Comr. of Revenue,* 232 N.C. 307, 59 S.E. 2d 819; *Valentine v. Gill, Comr. of Revenue,* 223 N.C. 396, 27 S.E. 2d 2. And where there is conflict between the interpretation of an administrative agency and that of the courts, the latter will prevail. *Campbell v. Currie, Comr. of Revenue,* 251 N.C. 329, 111 S.E. 2d 319. The fact that the legislature amended the definition of "cost price" in 1967 to list cash discounts among the items not to be deducted when calculating actual cost is, nothing else appearing, a strong indication that the General Assembly considered such discounts deductible prior to the amendment. In case of an isolated, independent amendment to the tax law, as here, the presumption that a change in substance — not a clarification — was intended is fairly strong. *Oklahoma Tax Commission v. Stanolind Pipe Line Co.,* 113 F. 2d 853 (10th Cir. 1940).

In *Standard Oil Co. v. State,* 283 Mich. 85, 276 N.W. 908 (1937), sales taxes were assessed by the state on the basis of the gross amount of plaintiff's sales, including the amounts which plaintiff had given in cash discounts. Plaintiff sued for recovery of taxes which it had paid on cash discounts under such an assessment. The Michigan tax law, like ours, contained no specific provision concerning cash discounts. The Court said: ". . . [I]n the case of a cash discount, the seller gives the buyer an option to pay either one of

two prices, viz.: The price less discount if paid within a specified time or the price without discount if not paid within such time. . . . In our opinion a cash discount, if taken by the customer, is no part of the 'gross proceeds' of a retail sale. . . ." *A fortiori,* a cash discount is no part of the actual cost to the purchaser.

In *Napier v. John V. Farwell Co.,* 60 Colo. 319, 153 Pac. 694, the court defined *discount* as "an abatement from the face of the account, and the remainder is the actual purchase price of the goods charged in the account. A purchaser entitled to discounts never owes the face of the bills. . . . His debt is the net of the bills after the agreed discount has been deducted. . . ." This is in accord with our view. We hold that cash discounts should be excluded from the base on which the use tax is calculated. Decisions to the contrary are not persuasive. See *Frank J. Klein & Sons, Inc. v. Comptroller of Treasury,* 233 Md. 490, 197 A. 2d 243.

[19] Is any portion of defendant's counterclaim barred by lapse of time? Plaintiff applied under G.S. 105-266.1(a) for a refund of use taxes paid on transportation charges. Defendant conducted a hearing on the application and denied the refund. In lieu of petitioning for administrative review by the Tax Review Board under G.S. 105-241.2, plaintiff then elected to bring this action for recovery of the alleged overpayment, as was its right, under G.S. 105-266.1(c). Plaintiff now concedes it is not entitled to any refund so this aspect of the case is moot. Hence, statutes governing suits to recover an *overpayment* of taxes, G.S. 105-266.1 and G.S. 105-267, are no longer pertinent. We are now concerned with alleged *underpayment* of taxes and with the statutes relating thereto.

[18] Defendant, Commissioner of Revenue, now brings suit, i.e., his counterclaim, for additional use taxes. His first audit of plaintiff's books was completed about November 10, 1966, and indicated plaintiff owed a balance of $71,645.00 tax, penalty and interest for the period October 1962 through May 1966. A notice of assessment for this amount was furnished plaintiff under date of November 16, 1966. Further audit amendments and adjustments and additional payments by plaintiff eliminated all sums in controversy save that portion of the assessment based on a 3% tax on transportation charges and cash discounts which plaintiff refused to pay. Defendant amended his answer to allege a counterclaim for recovery of that part of the assessment. The counterclaim is obviously the unpaid portion of the assessment which was levied under G.S. 105-241.1. That statute therefore applies to this recovery. Subsection (e) thereof provides, in pertinent part, that "[w]here . . . a return

has been filed and in the absence of fraud, the Commissioner of Revenue shall assess any tax or additional tax due from a taxpayer within three (3) years after the date upon which such . . . return is filed or within three (3) years after the date upon which such . . . return was required by law to be filed, whichever is the later." This statute of limitations runs against the sovereign since it is expressly named therein. *Wilmington v. Cronly,* 122 N.C. 388, 30 S.E. 9; *Charlotte v. Kavanaugh,* 221 N.C. 259, 20 S.E. 2d 97; *Fertilizer Co. v. Gill, Comr. of Revenue,* 225 N.C. 426, 35 S.E. 2d 275.

[19] Plaintiff was required to file a return on or before the 15th day of the month next succeeding the month in which the tax accrued and remit the amount of tax due for the month covered by the return. G.S. 105-164.16 and G.S. 105-164.17. This was done. It thus appears, and we hold, that the Commissioner of Revenue can make no assessment in this case which extends to use taxes incurred more than three years prior to November 16, 1966. All use taxes accruing prior to November 16, 1963, are barred by G.S. 105-241.1(e). Taxes which cannot be legally assessed cannot be legally recovered.

In view of the conclusions reached, a discussion of the remaining questions raised becomes unnecessary.

The case is remanded to the superior court for entry of judgment consistent with this opinion.

Error and remanded.

MRS. ESTER BYERS, WIDOW AND ADMINISTRATRIX OF THE ESTATE OF WEAVER BYERS, DECEASED EMPLOYEE v. NORTH CAROLINA STATE HIGHWAY COMMISSION, EMPLOYER SELF-INSURER, STANDARD CONCRETE PRODUCTS COMPANY, THIRD PARTY TORT-FEASOR

No. 12

(Filed 9 April 1969)

1. Master and Servant § 89— workmen's compensation — distribution of recovery against third party tortfeasor

Where an employee subject to the Workmen's Compensation Act is injured or killed as a result of the negligence of a third party, recovery for injury or death in a tort action against the third party must be distributed by the Industrial Commission according to the order of priority set out in G.S. 97-10.2(f)(1).

2. Master and Servant § 96— appeal of Industrial Commission decision — scope of review

In appeals from the Industrial Commission, the superior court sits as

a court of appeals and as such may determine upon proper exceptions that the facts found by the Industrial Commission were or were not supported by competent evidence; that the findings so supported do or do not sustain the legal conclusions and the award of the Industrial Commission.

3. Master and Servant § 96— appeal of Commission decision — scope of review

In case the findings of the Industrial Commission are insufficient upon which to determine the rights of the parties, the court may remand the proceeding to the Commission for additional findings; in no event may the court make findings of its own.

4. Master and Servant § 89— distribution of wrongful death recovery — appeal — jurisdiction of superior court

On appeal to the superior court from an order of the Industrial Commission directing that the entire amount recovered in a wrongful death action brought by the administratrix of the estate of the deceased employee be paid to the employer in satisfaction of its subrogated rights under G.S. 97-10.2(f)(1)(c), the superior court is without authority to make independent findings of fact and, based thereon, to order distribution to the administratrix rather than to the subrogee.

5. Master and Servant § 89— distribution of wrongful death recovery

Recovery in a wrongful death action is not exempt from disbursement by the Industrial Commission under G.S. 97-10.2(f)(1)(c) where the Workmen's Compensation Act is applicable to the deceased employee.

6. Master and Servant § 89— wrongful death recovery by administratrix — employer's right to subrogation — failure to participate in recovery

Employer, by its failure to participate in the trial and appeal of a wrongful death action brought by the administratrix of the estate of the deceased employee, did not forfeit its subrogation right to be reimbursed out of the recovery from the third party whose negligence caused the death, since, the suit having been brought within one year from the employee's death, his personal representative had exclusive control of the proceedings against the negligent third party.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed in this case on December 11, 1968 and reported in 3 N.C. App. 139.

Robert Morgan, Attorney General; Harrison Lewis, Deputy Attorney General; Fred P. Parker, III, Trial Attorney, for the Respondent-appellee.

Hayes & Hayes by Kyle Hayes, for the plaintiff-appellant.

HIGGINS, J.

The facts controlling decision in this case are not in dispute. On and prior to May 25, 1965, Weaver Byers was a regular employee of the North Carolina State Highway Commission. Both employer and employee were subject to, and their employment relations were governed by, the North Carolina Workmen's Compensation Act. The employer was a self-insurer.

On May 25, 1965, Weaver Byers was injured when the highway bridge on which he was at work collapsed. He died the following day as a result of his injuries. The Highway Commission admitted liability under the Workmen's Compensation Act. Under orders of the North Carolina Industrial Commission, the employer paid hospital and burial expenses, and is continuing to pay $37.50 per week to the employee's dependents. The Highway Commission's outlay on account of Byers' death will exceed $12,000.

Within one year after the death of Weaver Byers, his widow, administratrix of his estate, instituted in the Superior Court of Wilkes County a wrongful death action against Standard Concrete Products Company, alleging her intestate's death was proximately caused by the actionable negligence of the defendant as a responsible third party and that by reason thereof the estate had been damaged in the sum of $50,000. Specifically, she alleged the bridge on which her husband was at work collapsed when the agent of the defendant attempted to drive a truck load of concrete, total weight 40,000 lbs., over the bridge which he knew was designed to carry a load not in excess of 20,000 lbs.

The wrongful death action came on for trial at the May-June, 1966 Civil Session, Wilkes Superior Court. At the conclusion of the plaintiff's evidence, the court sustained the defendant's motion for compulsory nonsuit. From the judgment dismissing the action, the plaintiff appealed. This Court reversed the judgment and remanded the cause to the Superior Court for trial. 268 N.C. 518. Although notified of the trial in the wrongful death action and the appeal from judgment of nonsuit, nevertheless, the Highway Commission failed to participate or to render assistance in prosecuting the appeal.

After this Court remanded the cause, the parties signed a consent judgment and the defendant, according to the agreement, paid into court the sum of $7,500 in full settlement of all liability to the estate. In consideration of the settlement, the Highway Commission executed to Standard Concrete Products Company a release from all liability.

Mrs. Byers, administratrix, filed a petition before the Industrial Commission requesting an order: (1) approving the settlement; and (2) adjudging the net recovery belonged to her as personal representative; or in the alternative, a finding the Highway Commission, by failing to assist in prosecuting the appeal from the nonsuit judgment, had abandoned its right to claim any of the proceeds arising from the settlement.

The Chairman of the Industrial Commission, and on further review the full Commission, ordered that the amount of recovery, less cost and attorney's fee, be paid to the Highway Commission as subrogee. On appeal from the Industrial Commission's order, Judge Gambill, in the Superior Court, purported to make extensive findings of fact, and based thereon, reversed the judgment of the Industrial Commission and directed that the remaining funds, after payment of cost and attorney's fee, be paid to the administratrix "for distribution among the heirs at law of the deceased". The Highway Commission, as subrogee, appealed to the North Carolina Court of Appeals which reversed the judgment of the Superior Court and remanded the cause for distribution according to the award of the Industrial Commission.

[1] The order of the Industrial Commission and the decision of the Court of Appeals are clearly correct. They followed precisely the requirements of G.S. 97-10.2(f)(1)(a)(b)(c). The Superior Court fell into error in two particulars. First, the court failed to realize that in case an employee subject to the Workmen's Compensation Act is injured or killed as a result of the negligence of a third party, recovery for the injury or death "shall be distributed by order of the Industrial Commission for the following purposes and in the following order of priority:" (a) payment of court costs; (b) payment of the attorney's fee; (c) reimbursement of the employer for all benefits by way of compensation or medical treatment expenses paid or to be paid by the employer under award of the Industrial Commission; (d) payment of any remaining amount to the employee or his personal representative. Since the passage of the Compensation Act, this Court has held recovery from a responsible third party must be distributed by the Industrial Commission according to the order of priority set out in the Act. "The distribution of any recovery (in a tort action against a third party) is a matter for the Industrial Commission under G.S. 97-10.2(f)." *Spivey v. Wilcox Co.*, 264 N.C. 387, 141 S.E. 2d 808; *Cox v. Transportation Co.*, 259 N.C. 38, 129 S.E. 2d 589.

[2-4] Second, the Superior Court undertook to make independent

findings of fact; and based thereon, attempted to reverse the award of the Industrial Commission, and to order distribution to the personal representative rather than to the subrogee. The Superior Court, as a court of appeals in these matters, exceeded its power.

It has been considered settled law in this State that in appeals from the Industrial Commission, the Superior Court sits as a court of appeals. As such it may determine upon proper exceptions that the facts found by the Industrial Commission were, or were not supported by competent evidence; that the findings so supported do, or do not sustain the legal conclusions and the award of the Industrial Commission. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272; *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706; *Reed v. Lavendar*, 206 N.C. 898, 172 S.E. 877. In case the findings are insufficient upon which to determine the rights of the parties, the court may remand the proceeding to the Industrial Commission for additional findings. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439; *Thomason v. Cab Co., supra.* In no event may the court make findings of its own. *Brice v. Salvage Co., supra; Ussery v. Cotton Mills*, 201 N.C. 688, 161 S.E. 307. " 'In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether . . . there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions.' " *Mason v. Highway Commission*, 273 N.C. 36, 159 S.E. 2d 574; *Bailey v. Department of Mental Health*, 272 N.C. 680, 159 S.E. 2d 28; *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760. Obviously the Superior Court, on appeal, could neither find facts nor adjudicate matters within the jurisdiction of the Industrial Commission. *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799.

[5, 6] We do not find authority either in the statutes or in our case law for holding recovery in a wrongful death action is exempt from disbursement by the Industrial Commission if the Workmen's Compensation Act is applicable to the injured employee. Likewise, we find nothing in the record which will support the contention the Highway Commission as subrogee has waived its right to be reimbursed out of the recovery from the third party whose negligence caused the injury. By failing to participate in the appeal, the Highway Commission did not forfeit its right of subrogation. Suit having been brought within one year from his death, the personal representative of the deceased employee had the exclusive control of the trial procedure against the negligent third party. This right of control is recognized in the Workmen's Compensation Act in wrong-

ful death cases. The third party whose negligence caused the death may be held responsible for the total pecuniary loss to the estate. The net recovery from the responsible third party (except that which must be returned to the subrogee for its outlay) goes to the personal representative under G.S. 97-10.2(f)(1)(d). The compromise settlement in this case was insufficient to reimburse the Highway Commission for its outlay. Nothing remained to be distributed to the personal representative. The Highway Commission did not waive its right to the fund as subrogee by permitting the personal representative to exercise exclusive control of the trial in the wrongful death action. Failure to act is not a waiver unless someone has been misled to his prejudice. *Hawkins v. Finance Co.*, 238 N.C. 174, 77 S.E. 2d 669; *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114.

The decision of the North Carolina Court of Appeals is

Affirmed.

NANNIE D. VINSON v. MINNIE V. CHAPPELL, ADMINISTRATRIX C.T.A. OF JOHN A. VINSON, DECEASED; MINNIE V. CHAPPELL, INDIVIDUALLY; LIZZIE SASSER, MERL C. McCLENNY, ADMINISTRATOR OF THE ESTATE OF DAVID J. VINSON, DECEASED; SALLIE H. VINSON, WIDOW; MARGARET V. McCLENNY AND FRANCES V. BRYANT

No. 13

(Filed 9 April 1969)

1. Wills § 61— right of surviving spouse to dissent from a will

Where testator leaves surviving him a wife and children, the wife has a right to dissent from testator's will if the aggregate value of the provisions under his will for her benefit, when added to the value of the property or interests in property passing in any manner outside the will to her as a result of his death, was less than her intestate share. G.S. 30-1.

2. Wills § 61— applicability of G.S. 30-3(b)

G.S. 30-3(b) applies to limit the share of a surviving spouse to one-half the intestate share only when (1) a married person dies testate survived by his spouse, (2) the surviving spouse, being entitled under G.S. 30-1 to do so, dissents, (3) the surviving spouse is a "second or successive spouse," (4) no lineal descendants by the second or successive marriage survive the testator, and (5) the testator is survived by lineal descendants by his former marriage.

3. Wills §§ 30, 61— presumptions — right to dissent from will

In making a will a husband or wife is presumed to have knowledge of and to have taken into consideration the statutory right of his spouse to dissent from the will.

4. Wills § 61— purpose of G.S. 30-3(b)

The intent of the Legislature in enacting G.S. 30-3(b) was to enable a person who has a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant.

5. Descent and Distribution § 1— right to take property by descent

The right to take property by descent is a mere privilege or creature of the law and is not a natural or inherent right, participation in the estate of a deceased person being by grace of the sovereign political power, which alone has any natural or inherent right to succeed to such property.

6. Descent and Distribution § 1— determination of heirs and distributees — applicable law

An estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor.

7. Descent and Distribution § 1— power of Legislature to determine who shall take by descent

The Legislature has the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act.

8. Wills § 1— right to make a will

The right to make a will is not an inherent or constitutional right, but is conferred and regulated by statute.

9. Wills § 61— right to dissent from will

The right of a husband or wife to dissent from the will of his spouse is conferred by statute and may be exercised at the time and in the manner fixed by statute.

10. Statutes § 4— construction — constitutionality

In considering the constitutionality of a statute, every presumption is to be indulged in favor of its validity.

11. Wills § 61— inferior rights in second or successive spouse who dissents from will — constitutionality

G.S. 30-3(b), which provides that a second or successive spouse who dissents from the will of his deceased spouse shall take only one-half the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no surviving lineal descendants by the second or successive marriage, *is held* not arbitrarily discriminatory and capricious so as to be violative of the due process provisions of the Federal and State Constitutions.

APPEAL by plaintiff under G.S. 7A-30(1) from decision (3 N.C. App. 348, 164 S.E. 2d 631) of the Court of Appeals.

John A. Vinson died testate on January 26, 1968. He and Nannie D. Vinson, plaintiff herein, were married on January 7,

1953, and thereafter lived together as husband and wife until John's death. She was John's second wife. No children were born of their marriage.

Three children were born of John's first marriage, two daughters and a son. John was survived by the two daughters. The son, who predeceased John, was survived by his widow. The two daughters of John and the widow of John's son are defendant's herein.

Nannie dissented from John's will. She asserts she is entitled, under the provisions of G.S. 30-3(a) and G.S. 29-14(2) to *one-third* of John's net estate. She asserts G.S. 30-3(b), the terms of which would restrict her to *one-sixth* of John's net estate, is void because violative of Article I, Section 17, of the Constitution of North Carolina and of the Fourteenth Amendment to the Constitution of the United States.

In the Superior Court of Wayne County, Judge Cowper, based on his conclusion of law that G.S. 30-3(b) "is a constitutional enactment as applied to the facts of this case," entered judgment that plaintiff "is entitled to one-sixth of the estate of John A. Vinson, deceased." Plaintiff appealed. The Court of Appeals affirmed Judge Cowper's judgment.

Herbert B. Hulse and Sasser, Duke & Brown for plaintiff appellant.

Futrelle & Baddour for defendant appellees.

BOBBITT, J.

Chapter 879, Session Laws of 1959, as amended, is now codified as Chapter 29, "Intestate Succession," of Volume 2A, Replacement 1966, of the General Statutes.

Chapter 880, Session Laws of 1959, as amended, was re-enacted by Chapter 849, Session Laws of 1965, and is now codified as Chapter 30, "Surviving Spouses," of Volume 2A, Replacement 1966, of the General Statutes.

The 1959 statutes were enacted June 10, 1959, and are applicable to estates of persons dying on or after July 1, 1960.

G.S. 29-14(2), the pertinent portion of the Intestate Succession Act, provides that the share of the surviving spouse, "(i)f the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children," shall be "one-third of

the net estate, including one-third of the personal property and a one-third undivided interest in the real property. . . ." If John had died intestate, Nannie, his surviving spouse, would be entitled to one-third of his net estate.

[1] Under G.S. 30-1, Nannie had the right to dissent from John's will if the aggregate value of the provisions under his will for her benefit, when added to the value of the property or interests in property passing in any manner outside the will to her as a result of his death, was less than her intestate share. *Bank v. Stone,* 263 N.C. 384, 386, 139 S.E. 2d 573, 575.

Although the record discloses the provisions of John's will, there is no evidence, finding or stipulation as to (1) the value of John's entire estate, or (2) as to the aggregate value of the benefits passing to Nannie under John's will, or (3) as to the value of the property or interests in property, if any, passing to Nannie in any manner outside the will as a result of John's death. However, defendants have not challenged Nannie's right to dissent; and, since all interested parties are competent and more than twenty-one years of age, our further consideration is based on the assumption that Nannie's dissent is in all respects valid.

G.S. 30-1 provides that "(a) spouse may dissent from his deceased spouse's will" if and when defined conditions exist. (For constitutional provisions and statutory enactments bearing upon a widower's right to dissent from his wife's will, see: *Dudley v. Staton,* 257 N.C. 572, 126 S.E. 2d 590; *Fullam v. Brock,* 271 N.C. 145, 155 S.E. 2d 737; also, 2 Lee, N. C. Family Law, § 216, including 1968 Cumulative Supplement.) G.S. 30-2 relates to the time and manner of such dissent. G.S. 30-3, relating to the effect of such dissent, is quoted below.

"§ 30-3. Effect of dissent. — (a) Upon dissent as provided for in G.S. 30-2, the surviving spouse, *except as provided in subsection (b) of this section,* shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one-half of the deceased spouse's net estate as defined in G.S. 29-2(3), which one-half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax. (Our italics.)

"(b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one-half of the amount provided by

the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

"(c) If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata unless the will otherwise provides."

[2] G.S. 30-3(b) applies only when these facts concur: (1) A married person, husband or wife, dies testate, survived by his (her) spouse. (2) The surviving spouse, being entitled under G.S. 30-1 to do so, dissents. (3) The surviving spouse is a "second or successive spouse." (4) No lineal descendants "by the second or successive marriage" *survive* the testator (testatrix). (5) The testator (testatrix) is survived by lineal descendants by his (her) former marriage.

[3] "In making a will a husband (or wife) is presumed to have knowledge of and to have taken into consideration the statutory right of his widow to dissent from the will. G.S. 30-1." *Keesler v. Bank*, 256 N.C. 12, 18, 122 S.E. 2d 807, 812.

When the facts listed above concur, the husband or wife disposes of his (her) property by will with the knowledge that his (her) surviving "second or successive spouse," if she (he) elects to dissent, will receive only one-half of what she (he) would receive if the decedent had died intestate.

Analysis of G.S. 30-3(b) discloses:

1. If the "second or successive spouse" is the decedent, and is not survived by a child or lineal descendant of a former marriage, if any, the surviving husband (wife), if he (she) elects to dissent, will receive the *full* intestate share of a surviving spouse. (Note: If Nannie had died and willed her property to persons other than John, John could have dissented from Nannie's will and by doing so would have received his *full* intestate share in her estate.) It would seem that, in a factual situation in which one spouse would be reduced to one-half of the share to which he or she would be entitled if the other died intestate, the rule as to *one-half* should be applied equally to both parties to the marriage.

2. The inferior rights of the surviving "second or successive spouse" do not depend upon whether a child was born of her (his)

marriage with the decedent; rather, they depend upon whether such child (or lineal descendant) *survives* the decedent.

3. G.S. 30-3(b) is applicable when the decedent is *survived* by a child or lineal descendant of a former marriage *even if* the decedent's will leaves nothing to such child or lineal descendant.

Whether G.S. 30-3(b) applies does not depend at all upon such considerations as: (1) The comparative durations of the first and second marriage; (2) whether the former marriage was terminated by death or by divorce; (3) the age(s) of the child or children of the former marriage at the time of the second or successive marriage; and (4) the age(s) of the child or children of the former marriage and their financial status at the time of the death of the decedent.

In *Tolson v. Young,* 260 N.C. 506, 133 S.E. 2d 135, where decision was based in substantial part on G.S. 30-3(b), the validity of this statute was not challenged on constitutional grounds or otherwise.

The constitutional question presented is whether G.S. 30-3(b), by providing inferior rights to a surviving "second or successive spouse," is arbitrarily discriminatory and capricious and therefore denies to plaintiff the substantive due process of law guaranteed by Article I, Section 17, of the Constitution of North Carolina, and by the Fourteenth Amendment to the Constitution of the United States.

The provisions of G.S. 30-3(b), as presently codified in Chapter 30 of Volume 2A, Replacement 1966, were enacted as part of Chapter 880, Session Laws of 1959. The reasons that impelled the inclusion of this unusual provision in the 1959 Act are unclear.

Our research indicates only two other States have statutes which provide that a surviving "second or other subsequent spouse" who, under somewhat similar circumstances, elects to take "against the will," receives less than such surviving spouse would receive if she (he) were a *first* spouse. Ind. Ann. Stat. § 6-301 (1953); Wyo. Stat. Ann. § 2-47 (1959).

In an article entitled, "Election, Dissent and Renunciation," by Professor W. Bryan Bolich, this statement appears: "This limitation on the amount a dissenter may receive could have either or both of two objectives: fostering freedom of testation or discouraging multiple marriages by making it financially less desirable to marry a widow or widower with issue by a prior marriage." 39 N.C.L.R. 17, *33* (1960-61).

Since the public policy of the State is primarily for legislative

determination, we express no opinion as to whether the law should discourage marriage with a widow or widower with issue by a prior marriage. Undoubtedly, by reason of G.S. 30-3(b), a testator (testatrix) who has a child or lineal descendant by a former marriage has greater freedom of testation *as against* a childless "second or successive spouse."

[4] As we read G.S. 30-3(b), the legislative intent was *to enable* a person who has a child or lineal descendant by a former marriage to make greater provision for such child or lineal descendant. True, the testator (testatrix) *is not required* to make greater provision *or any provision* for such child or lineal descendant notwithstanding the inferior rights of his (her) surviving "second or successive spouse." Presumably, the General Assembly considered (1) the natural inclination of a parent to make proper provision for his (her) child, and (2) the natural inclination of the surviving parent of a decedent's child to respond to the needs of such child, sufficient to justify the statutory classification embodied in G.S. 30-3(b).

Although not presented on this appeal, further consideration of G.S. 30-3(b) suggests interesting questions. In the article cited, Professor Bolich states: "The application of this limitation (G.S. 30-3(b)) to G.S. § 29-30 where the dissenting spouse elects instead of the intestate share a life estate in one-third of the decedent's real estate, including without regard to value the dwelling house and household furnishings, might be awkward. Would it be a life estate in one-sixth, including the dwelling and furnishings regardless of value?" Too, Nannie would be entitled to one third of John's estate had he died intestate. He did not die intestate but left a will. Under G.S. 30-1(a), Nannie's right to dissent depends upon whether the benefits to her on account of John's death under the will and outside the will aggregate less than "the intestate share of such spouse." While the right to dissent is related to the value of "the intestate share of such spouse," it is provided in G.S. 30-3(b) that, in the event of dissent, the surviving "second or successive spouse" will receive one-half of the intestate share. In Professor Bolich's phrase, reconciliation of these provisions "might be awkward."

The constitutional question is to be considered in the light of the well-established legal propositions stated below.

[5] "It is generally considered that the right to take property by descent is a mere privilege or creature of the law and not a natural or inherent right." 26A C.J.S., Descent and Distribution § 2. "The theory of the law is that any participation in the estate of a deceased person is by grace of the sovereign political power, which

alone has any natural or inherent right to succeed to such property." 23 Am. Jur. 2d, Descent and Distribution § 11. Our decisions are in accord: *Pullen v. Commissioners,* 66 N.C. 361, 363-364; *In re Morris Estate,* 138 N.C. 259, 262, 50 S.E. 682, 683; *Wilson v. Anderson,* 232 N.C. 212, 220, 59 S.E. 2d 836, 843, 18 A.L.R. 2d 951, 958, and s. c. on rehearing, 232 N.C. 521, 61 S.E. 2d 447, 18 A.L.R. 2d 959.

[6, 7] It is well settled that "an estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor." 23 Am. Jur. 2d, Descent and Distribution § 21, citing, *inter alia, Wilson v. Anderson, supra.* Accord: *Johnson v. Blackwelder,* 267 N.C. 209, 148 S.E. 2d 30. Moreover, as stated by Rodman, J., in *Bennett v. Cain,* 248 N.C. 428, 103 S.E. 2d 510: "The power of the Legislature to determine who shall take the property of a person dying subsequent to the effective date of a legislative act cannot be doubted."

[8] "The right to make a will is not a natural, inalienable, inherited, fundamental, or inherent right, and is not one guaranteed by the Constitution. The right to make a will is conferred and regulated by statute." *Fullam v. Brock, supra.* Accord: 94 C.J.S., Wills § 2; 57 Am. Jur., Wills § 153.

In *Fullam v. Brock, supra,* Parker, C.J., quotes with approval the following from Mr. Justice Jackson in *Irving Trust Co. v. Day,* 314 U.S. 556, 86 L. ed. 452, 62 S. Ct. 398: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

[9] The right of a husband or wife to dissent from the will of his (her) spouse is conferred by statute and may be exercised at the time and in the manner fixed by statute. *Bank v. Easterby,* 236 N.C. 599, 602, 73 S.E. 2d 541, 543.

[10] As indicated in our analysis of its provisions, G.S. 30-3(b) contains seeds of inequities, particularly where upon the death of one spouse the survivor upon dissent would receive only one-half of her (his) intestate share while upon the death of the other spouse the survivor would receive his (her) full intestate share. Even so, we are mindful that "(i)n 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. Objections to the provisions of G.S. 30-3(b) would seem to re-

late to their wisdom and fairness under particular circumstances rather than to constitutional limitations on the power of the General Assembly to enact these statutory provisions.

[11] We conclude that the legislative provisions defining the rights of a surviving "second or successive spouse" in a factual situation prerequisite to the application of G.S. 30-3(b) are not vulnerable to attack as unconstitutional on the ground they are arbitrarily discriminatory and capricious. Hence, based upon the legal principles stated, and the authorities cited, by Judge Britt in his opinion for the Court of Appeals, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE v. NAT VILLIAM WRIGHT

No. 15

(Filed 9 April 1969)

1. Criminal Law §§ 26, 135— double jeopardy — capital cases — life imprisonment at first trial — retrial

Where defendant was awarded a new trial by the Supreme Court after having been tried for the capital crime of rape and found by a jury to be guilty of rape with a recommendation of life imprisonment, the court at defendant's retrial properly denied defendant's plea in abatement by which he contended that he should not again be tried for his life, defendant having waived his protection against reprosecution for the same offense by his appeal and the vacated sentence not being a ceiling for punishment upon retrial.

2. Criminal Law §§ 76, 178— former appeal — admissibility of confession — law of the case

Where on former appeal of this case the Supreme Court passed upon the admissibility of inculpatory statements allegedly made by defendant to police officers, reconsideration by the Supreme Court of the admissibility of such statements at defendant's retrial is precluded by the doctrine of law of the case where the evidence relating to the admission of the statements in the retrial is substantially the same as that at the previous trial.

3. Criminal Law § 76— determination of admissibility of confession

The findings of fact by the trial judge upon the *voir dire* as to the admissibility of defendant's inculpatory statements to police officers, being supported by competent evidence, are binding on appeal and *are held* sufficient to support the court's conclusion that the statements were freely, voluntarily, knowingly and intelligently made.

4. Rape § 5— sufficiency of evidence

In this rape prosecution, defendant's motion for nonsuit is properly denied where the State's evidence tends to show that a rape was committed on the prosecutrix, that window screens were removed and prosecutrix' house was entered on the night of the alleged rape, that defendant admitted to police officers that he removed window screens from the house occupied by prosecutrix, entered the house and placed his hand upon the body of a woman lying on a bed, that a month after the alleged rape defendant was arrested on a peeping tom charge approximately two and one-half blocks from prosecutrix' house, and that when arrested defendant was wearing a baseball cap and galoshes similar to those described by prosecutrix as worn by her assailant.

5. Criminal Law § 112— necessity for instructions as to circumstantial evidence

In this rape prosecution, the court did not commit prejudicial error by failing to instruct the jury as to the rule of circumstantial evidence in absence of a request for such instructions where the State's evidence consisted mainly of direct evidence of the prosecutrix and the inculpatory statements of defendant, and the only circumstantial evidence offered was incidental and corroborative.

APPEAL by defendant from *Clark, J.*, at the 28 October 1968 Regular Criminal Session of DURHAM Superior Court.

Defendant was tried under a bill of indictment charging the crime of rape upon Mrs. Naomi Marie Byrd. This is defendant's third trial on this bill of indictment. At the first trial, during the January 1968 Regular Criminal Session, Durham Superior Court, before Hall, J., the jury found defendant guilty of rape with a recommendation for life imprisonment. Defendant appealed to this Court and was granted a new trial. *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581. Defendant's second trial on this charge resulted in a mistrial because the jury was unable to reach a verdict. At the third trial, the subject of this appeal, defendant was again found guilty as charged with a recommendation for life imprisonment.

The State offered evidence which tended to show that on the night of 22 July 1967 Mrs. Naomi Marie Byrd was at her home at 1112 Taylor Street in Durham, with her husband and her two and one-half year old child. About 11:15 p.m. Mrs. Byrd retired to her bedroom. Her child was already asleep in a separate bed located in her bedroom. Mr. Byrd was asleep on a couch in the living room where he and Mrs. Byrd had been watching a television movie. All the outside doors were closed and all the windows to the house had screens which were closed and hooked.

At approximately 12:15 a.m. Mrs. Byrd awakened and saw a

man standing beside her bed. At first she thought it was her husband coming to bed. When she realized that it was not her husband and started to raise up, the man put a sharp object to the left side of her neck and said: "Hush, Hush, if you make a fuss I will kill you." The man got on the bed and said, "Open up, open up." At this time the man had sexual intercourse with Mrs. Byrd. She was afraid for her child and her husband. After it was over and the man kept lying there for a second or two, Mrs. Byrd told him that, "My husband is going to get up early and go fishing." The man said, "O. K." and got up and walked out of the bedroom, straight down the hall, and through the den door. The hall was lighted by a light left on in the living room. Mrs. Byrd could see that the man was colored and was wearing a light shirt, dark pants, a cap similar to a baseball cap, and some type of galoshes or boots. After the man walked out, Mrs. Byrd awoke her husband and told him that someone had been in the house. Mr. Byrd searched the house but found nobody. He then called the police. Officer Sullivan of the Durham Police Department arrived at the Byrd residence at approximately 1:40 a.m. He found Mrs. Byrd to be very upset and in an emotional state of shock and advised her husband to take her to the hospital. Officer Sullivan, during the course of his investigation, found a screen to a window in the den and a screen to the window in the bathroom removed.

Mr. Byrd took Mrs. Byrd to the emergency room at Watts Hospital, where she was examined by Dr. T. F. Atkins, a specialist in gynecology and obstetrics. The examination revealed the presence of male sperm in Mrs. Byrd's vagina. Dr. Atkins found no evidence of forceful dilation of the vaginal orifice. No bruises or abrasions were found about her pelvis, and no abrasions were found on the left side of her throat.

On 20 August 1967, at 1:50 a.m., defendant Nat Villiam Wright was arrested on a peeping tom charge approximately two and one-half blocks from the Byrd residence. He was wearing a light shirt, dark pants, a baseball cap and galoshes. Wright was advised of his rights and placed in jail.

Detective Carl King of the Durham Police Department testified that at 10:00 a.m. of the same day Detective Upchurch and he questioned defendant Wright. At this point in the trial defendant requested a *voir dire* examination, whereupon the jury was excused.

On *voir dire* Detective King stated he advised defendant of his rights. Defendant then signed a standard waiver form waiving his right to counsel and agreeing to answer questions. During the ques-

tioning defendant complained of a headache and pains from an ulcerated stomach. Between 12:00 and 1:00 o'clock, defendant was placed in a line-up. According to Detective King, defendant orally consented to the line-up, but refused to sign any written waiver. Following the line-up, defendant was placed in a police car and driven to Taylor Street, where he was again questioned by Detectives King and Upchurch. While sitting in the car at Taylor Street, the street where Mrs. Byrd lives, Wright made certain incriminating statements to the detectives. After returning to the police station defendant saw his wife and his minister, Rev. Yelverton.

Rev. Frizelle Yelverton testified for defendant on *voir dire* that defendant's mental capacity was that of an eleven to twelve year old child, and that he was easily led. Rev. Yelverton further stated that "(h)e tries to please everybody. In my opinion he would do things or say things just to try to please somebody even if they weren't true." He also testified that Wright's general character and reputation in the community were good, and that he had never heard him read or seen him write.

The testimony of defendant's witness, Doris Sowell, generally supported that of Rev. Yelverton.

Defendant at this time introduced into evidence his medical report from Cherry Hospital, Goldsboro, North Carolina. The case history of the medical report stated that defendant claimed to have finished the ninth grade at age fifteen, and although he liked school, he had to stop to go to work; and that he averaged between $75 and $100 per week at his job. The objective findings of the clinical summary indicated that defendant was in good contact and that his speech was normal, except for a hesitancy due to tension; that the content of his thought was without abnormality; that he talked intelligently with perhaps a little too much philosophical discussion at times, although such discussion was not rambling or disorganized; that he was alert and tried so hard in testing that, to some extent, he handicapped his own performance; that he liked people and wanted them to approve; and that he had a mental deficiency lying in the upper moderate range, with an I.Q. of 62. There was no evidence of a thinking disorder or abnormality other than the mental deficiency indicated.

Based on the evidence offered during the *voir dire* examination the court made full and complete findings of fact and concluded that defendant's statements were "freely, voluntarily, knowingly and intelligently made" and admissible into evidence.

The examination of Detective King before the jury resumed.

King testified that while talking to defendant in the police car on Taylor Street defendant had pointed out Mrs. Byrd's house as the place he entered. According to King, defendant stated that he removed two screens from the windows of the house and entered the house through a window. He went into a room and touched a woman lying on a bed. He ran out the front door when she screamed. He did not rape her. Detective King also testified that defendant had no prior police record and that he had no attorney during the entire period of interrogation.

Detective Upchurch of the Durham Police Department testified that he had participated with Detective King in the interrogation of defendant, and his testimony tended to corroborate the testimony of Detective King.

At the conclusion of the State's evidence defendant's motion for nonsuit was denied. From a verdict of guilty with a recommendation for life imprisonment defendant appealed.

Attorney General Morgan and Assistant Attorney General Harrell for the State.

E. C. Harris, Jr., for defendant appellant.

BRANCH, J.

[1] Defendant assigns as error the trial judge's denial of his plea in abatement by which he contended that he should not be tried twice for his life.

Defendant relies heavily on *Green v. United States,* 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), where the United States Supreme Court held that a defendant, charged with first degree murder but convicted of second degree murder, received an implied acquittal of the charge of first degree murder which prevented retrial on that charge because to so do would place him twice in jeopardy. Wright contends that the interpretation of *Green v. United States, supra,* by the Fourth Circuit Court of Appeals in the case of *Patton v. North Carolina,* 381 F. 2d 636 (4th Cir. 1967), prohibited the State from seeking the death penalty at his retrial when he received life imprisonment at his first trial.

To here review, in depth, the pertinent principles of law would be unnecessary repetition since they have recently been clearly and fully stated by Sharp, J., in the case of *State v. Stafford,* 274 N.C. 519, 164 S.E. 2d 371. There the Court, in rejecting the holdings of Patton, *inter alia,* stated:

> 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, 14 S. Ct. 1192, 1195, 41 L. Ed. 300, 303 (1896).
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> . . .
>
> 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 this case defendant was not convicted of the greater offense, nor did he receive increased punishment. Therefore, since there is no basis for this assignment of error, it is overruled.

[2] Defendant by his second assignment of error contends that the trial court erred in admitting into evidence inculpatory statements purportedly made by him.

On the former appeal of this case this Court passed on the admissibility of the inculpatory statements purportedly made by defendant and in the opinion (*State v. Wright, supra*), *inter alia,* stated:

> 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.

In the case of *State v. Stone,* 226 N.C. 97, 36 S.E. 2d 704, the defendant excepted to the refusal of the court to grant his motion for nonsuit. The exception had been before the Court on a former appeal (*State v. Stone,* 224 N.C. 848, 32 S.E. 2d 651), and the Court in the second appeal stated:

> These exceptions are untenable for the reason that this case was before the Court on a former appeal (cite omitted) and the Court then said: "We think the evidence sufficient to warrant its submission to the jury." The evidence produced at this trial is substantially similar to the evidence produced at the former trial. Under these circumstances the question of nonsuit, or the sufficiency of the evidence to be submitted to the jury, the decision of the Court on the former appeal is decisive. *S. v. Lee,* 213 N.C. 319, 195 S.E. 785.

Accord: *State v. Peterson,* 226 N.C. 770, 40 S.E. 2d 362; *Jernigan v. Jernigan,* 207 N.C. 831, 178 S.E. 587. See also 5 Am. Jur. 2d, Appeal and Error, § 744, at 188 *et seq.*

The principle of "law of the case" has been specifically applied to inculpatory admissions of a defendant in other jurisdictions. The California Supreme Court considered this principle in the case of *People v. Modesto,* 66 Cal. 2d 695, 59 Cal. Rptr. 124, 427 P. 2d 788. The Court's decision concerning the application of the principle of "law of the case" is correctly stated in headnote four of the case as reported in the Pacific Reporter, viz:

> Reconsideration of admissibility of defendant's statements to police was precluded by doctrine of the law of the case where facts on which prior ruling was predicated remained unchanged.

In the case of *Pool v. Commonwealth,* 308 Ky. 107, 213 S.W. 2d 603, the Court stated:

> Appellant further contends that an error was committed in the admission of his written confession as legal evidence against himself on this trial. Under what is known as "the law of the case" rule, this written confession, just as it was set out at full length in our opinion on the first appeal, would not now be a proper subject of sound legal attack upon this second appeal.

See also *Bryant v. State,* 197 Ga. 641, 30 S.E. 2d 259.

We have carefully compared the evidence relating to the admission of inculpatory statements made by defendant in the previous trial with that in this case and we find it to be substantially the same. If there be any variance, the difference favors the admissibility of the evidence.

[3] Nevertheless, because of the serious nature of this case we have again carefully considered the merits of defendant's contention. We find that upon his objection to the testimony relating to the inculpatory statements purportedly made by him, the trial judge properly held a *voir dire* hearing to determine whether the statements were in fact voluntarily and understandingly made. *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. Both the State and defendant offered evidence on *voir dire* and at the conclusion of the *voir dire* hearing the trial judge made full findings of fact and concluded that defendant's statements were "freely, voluntarily, knowingly and intelligently made." There was competent evidence to support the findings of fact and these findings are binding on this Court. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1. The findings of fact support the con-

clusions of law. For the reasons stated, this assignment of error is overruled.

[4] Defendant contends that the court erred in failing to grant his motion for judgment as of nonsuit.

In the case of *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374, it is stated:

> "If there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Johnson,* 199 N.C. 429, 431, 154 S.E. 730, 731. This quotation, as Higgins, J., said in *State v. Stephens, supra,* is just "another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss." 244 N.C. at 383, 93 S.E. 2d at 433. It does not mean that the evidence, in the court's opinion, excludes every reasonable hypothesis of innocence. Should the court decide that the State has offered substantial evidence of defendant's guilt, it then becomes a question for the jury whether this evidence establishes beyond a reasonable doubt that defendant, and no other person, committed the crime charged. *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728.

Here the evidence of the prosecuting witness and the medical expert is clearly sufficient to support a jury-finding that a rape had been committed on the prosecuting witness. The admissions by defendant that he removed the screens from the windows, entered the house occupied by the prosecuting witness and her family, and placed his hand upon the body of a woman, when considered with the evidence that the screens were removed and the house was entered on the night of the alleged rape, together with the circumstances of defendant's arrest, are sufficient to permit, but not compel, a legitimate and reasonable inference that defendant was the person who committed the crime.

The trial court properly denied defendant's motion for nonsuit.

[5] Defendant urges that the trial judge committed prejudicial error by failing to instruct the jury as to the rule of circumstantial evidence. We do not agree.

Circumstantial evidence and direct evidence are defined in the case of *State v. Blackwelder,* 182 N.C. 899, 109 S.E. 644, as follows:

> Direct evidence is that which is immediately applied to the fact

to be proved, while circumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deducted or inferred. In other words, as has been said, circumstantial evidence is merely direct evidence indirectly applied.

This Court considered the defendant's exception to the trial court's failure to charge on circumstantial evidence in the case of *State v. Stevens*, 244 N.C. 40, 92 S.E. 2d 409, and there stated:

> The exception to the court's failure to charge on circumstantial evidence cannot be sustained. The evidence in the case was largely direct. It consisted of the statements of the two men who actually committed the robbery. The circumstantial evidence offered was incidental to and in corroboration of the direct evidence. In the absence of special request, failure to charge with respect to circumstantial evidence was not error. *S. v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42.

Here the State's evidence consisted mainly of direct evidence of the prosecuting witness and the inculpatory statements of defendant. The only circumstantial evidence offered was incidental and corroborative. Defendant did not request the trial judge to charge the jury as to circumstantial evidence.

In the trial of the case below we find

No error.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND CAROLINA POWER & LIGHT COMPANY AND ACME ELECTRIC CORPORATION AND ACME ELECTRIC CORPORATION OF LUMBERTON, NORTH CAROLINA, APPELLEES v. LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION, APPELLANT

No. 17

(Filed 9 April 1969)

1. Electricity § 2; Utilities Commission §§ 2, 4— public utilities — electric suppliers — right of competition

In absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so.

2. Electricity § 2— right to choose vendor of electricity

Unless compelled by some cogent reason, one seeking electric service should not be denied the right to choose between vendors.

3. Utilities Commission § 1— police power of the State — certificate of public convenience and necessity

The police power of the State is broad enough to include a statute providing that a public utility company desiring to serve a new area must obtain from the Utilities Commission a certificate that public convenience and necessity require the proposed extension of its distribution facilities.

4. Utilities Commission § 4; Electricity § 2— competition between electric suppliers — jurisdiction of Utilities Commission

The Utilities Commission is a creature of the Legislature and has no authority to restrict competition between suppliers of electricity except insofar as that authority has been conferred upon it by statute.

5. Utilities Commission § 1— authority of Commission

The Commission may not by its rule or order forbid the exercise of a right expressly conferred by statute.

6. Constitutional Law § 11— exercise of the police power

The legislative body is under no compulsion to exercise the police power of the State to its fullest extent, or to exercise it in a manner which the courts, or an administrative agency, may deem wise or best suited to the public welfare.

7. Electricity § 2— competition between electric suppliers — determination of policy

It is for the Legislature, not for the court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest.

8. Electricity § 2— competition in rural areas prior to 1965

Prior to the enactment of G.S. 62-110.2 in 1965, there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power except as established by contract.

9. Electricity § 2— service to customers in rural areas — G.S. 62-110.2(a)(1) — "premises" defined

"Premises", as that word is defined in G.S. 62-110.2(a)(1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located; consequently, public membership corporation had no right under G.S. 62-110.2(b)(1) to provide electric service to a plant on the ground that it had served a residence and electric signs previously located on the tract.

10. Utilities Commission § 4; Electricity § 2— right of rural consumer to choose electric supplier — jurisdiction of Commission

Where location of manufacturer's plant building was outside a municipality and was not wholly within 300 feet of any line of any electric

supplier, and was not partially within 300 feet of the lines of two or more electric suppliers, manufacturer initially requiring electric service after April 20, 1965 had the right to choose public utility, rather than electric membership corporation, as its supplier of electricity; and the Utilities Commission is not authorized to forbid the public utility to serve the plant merely because the electric membership corporation desires to perform the service and can reach the plant by relatively short extension of its lines across a highway while the public utility must build approximately four miles of line, substantially duplicating membership corporation's line, in order to reach the plant. G.S. 62-110.2(b)(5).

11. Statutes § 5— rule of construction — particular v. general statute

Section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application, and especially so where the specific provision is the later enactment.

12. Statutes § 5— provisions in pari materia

Although statutes dealing with the same subject matter must be construed *in pari materia* and harmonized to give effect to each, yet when the section dealing with a specific matter is clear and understandable on its face, it requires no construction.

13. Electricity § 2— assignment of rural territory — construction of statute

Where provisions of G.S. 62-110.2 relating to assignment of electric service territory in rural areas are clear and understandable on their face, the court is not required to construe this statute in connection with other provisions of G.S. Ch. 62 relating to powers of the Utilities Commission to regulate public utilities.

APPEAL by Lumbee River Electric Membership Corporation from the Court of Appeals.

Lumbee River Electric Membership Corporation, hereinafter called Lumbee, instituted this proceeding in the North Carolina Utilities Commission by filing in a single document a complaint against Carolina Power & Light Company, hereinafter called CP&L, and an application for an assignment to Lumbee of a described area in Robeson County as its electric service area. The Utilities Commission entered its order separating the two into independent proceedings and setting the complaint against CP&L for hearing. Lumbee did not except to that order, and all subsequent proceedings, including the present appeal, have been and are upon the theory that nothing but the complaint against CP&L is involved. CP&L filed its answer thereto. Acme Electric Company, hereinafter called Acme, was permitted by the Utilities Commission to intervene and filed its answer in support of the position taken by CP&L.

The Utilities Commission heard no evidence, but, upon facts

stipulated by the parties and admissions in the pleadings, dismissed the complaint, Commissioners Eller and McDevitt dissenting. Lumbee appealed to the Court of Appeals which affirmed the order of the commission, its opinion being reported in 3 N.C. App. 318, Brock, J., dissenting.

The material facts, summarized, are these:

Lumbee, a non-profit electric membership corporation, organized pursuant to Ch. 117 of the General Statutes, supplies electric power to its members in Robeson County and nearby areas. CP&L, a public utility corporation, carries on for profit in Robeson County, and elsewhere in North Carolina, the business of supplying electric power to the public. Lumbee purchases substantially all of its power at wholesale rates from CP&L and so is a CP&L rate payer. Acme is a manufacturer of electrical equipment. The Utilities Commission has not made any assignment of territories in Robeson County to CP&L or to Lumbee or to other suppliers as service areas pursuant to G.S. 62-110.2(c).

Acme, after negotiations with CP&L, acquired a tract of 36 acres in Robeson County on the east side of Highway I-95 and the north side of U. S. Highway 74. At the time of Acme's acquisition of this site, Lumbee owned and operated a three-phase power line running along U. S. Highway 74 and thence along and near to the west boundary of Highway I-95, across from the site so acquired by Acme, and also a single-phase line running therefrom, across the highway right-of-way into and upon the western portion of the land so acquired by Acme. The purpose and use of the single-phase line was to supply electric power to a tenant house and two signs all then located upon the site but subsequently removed in the construction of Acme's plant. The single-phase line was then removed by Lumbee at Acme's request, without prejudice to any right of Lumbee to supply electricity to the plant.

Acme conveyed a portion of the tract to its wholly owned subsidiary. The subsidiary built thereon a large building, which it then leased to Acme for the operation therein by Acme of its manufacturing business. The larger part of this building lies within 300 feet of the former location of Lumbee's single-phase line, but a portion of it is more than 300 feet from the former location of that line and all of it is more than 300 feet from Lumbee's three-phase line west of Highway I-95, that along U. S. Highway 74 being more distant.

Acme contracted with CP&L to take all of its electric power at this plant from CP&L. Acme requires three-phase electric service.

To serve Acme it was necessary for CP&L to construct 3.63 miles of new three-phase line and to convert 0.6 miles of single-phase line to three-phase line. Substantially all of this CP&L line runs along U. S. Highway 74, just across the highway from Lumbee's three-phase line. For Lumbee to serve the Acme plant would require a relatively short extension of its existing three-phase line across Highway I-95. The point of connection of the CP&L line, so extended, with the Acme plant is more than 300 feet from the former location of Lumbee's single-phase line.

In its letter to Lumbee requesting the removal of the single-phase line and advising Lumbee of Acme's contract with CP&L, Acme stated that its reasons for desiring service by CP&L were that it desired to be served by a regulated public utility and that CP&L had been of assistance to Acme in locating and selecting this site for its plant. In its answer Acme alleged CP&L was better qualified by experience and facilities to supply an industrial plant such as Acme's than was Lumbee.

The complaint alleged, in substance, such of the above facts as had occurred at the time it was filed. It also alleged Lumbee was ready, able and willing to supply adequately all the needs of the Acme plant for electric service, that CP&L had begun the construction of its above mentioned line and that it would be an unnecessary and economically wasteful and unsightly construction. Lumbee prayed the Utilities Commission to restrain CP&L from further construction of such facilities and from rendering service to the Acme plant and to require CP&L to remove the facilities which had then been constructed for that purpose.

Lumbee moved for a temporary restraining order, which was denied by the commission. The construction of the line was completed by CP&L and it supplied electric service over these facilities to the contractor constructing the Acme plant. CP&L and Acme then moved to dismiss the complaint as a matter of law upon the stipulated facts and the pleadings. The commission first denied this motion and then, upon reconsideration, allowed it.

The commission found as a fact: "Lumbee does not allege, and counsel for Lumbee conceded that it does not propose to show, that CP&L will not make a profit or earn a return on the facilities constructed by it to furnish electric service to the Acme premises." While this is not a fact stipulated, it is true that the complaint does not contain any allegation with reference to this matter.

The commission concluded: "There is no question but that, under G.S. 62-110.2(b)(5), CP&L has the right to provide electric service to the Acme plant or 'premises' in this case. * * * [W]hether

or not there may be duplication, is not an issue in this proceeding, * * * [E]ven if duplication should exist it would not deprive the consumer of its statutory right to choose its electric supplier or deprive CP&L of its statutory right to serve."

Crisp, Twiggs & Wells for appellant.

Edward B. Hipp and Larry G. Ford for North Carolina Utilities Commission, appellee.

Sherwood H. Smith, Jr., Charles F. Rouse and W. Reid Thompson for Carolina Power & Light Company, appellee.

McLean & Stacy for intervenor appellee.

LAKE, J.

Acme desires to purchase from CP&L the electric power it requires for the operation of its manufacturing plant. CP&L desires to sell that power to Acme. They have entered into a contract for such purchase and sale. We are not required to determine whether Acme could compel an unwilling CP&L to serve it.

Lumbee is a customer of CP&L. We are not, however, presently required to determine whether, as such customer, it may bring a proceeding before the Utilities Commission to prevent CP&L from constructing an extension of CP&L's facilities on the theory that such extension will be unprofitable and, therefore, may, at some future date, make it necessary for CP&L to charge Lumbee rates higher than CP&L would otherwise need in order to earn a fair return on the fair value of CP&L's total plant. Lumbee does not proceed here upon that theory. While it does not stipulate that CP&L will derive from its service to Acme a fair return upon that portion of its total rate base attributable to such service, Lumbee does not allege the contrary. It proceeds here upon the theory that it, as a supplier of electric power, has the exclusive right to serve Acme though Acme prefers another supplier.

Again, we do not presently have before us the question of Lumbee's right to have the Utilities Commission assign to Lumbee, as its exclusive service area, any territory pursuant to G.S. 62-110.2(c). That statute confers upon the commission the authority, and imposes upon it the duty, to make such assignments to electric membership corporations, such as Lumbee, and to electric utility companies, such as CP&L, of all territory outside the corporate limits of municipalities and more than 300 feet from the lines of any such supplier. It provides that "in order to avoid unnecessary dupli-

cation of electric facilities," the commission shall, "as soon as practicable after January 1, 1966," so assign all such territory "in accordance with public convenience and necessity." The record before us shows that, despite the passage of three years, there has been no such division of such territory in Robeson County, either by agreement of the suppliers or by order of the commission. Originally, in this proceeding Lumbee combined its prayer for a restraining order against CP&L with its application for an order so assigning to Lumbee the territory which includes the Acme plant. However, Lumbee did not except to the order of the commission which separated its application for such assignment of territory from its complaint against CP&L. Only the latter was heard by the commission and it alone is now before us.

Thus, the question before us is whether Lumbee, as a competitor of CP&L, has a right, in the absence of such assignment of territory by the commission and in the absence of any contract between Lumbee and CP&L or between Lumbee and Acme, to an order by the Utilities Commission forbidding CP&L to serve Acme in accordance with Acme's request. Lumbee asserts that it is entitled to the entry of such order solely because, at the time Acme's initial need for service arose, Lumbee had in operation a single-phase power line within 300 feet of a portion of Acme's plant, and a three-phase line a short distance further therefrom, whereas CP&L had to build approximately four miles of line, substantially paralleling and duplicating Lumbee's line, in order to reach the Acme plant.

[1, 2] In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly, or other right to prevent its competitor from serving anyone who desires the competitor to do so. In *Membership Corp. v. Power Co.*, 258 N.C. 278, 128 S.E. 2d 405, this Court said, "Unless compelled by some cogent reason, one seeking electric service should not be denied the right to choose between vendors." In *Membership Corp. v. Light Co.*, 255 N.C. 258, 120 S.E. 2d 749, and in *Light Co. v. Electric Membership Corp.*, 211 N.C. 717, 192 S.E. 105, this Court recognized that, except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial duplication of electric power lines and other facilities.

[3, 4] It is well settled that the police power of the State is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. It is, however, equally well settled that the Utilities Commission is a creature of the Legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. *Utilities Com. v. Motor Lines,* 240 N.C. 166, 81 S.E. 2d 404; *Utilities Com. v. Greyhound Corp.,* 224 N.C. 293, 29 S.E. 2d 909.

[5-7] Obviously, the commission may not, by its rules or order, forbid the exercise of a right expressly conferred by statute. See *Utilities Com. v. R. R.,* 224 N.C. 283, 29 S.E. 2d 912. The legislative body is under no compulsion to exercise the police power of the State to its fullest extent, or to exercise it in a manner which the courts, or an administrative agency, may deem wise or best suited to the public welfare. *Zopfi v. City of Wilmington,* 273 N.C. 430, 160 S.E. 2d 325; *In Re Markham,* 259 N.C. 566, 131 S.E. 2d 329. It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest. If the Legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the customer, neither this Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. In such event, it is immaterial whether the Legislature has imposed upon such supplier a correlative duty to serve.

[8] In the light of these principles, we turn to G.S. 62-110.2, enacted in 1965, prior to which time there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power except as established by contract. *Membership Corp. v. Light Co., supra.*

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. See *Membership Corp. v. Power Co., supra.* In the hope of putting an

end to or reducing this turmoil, the 1965 Legislature enacted G.S. 62-110.2, the language of which was the result of collaboration and agreement between the two types of suppliers.

Subsection (c) of this statute provides for the assignment of territory by the commission above mentioned. Subsection (b) of this statute sets forth in ten numbered paragraphs specific rules governing the right of suppliers to serve in situations there described. Provisions pertinent to this appeal are as follows:

"(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

"(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

"(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

"(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965 to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

"(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

"(5) Any premises initially requiring electric service after April 20, 1965 which are not located wholly within 300

feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

* * *

"(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section * * *."

[9] Subsection (a)(1) of this statute defines "premises" to mean "the building, structure, or facility to which electricity is being or is to be furnished," subject to a proviso not presently material. Consequently, it is the plant of Acme, and not the tract upon which it is located, which constitutes the "premises" here involved, as that term is used in subsection (b). Thus, paragraph (1) of subsection (b), above quoted, does not confer upon Lumbee the right to serve the Acme plant by reason of Lumbee's former service to the residence and the electric signs previously located on this tract. For the same reason, the "premises" here involved are located partially but not wholly within 300 feet of where Lumbee's single-phase line was when Acme's initial need for electric service arose. Consequently, the right of CP&L to construct its line here in question and to serve the Acme plant is governed by paragraphs (3), (4) and (5), above quoted.

CP&L's right, if any, under paragraphs (3) and (4) of subsection (b), to serve Acme arises by reason of its extension of its lines after April 20, 1965, for the purpose of serving Acme and, therefore, depends upon the right of CP&L to extend its lines for that purpose. Thus, the controlling provision of the statute is paragraph (5).

[10] At the time this proceeding was commenced, and prior thereto, the location of the Acme plant was not wholly within 300 feet of any line of any electric supplier, nor was it partially within 300 feet of the lines of two or more electric suppliers. As of that time, paragraph (5) of subsection (b) of the statute plainly and unequivocally established the right of Acme to choose CP&L as its supplier and the right of CP&L to serve this plant if Acme so chose it. Acme did so choose. Thus, the line constructed to the plant by CP&L

after April 20, 1965 was constructed to serve a consumer CP&L had the right to serve. This brought paragraphs (3) and (4) of subsection (b) of the statute into operation. Since the statute expressly conferred upon CP&L the right to serve this plant, the Utilities Commission was not authorized to forbid CP&L to do so merely because Lumbee desired to perform the service and could reach the plant by an extension of its lines substantially shorter than the lines required to be built by CP&L.

We express no opinion as to the authority of the Utilities Commission, on its own motion or upon complaint, to forbid construction by a public utility company for the purpose of serving a customer located similarly to Acme upon an allegation and a showing that such construction would be so wasteful of that supplier's own financial resources as to endanger its future capacity to serve adequately at reasonable rates. Lumbee does not allege such a situation.

[11-13] Lumbee contends that since the Act of 1965 inserted G.S. 62-110.2 into the chapter of the General Statutes relating to the regulation of public utility companies, this statute must be read in connection with other provisions of that chapter and, consequently, the powers conferred upon the commission by those other sections apply also to the specific situations dealt with in G.S. 62-110.2. It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application. *Utilities Commission v. Coach Co.,* 236 N.C. 583, 73 S.E. 2d 562. In such situation the specially treated situation is regarded as an exception to the general provision. *Young v. Davis,* 182 N.C. 200, 108 S.E. 630. This rule of construction is especially applicable where the specific provision is the later enactment. *Food Stores v. Board of Alcoholic Control,* 268 N.C. 624, 151 S.E. 2d 582. It is true, as contended by Lumbee, that when statutes "deal with the same subject matter, they must be construed in *pari materia* and harmonized to give effect to each." *Gravel Co. v. Taylor,* 269 N.C. 617, 153 S.E. 2d 19. When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22; *Davis v. Granite Corporation,* 259 N.C. 672, 131 S.E. 2d 335; *Long v. Smitherman,* 251 N.C. 682, 111 S.E. 2d 834. In such case, "the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain." *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643.

It is for the Legislature, not the Court or the Utilities Commission, to determine whether a special provision should be made for the regulation of competition between electric membership corporations and public utility companies rendering electric service. Here, the Legislature has made that determination in clear, unequivocal terms. Consequently, it was unnecessary for the Utilities Commission to inquire into or determine the general economic or esthetic effect and advisability of the duplication of Lumbee's line by CP&L. In view of the policy expressly declared by the Legislature, such determination by the commission would have been immaterial. Consequently, the commission properly dismissed the complaint without making such inquiry.

Affirmed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BOWEN v. GARDNER

No. 30 PC.

Case below: 3 N.C. App. 529.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 1 April 1969.

CRAWFORD v. BOARD OF EDUCATION

No. 16 PC.

Case below: 3 N.C. App. 343.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 March 1969.

JERNIGAN v. R. R. CO.

No. 24 PC.

Case below: 3 N.C. App. 408.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 5 March 1969.

PRICE v. TOMRICH CORPORATION

No. 26 PC.

Case below: 3 N.C. App. 402.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 1 April 1969.

STATE v. CHANCE

No. 20 PC.

Case below: 3 N.C. App. 459.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 March 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. COOPER

No. 28 PC.

Case below: 3 N.C. App. 308.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 12 March 1969.

STATE v. JONES

No. 31 PC.

Case below: 3 N.C. App. 455.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 1 April 1969.

STATE v. PERRY

No. 18 PC.

Case below: 3 N.C. App. 356.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 5 March 1969.

STATE v. WEAVER

Nos. 22-PC and 14.

Case below: 3 N.C. App. 439.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 3 March 1969. Appeal of right dismissed for lack of substantial constitutional question 3 March 1969.

STATE OF NORTH CAROLINA v. CHARLES E. JOHNSON, ALIAS CHARLES E. JONES, AND HERMAN NATHANIEL McCOY

No. 18

(Filed 14 May 1969)

1. Constitutional Law § 30— right to speedy trial — undue delay in return of indictment

Defendant was denied his constitutional right to a speedy trial, entitling him to a dismissal of the prosecution, where there was a four year delay between the issuance of the arrest warrant charging defendant with a felony and the return of the indictment, and where the record shows that (1) the delay was the purposeful and deliberate choice of the solicitor, even though the defendant was in prison on another charge and was available for trial at all times and even though the State's witness was also continuously available for trial, and (2) the four year delay created the reasonable possibility that prejudice resulted to defendant in that had the indictment and the trial promptly followed the issuance of the warrant, the trial judge at an earlier trial might have allowed the sentence for this prosecution to run concurrently with sentences in other offenses.

2. Constitutional Law § 30— right to speedy trial

The fundamental law of the State secures to every person formally accused of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment).

3. Constitutional Law § 30— speedy trial — applicable to convicts

A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.

4. Constitutional Law § 30— speedy trial — factors considered

The four interrelated factors to be considered in determining whether defendant has been denied his constitutional right to a speedy trial are: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

5. Constitutional Law § 30— speedy trial — purpose

The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State, prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

6. Constitutional Law § 30— speedy trial — burden of proof

The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution.

7. Constitutional Law § 30— speedy trial — delay by defendant

A defendant who has himself caused the delay of his trial, or acquiesced

in it, will not be allowed to convert the guarantee of a speedy trial, designed for his protection, into a vehicle in which to escape justice.

8. Constitutional Law § 30— speedy trial — delay in serving warrant

After a complaint has been filed, an inordinate delay in serving the warrant or in securing an indictment will violate the right to a speedy trial.

9. Criminal Law § 8— limitation of actions — felony

In this State no statute of limitations bars the prosecution of a felony.

10. Constitutional Law § 30— speedy trial — effect of statute releasing defendant from custody

G.S. 15-10, which merely provides that under certain circumstances a defendant who has not been speedily tried shall be released from custody, does not require that the prosecution against defendant be dismissed.

11. Constitutional Law § 30— speedy trial — effect of legislation

The constitutional guarantee of a speedy trial imposes the only limitation upon purposeful and oppressive delays between the date of a felonious offense and the commencement of the prosecution, and this guarantee cannot be impinged by legislative limitation.

12. Constitutional Law § 30— speedy trial — status of the accused

There is little, if any, difference in the dilemma which unreasonable delay in trial creates for the suspect who was belatedly charged, the accused named in a warrant promptly issued but belatedly served, and the indicted defendant whose trial has been unduly postponed.

13. Constitutional Law § 30— demand for speedy trial — waiver of right

A defendant who has been indicted is in a position to demand a speedy trial, and if he does not do so he will waive his right to the constitutional guarantee.

14. Constitutional Law § 30— speedy trial — no duty of defendant to demand indictment

Defendant who had been charged with the felony of armed robbery in an arrest warrant was under no duty to demand that an indictment be brought against him in order to secure his constitutional right to a speedy trial.

15. Constitutional Law § 30; Criminal Law § 91— speedy trial — possibility of delay

The possibility of unavoidable delay is inherent in every criminal action.

16. Constitutional Law § 30— speedy trial — good-faith delays — oppressive delays

The constitutional guarantee to a speedy trial does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case; the proscription is against purposeful or oppressive

delays and those which the prosecution could have avoided by reasonable effort.

17. Constitutional Law § 30; Solicitors— duty of prosecuting officers — initiation of prosecution

It is the duty of prosecuting officers to file formal charges when their case against a suspect is complete and the testimony to convict him is at hand, and to serve the warrant within a reasonable time thereafter.

18. Constitutional Law § 30; Solicitors— duty of prosecuting officers — arraignment and trial

After initiating a prosecution the State has the duty to arraign the defendant and see that he is speedily brought to trial.

19. Criminal Law § 138— eligibility for parole

Defendant who has served one-fourth of his sentence is eligible for parole. G.S. 148-58.

20. Constitutional Law § 30— denial of right to speedy trial — dismissal of prosecution

When there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed.

21. Constitutional Law § 30— speedy trial — four-year delay in securing indictment

A delay of four years in securing an indictment is, nothing else appearing, an unusual and an undue delay.

APPEAL, under G.S. 7A-30, by defendant Johnson from the decision of the Court of Appeals (3 N.C. App. 420, 165 S.E. 2d 27), which found no error in his trial before *Parker, J.,* 25 March 1968 Session of NASH.

Appellant was tried upon a bill of indictment returned at the November 1967 Session of Nash. It charges that on 25 October 1963, in the place of business of Bruce Murray, Johnson threatened the life of William Hatch with a pistol and feloniously took from him and carried away $115.00 belonging to Murray. At the same time an indictment charging Herman Nathaniel McCoy with the identical offense was returned. The two bills were consolidated for trial.

Before the jury was impaneled, each defendant moved that the prosecution be dismissed because his right to a speedy trial, "as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States," had been violated. The court, after

finding facts, which will be summarized in the opinion, overruled the motion.

The evidence for the State tended to show: About 1:00 a.m. on 25 October 1963, while William Hatch, an employee of Bruce Murray, was on duty alone at Murray's Esso Service Station in Sharpsburg, Johnson and McCoy, after threatening him with a pistol, took approximately $115.00 from the cash register and fled. Two days later, in the Wilson County jail, Hatch identified McCoy as the man who held the gun on him and Johnson as the one who removed the money. On 1 November 1963, G. O. Womble, Sheriff of Nash County, obtained warrants charging the two men with armed robbery. On that day, in the office of the Chief of Police of Wilson, both Johnson and McCoy, after each had been fully warned of his constitutional rights (as these rights were understood prior to the decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602), made full confessions. These corroborated Hatch's version of the episode in every detail. Each also implicated one James Stewart, who (they said) had driven the automobile used in the robbery. After the three divided the money the next day, Stewart left; the other two had not seen him since.

Defendants offered no evidence; each was convicted of the crime charged. Upon each, the judge imposed a sentence of not less than ten nor more than fifteen years, to begin at the expiration of the twenty-year sentence imposed upon him at the 6 December 1963 Session of Wilson upon another charge of armed robbery. Both appealed to the Court of Appeals, which found no error in the trial. Only Johnson appealed to this Court.

Attorney General T. W. Bruton by Deputy Attorney General Ralph Moody for the State.

Cleveland P. Cherry for Charles E. Johnson, alias Charles E. Jones, defendant appellant.

SHARP, J.

[1] Defendant's first assignment of error is that the trial judge erred in overruling his motion to dismiss this prosecution because he had been denied his constitutional right to a speedy trial. The facts upon which defendant bases this motion are not in dispute:

On 1 November 1963, the seventh day after the robbery, Sheriff Womble obtained warrants charging Johnson and McCoy with the crime. At that time Johnson and McCoy were in jail in Wilson

County, charged with having committed during the week of the Nash County robbery four other armed robberies, one in Edgecombe County and three in Wilson County. In addition, appellant Johnson was charged in Edgecombe with the crime of felonious assault. On the same day the sheriff obtained the warrants, he read them to Johnson and McCoy in the Wilson County jail. The warrants were not formally served on them because, Womble said, he lacked authority to act in Wilson County. However, at that time (Judge Parker found) defendants "understood thoroughly the contents" of the warrants. At this point, the sheriff did nothing further to advance the trial of this action.

At the 11 November 1963 Session of Edgecombe, Johnson entered pleas of guilty in the two cases pending against him there. They were consolidated for judgment and one sentence of fifteen years in the State's prison was imposed by the Honorable George M. Fountain, Judge Presiding in the Seventh Judicial District (Wilson, Edgecombe, and Nash counties). At the December 1963 Session of Wilson, Johnson also entered pleas of guilty to the three indictments pending there, and Judge Fountain imposed concurrent sentences of twenty, ten, and twenty years in the State's prison. These sentences ran concurrently with the Edgecombe County sentence.

Four years later, at the November 1967 Session of Nash, the grand jury returned the bill of indictment charging Johnson and McCoy with the Nash County robbery. Sheriff Womble said he could have secured the indictment in December 1963 but did not do so because he had been attempting, without success, to locate "a third party," who was involved in the case. By November 1967, however, he was convinced he would never find that party. On 29 September 1967 he had filed a detainer against defendant with the Department of Correction.

At no time did either defendant ever request or demand a trial of the charge contained in the unserved warrant.

At the January 1968 Session counsel was appointed for both defendants and the case continued until March at their request. At the hearing upon defendant's motion to dismiss, Johnson's attorney testified that the case was then so old he could find nobody who remembered anything about it; that defendant did not give him the names of any witnesses and said that he could not remember where he was on 25 October 1963.

Mr. Roy R. Holdford, Jr., since 1 January 1963, the solicitor of the Second Solicitorial District (which included, *inter alia,* Wilson,

Edgecombe and Nash counties) testified that in 1963 he disposed of 1,700 cases. He had no recollection of Johnson and McCoy prior to 29 January 1968, although he had probably talked to Sheriff Womble when the defendants were tried in Wilson County.

In support of their motion, defendants introduced certified copies of the bills of indictment returned in Edgecombe and Wilson counties, the four commitments from Wilson County, and a letter to Johnson's attorney from the Department of Correction. This letter, dated 13 February 1968, stated that the Clerk of the Superior Court of Nash County had filed the detainer against defendant on 24 January 1968, and that Johnson's release was then tentatively scheduled 26 December 1977. Neither defendant testified.

[2-7] Decisions of this Court establish:

1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina,* 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967)).

2. A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.

3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. *State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed,* 382 U.S. 22, 15 L. Ed. 2d 16, 86 S. Ct. 227 (1965); *State v. Patton,* 260 N.C.

359, 132 S.E. 2d 891, *cert. denied,* 376 U.S. 956, 11 L. Ed. 2d 974, 84 S. Ct. 977 (1964); *State v. Webb,* 155 N.C. 426, 70 S.E. 1064.

The North Carolina cases which establish the foregoing principles dealt with delays between the return of the indictment and the trial. This case involves a pre-indictment delay and the question when the right to a speedy trial first attaches. It requires us to decide whether the interval between the time the State acquired evidence sufficient to justify defendant's prosecution (at which time a warrant for his arrest was secured) and the time it procured the indictment, constituted a delay violating his right to a speedy trial.

It has generally been held that federal and state constitutional guarantees of a speedy trial were inapplicable to delays in commencing a prosecution; that prior to the time a defendant was actually charged he was not an "accused" and the right to a speedy trial arose only after a formal complaint had been lodged. *State v. LeVien,* 44 N.J. 323, 209 A. 2d 97 (1965); 21 Am. Jur. 2d *Criminal Law* § 248 (1965); *see State v. Hodge,* 153 Conn. 564, 219 A. 2d 367 (1966); *People v. Hayciuk,* 36 Ill. 2d 500, 224 N.E. 2d 250 (1961); Note: *The Lagging Right to a Speedy Trial,* 51 Va. L. Rev. 1587, 1588, 1613 (1965); Note: *Justice Overdue,* 5 Stan. L. Rev. 95, 99-100 (1952). The federal courts have held that an accused's right to have a prosecution dismissed because of a delay between the date of the offense and commencement of criminal prosecution is controlled by the applicable statute of limitations and not by the Sixth Amendment. *United States v. Panczko,* 367 F. 2d 737 (7th Cir. 1966); *Bruce v. United States,* 351 F. 2d 318 (5th Cir. 1965); *Nickens v. United States,* 323 F. 2d 808 (D. C. Cir. 1963) and cases cited therein; 22A C.J.S., *Criminal Law* § 474 (1961). However, in *Ross v. United States,* 349 F. 2d 210 (D. C. Cir. 1965), a delay of seven months between offense (narcotic violation) and formal complaint was held to have deprived the defendant of due process. In *Ross,* the record disclosed (1) a *purposeful* delay of seven months between offense and arrest, (2) the defendant's plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the government's case consisted of the recollection of one witness refreshed by a notebook. *Id.* at 215. In *Taylor v. United States,* 238 F. 2d 259 (D. C. Cir. 1956), the court added "the long delay in the return of the indictment (3 years, 7 months)" to the government's two-year delay thereafter in trying the defendant and held that, considering all the factors involved, the defendant had been denied a speedy trial. *Accord, Petition of Provoo,* 17 F. R. D. 183 (D. Md. 1955), *affirmed,* 350 U.S. 857, 100 L. Ed. 761, 76 S. Ct. 101 (1955).

[8] After a complaint has been filed an inordinate delay in serving the warrant or in securing an indictment will violate the right to a speedy trial. 21 Am. Jur. 2d *Criminal Law* § 248 (1965); Annot., Delay between filing of complaint or other charge and arrest of accused as violation of right of speedy trial, 85 A.L.R. 2d 980 (1962); *Ex parte Trull,* 133 Kan. 165, 298 P. 775 (1931); *Jones v. State,* 250 Miss. 186, 164 So. 2d 799 (1964); 21 Am. Jur. 2d *Criminal Law* § 248 (1965). *See* Note: *The Right to a Speedy Trial,* 20 Stan. L. Rev. 476, 482-85 (1968).

The situation of one against whom a warrant has been issued but not served and that of "the potential defendant" — the suspect who has not been formally charged — is practically the same. The question whether the latter is within the speedy-trial guaranty is, as pointed out by the Illinois court in *People v. Hryciuk, supra,* of comparatively recent origin. 20 Stan. L. Rev. 476, 485-493 (1968); *see* 5 Stan. L. Rev. 95 (1952). In *Hryciuk,* the defendant was arrested on 14 March 1939 for a rape, to which he then confessed. Two days later he confessed to a 1937 murder. He was not indicted for the murder but was tried and convicted for rape. In March 1953, in a post-conviction proceeding he was granted a new trial on the rape conviction. The following day he was indicted for the 1937 murder. In June 1955, he was convicted on the murder charge. On appeal, his sole contention was that he had been denied his constitutional right to a speedy trial. The question, said the Illinois Supreme Court, was "whether the 14 year delay between the time when the State had all the available evidence in its possession and the time when it chose to seek an indictment was so long and oppressive that the defendant was deprived of his right to a speedy trial." *Id.* at 501, 224 N.E. 2d at 251. In answering the question YES, the court declined to find that the prosecution had acted in bad faith. It was enough that "the delay was a deliberate and calculated one. From a delay of fourteen years, a presumption of prejudice arises. . . ." *Id.* at 504, 224 N.E. 2d at 252. *Accord, Barker v. Municipal Court,* 51 Cal. Rptr. 921, 415 P. 2d 809 (1966); *Rost v. Municipal Court,* 184 Cal. App. 2d 507, 7 Cal. Rptr. 869, 85 A.L.R. 2d 974 (1960); *Petition of Provoo, supra.*

[9-11] In this State no statute of limitations bars the prosecution of a felony. *State v. Burnett,* 184 N.C. 783, 115 S.E. 57. (*See* G.S. 15-1 for the limitation upon misdemeanors.) G.S. 15-10 merely provides that under certain circumstances a defendant who has not been speedily tried shall be released from custody. It does not require that the prosecution against him be dismissed. *State v. Patton,*

supra. The constitutional guarantee of a speedy trial, therefore, imposes the only limitation upon purposeful and oppressive delays between the date of a felonious offense and the commencement of the prosecution. Of course, no legislative limitation could impinge upon the constitutional guaranty, *Rost v. Municipal Court, supra.*

[12] We can see little, if any, difference in the dilemma which unreasonable delay creates for the suspect who was belatedly charged, the accused named in a warrant promptly issued but belatedly served, and the indicted defendant whose trial has been unduly postponed. The same considerations which impel prompt action in the one situation are equally critical in the others. "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. . . ." *Nickens v. United States, supra* at 813 (concurring opinion). *See Taylor v. United States, supra* at 261.

[13, 14] A defendant who has been indicted is in a position to demand a speedy trial. Indeed, if he does not do so he will waive his right to the constitutional guarantee. *State v. Hollars, supra;* Annot., 129 A.L.R. 572 (1940); Annot., 57 A.L.R. 2d 302 (1958). However, one who has not been arrested or indicted has no duty to take the initiative in his own prosecution, *United States v. Kojima,* 3 Hawaii Fed. 381 (1909). Prior to indictment he cannot demand a speedy trial.

[14] Defendant Johnson, charged with a felony in a warrant issued 1 November 1963, could not have been tried until he was indicted in November 1967 — four years later. Therefore, the judge's finding that "at no time since November 1, 1963" had defendant requested or demanded that he be allowed his constitutional right to a speedy trial is irrelevant to the inquiry. As the Supreme Court of New Jersey said in *State v. LeVien, supra* at 326-27, 209 A. 2d at 99, "[W]e find no authority which would permit one who commits a crime to insist on the State's instituting criminal proceedings. It is the prosecutor who in the first instance has the discretion in such circumstances."

In *Day v. State,* 50 Okla. Cr. 180, 296 P. 987 (1931), the defendant had moved to dismiss the prosecution against him because the indictment was not returned until approximately one year and one month after the homicide. The State made no attempt to show good

cause for the delay. The trial court denied the motion; the Court of Criminal Appeals reversed, saying:

". . . It can hardly be argued that one charged with crime and held at a preliminary examination for action of the district court is required to demand that an information be filed against him in order to secure his constitutional right to a speedy trial. There is a difference between a demand for a trial by an accused on bail after he has been formally charged in a court where a final trial can be had and a case such as the instant case, in which no information has been filed upon which a final trial can be had." *Id.* at 181-82, 296 P. at 988.

[15-18] The possibility of unavoidable delay is inherent in every criminal action. The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. *Butts v. Commonwealth,* 145 Va. 800, 133 S.E. 764 (1926). Speedy trial "does not preclude the rights of public justice." *Beavers v. Haubert,* 198 U.S. 77, 87, 49 L. Ed. 950, 954, 25 S. Ct. 573, 576 (1905). Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957). Obviously, the authorities should not bring formal charges against a suspect until they have probable cause to believe they can prove him guilty; and — in a proper case — a reasonable delay may be justified to protect and to promote further responsible police investigation. *State v. Hodge, supra.* Ordinarily, however, it is the duty of prosecuting officers to file formal charges when their case against a suspect is complete and the testimony to convict him is at hand, and to serve the warrant within a reasonable time thereafter. After initiating a prosecution the State has the duty to arraign the defendant and see that he is speedily brought to trial. *People v. Prosser,* 309 N.Y. 353, 130 N.E. 2d 891, 57 A.L.R. 2d 295 (1955); *State v. Milner,* 149 N.E. 2d 189 (Ohio Comm. Pl. Montgomery Cty. 1958); *Barker v. Municipal Court, supra; Rost v. Municipal Court, supra; Jones v. State, supra.*

[1] The facts in this case negate any valid reason for the State's four-year delay in procuring the indictment. The transcript affirmatively discloses that the delay was the studied choice of the prosecution. On 1 November 1963, Hatch (a continuously available witness), had positively identified defendant and McCoy as the two men who had committed the robbery. The two men had made a full

confession to Sheriff Womble and his deputy. In the confessions they had implicated Stewart in their crime. Indictments could have been secured at the November 1963 Session of Nash — or at any subsequent term — had the prosecuting authorities so desired. Serving twenty-year sentences in the State's prison, defendants' whereabouts were well known and they were at all times available for trial. Stewart's arrest was in no way a prerequisite to the prosecution of Johnson and McCoy. Prima facie, however, their testimony was necessary to Stewart's conviction, for — so far as the record declares — only appellant and McCoy knew of his participation in the robbery. Without doubt the sheriff took notice of the possibility that, after they had been tried and sentenced, the two men might be unwilling to testify against Stewart and that an impending charge of crime against them might be very helpful in securing this testimony for the State.

The transcript of the trial, conducted four years and five months after the commission of the crime charged, engenders no doubt as to defendant's guilt, nor does it suggest that his incarceration during the intervening years deprived him of any witness whose testimony might have created a doubt. (*See Taylor v. United States, supra.*) Obviously, we cannot say with certainty that the record would not have been different had defendant been tried in November 1963. We can say with assurance, however, that the record discloses the possibility of prejudice to defendant from the delay between the issuance of the warrant and the return of the indictment.

[19] During December 1968, having served one-fourth of his twenty-year sentence, defendant was eligible for parole. G.S. 148-58. The filing of the detainer on 29 September 1967 could have had only an adverse effect upon such consideration. *State v. Milner, supra.*

[1] In 1968, when Judge Parker pronounced the twenty-year sentence in this case, defendant had served approximately four years and four months of the twenty-year sentences imposed in Wilson. His Honor could, of course, have permitted the Nash County sentence to run concurrently with the remaining fifteen years and eight months of the Wilson judgment. Instead, he directed that the two sentences be served consecutively.

The record suggests that in 1963, when Judge Fountain imposed upon defendant the two concurrent twenty-year sentences for armed robbery in Wilson, he also took into consideration the Nash robbery, to which defendant had confessed in the office of Wilson's Chief of Police. The same solicitor represents Edgecombe, Wilson, and Nash counties, and it is inconceivable that when defendant and McCoy

entered their pleas in Wilson the law enforcement officers there failed to inform him of the Nash County robbery and that he failed to inform the judge. The solicitor's omission to send to the grand jury a bill against the two men at the November 1963 Session of Nash (when the matter was fresh in his mind) corroborates this view. It is reasonable to believe that, had he not considered the matter closed, the indictment would have been obtained promptly. He is unable to explain the omission because the passage of time has left him with no recollection of Johnson, McCoy or Stewart. Certainly, under the circumstances, defendant himself was justified in assuming that the charges in the unserved warrant had been dropped.

Had this case been tried during the fall of 1963 the record suggests (1) that defendant would have pled guilty in Nash just as he had done in Edgecombe and Wilson, and (2) that Judge Fountain, who had imposed concurrent sentences for the Edgecombe and Wilson crimes when the whole picture of defendant's recent conduct was before him, would have permitted the Nash County sentence to run concurrently with the others. If so, as of now, the cost of the delayed prosecution to defendant is twenty additional years in prison. This is, of course, a matter of conjecture, but the point is that such conjecture should not have been allowed to arise. This case exemplifies a situation which the speedy-trial guarantee was intended to prevent. Indisputably, the delay created both the possibility and the probability of prejudice. *Barker v. Municipal Court, supra.*

Here the formal complaint (the warrant for defendant's arrest) was filed, as it should have been, at the time the State's investigation of the robbery was complete and the testimony to convict defendant of it was available. At the same time, the duty devolved upon the prosecution to indict defendant promptly and then to try him without unreasonable delay. Instead of according him his right to a speedy trial, however, the prosecution deliberately delayed defendant's indictment for four years for the State's convenience or supposed advantage. The apprehension and conviction of criminals are, of course, the ultimate and legitimate objectives of dedicated law-enforcement officers. In pursuit of this goal, however, they may not impinge upon a specific constitutional guarantee intended for the protection of "the citizen faced with the loss of his liberty by reason of criminal charges." *See Ross v. United States, supra* at 213.

The facts of this case are analogous to those in *People v. Kenyon,* 39 Misc. 2d 876, 242 N.Y.S. 2d 156 (1963). In March 1939, three indictments for felony were returned against Kenyon. The district attorney tried the defendant on one and held the other two until

1945, when the defendant was tried and convicted. In holding that Kenyon had been denied his right to a speedy trial on the second and third indictments, the court said that the true motivation of the prosecution "must remain unanswered but it is reasonable to infer that the attitude was 'we'll arraign him on one indictment and hold the others for future ammunition.' Thus the additional indictments were a virtual Sword of Damocles, to be kept suspended over the head of the defendant. . . ." It also noted that the delay resulted in "arrogating to the prosecutor the decision as to defendant's obtaining possible concurrent sentences." 242 N.Y.S. 2d at 159.

Similarly, in *State v. Milner, supra*, two warrants were filed against the defendant while he was incarcerated in the Ohio penitentiary for another offense. Nine years and one month later, one indictment was returned and, upon defendant's parole, he was returned to Dayton for trial. In dismissing the delayed prosecution, McBryde, Judge, noted (1) that this process of trial could extend over the lifetime of a defendant against whom several charges were pending, and (2) that by merely filing the detainers the police had failed to prosecute the criminal action to a point where defendant could have demanded a trial. His logic is inescapable:

"Where more than one charge exists it is necessary to dispose of all promptly, by consolidation if the facts permit. If consolidation is not possible the defendant may be sentenced and returned from confinement to stand trial for the remaining offenses.

"* * *

"Delaying the indictment and the trial on one offense after another, until time is served on each consecutively, and served under circumstances described, is a denial of a speedy trial. It requires no intellectual gymnastics to see that such a plan designed to indefinitely extend the punishment and postpone the liberty of an individual is a violation of constitutional rights.

"The exercise of such control over a form of installment punishment, compounded by detainers, is a usurpation of the power of the court, of the jury, and of the parole board to determine guilt and punishment under the indeterminate sentence law. Whether consecutive or concurrent sentences should be imposed for more than one offense rests exclusively with the court and it cannot be assumed by any other agency." *Id.* at 191-92.

In this case, we have no occasion to decide when, if ever, a defendant who moves to dismiss a prosecution on the ground that he has been denied a speedy trial must show actual prejudice or under

what circumstances, if any, the State must show that a defendant suffered no material prejudice beyond that incident to ordinary and inevitable delay. We note, however, that, whatever the actualities, proof of either prejudice or nonprejudice may well be an impossible task. See the discussions of this confused and difficult problem in 20 Stan. L. Rev. 476, 493-501 (1968), 51 Va. L. Rev., 1587, 1591-97 (1965).

[20] We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed.

[21] A delay of four years in securing an indictment is, nothing else appearing, an unusual and an undue delay. *United States v. Lustman,* 258 F. 2d 475, 477 (2d Cir. 1958), *cert. denied,* 358 U.S. 880, 3 L. Ed. 2d 109, 79 S. Ct. 118 (1958). The four-year delay in this case was the purposeful choice of the prosecution, and it created the reasonable possibility that prejudice resulted to defendant. Therefore, the action against him must be dismissed. It is so ordered.

The decision of the Court of Appeals is reversed, and the cause remanded to that court with instructions that it direct the Superior Court to dismiss this prosecution.

Reversed.

CECIL D. JERNIGAN, JR. v. ATLANTIC COAST LINE RAILROAD COMPANY

No. 24

(Filed 14 May 1969)

1. Evidence § 3— matters of common knowledge — beam of locomotive headlights

It is a matter of common knowledge that a locomotive headlight casts an intense but narrow beam far ahead in order that the train crew may spot defects in the rails or obstructions on the roadbed.

2. Railroads § 5— crossing accidents — duty of motorist

The law casts upon the operator of a motor vehicle a continuing duty to look and listen before entering upon a railroad crossing.

3. Negligence § 1— acts constituting negligence — sight and hearing

Ordinarily, when a diligent use of one's senses of sight and hearing discloses danger in time to avoid it, failure to take the proper precaution constitutes negligence.

4. Railroads § 6— crossing accidents — reliance on flagman and warning devices

A plaintiff who knows of the railroad's custom to have a flagman at a crossing to direct traffic and to have the engine's whistle blowing and its bell ringing for a crossing has the right to place some reliance on the custom or usage, but plaintiff is not entitled to rely entirely thereon and omit the exercise of all ordinary care for his own safety.

5. Negligence § 26— burden of proof

In tort actions involving issues of negligence and contributory negligence, plaintiff has the burden of showing defendant's negligence.

6. Negligence §§ 29, 35— non-suit — contributory negligence

A motion to nonsuit should be sustained unless there is evidence before the jury from which it may, but not must, find each material fact necessary to make out a case of actionable negligence; even then, nonsuit is proper if plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn from that evidence.

7. Appeal and Error § 59— review of nonsuit — discussion of evidence

In passing on a judgment of nonsuit, the appellate court must examine all the evidence in the record; but if the nonsuit is reversed and the cause remanded for trial, the appellate court will ordinarily discuss only so much of the evidence as discloses the basis for decision.

8. Railroads § 5— crossing accidents — contributory negligence

In an action to recover for injuries received when plaintiff motorist collided in the nighttime with a train engine standing on a railroad crossing, plaintiff's evidence *is held* not to disclose contributory negligence as a matter of law where it shows that the street on which plaintiff approached the tracks was on a downgrade and that a trestle above the street obstructed plaintiff's view of the tracks until he was within seventy-two feet thereof, that the lights of the engine were not visible to plaintiff but the lights of a street beyond the tracks were, that plaintiff was familiar with the custom of the railroad to place a flagman at this crossing to warn of the presence of a train on the crossing, but that there was no flagman at the crossing when the accident occurred, and that plaintiff first saw the engine partially obstructing his lane of traffic when he was within eight to ten feet of the engine but was unable to avoid the collision.

ON certiorari to review the decision of the North Carolina Court of Appeals (3 N.C. App. 408) affirming judgment of involuntary nonsuit entered in the Superior Court of HALIFAX County at its February, 1968 Civil Session.

Allsbrook, Benton, Knott, Allsbrook & Cranford by Richard B. Allsbrook, for the plaintiff.

Spruill, Trotter & Lane by Charles T. Lane, for the defendant.

HIGGINS, J.

The plaintiff instituted this civil action to recover for personal injuries and property damage he sustained in a grade crossing collision between his automobile and the defendant's switch engine. The accident occurred about 1:20 on the morning of October 7, 1961 as the plaintiff was driving eastward on Third Street in the outskirts of Weldon.

Third Street, a link in U.S. Highway 158, is 36 feet wide. The surface is black asphalt divided into two lanes of equal width for vehicular traffic east and west. At the foot of a hill, three closely parallel yard tracks of the defendant cross Third Street at an angle of approximately 80 degrees. To the east of the crossing, and on the south side of the street, a service station, though closed, displayed a number of lights. At the intersection of Third Street and Washington Avenue, (more than a block east of the rail lines), an overhead traffic control light was in operation. Neither of these lights illuminated the crossing.

About 300 feet west of the yard tracks, Third Street begins its downward slope, described by one of the witnesses as 15 to 20 degrees. Seventy-two feet from the crossing, the main line of the railroad passes over Third Street on a trestle. A motorist driving eastward cannot see the crossing or the lights beyond until he has passed under the trestle.

The pleadings raise issues of negligence, contributory negligence, and damages. On the argument here the parties confined the discussion to the issue of contributory negligence. They have assumed, and properly so, that the plaintiff's evidence was sufficient to go to the jury on the issue of negligence.

The plaintiff's evidence disclosed substantially this situation and sequence of events: At approximately 1:00 on the morning of October 7, 1961, the plaintiff and his employee quit work on the plaintiff's cottage a short distance east of the point where Third Street crosses the yard tracks. As they drove west on Third Street, a flagman stopped the automobile at the crossing until switching operations there were completed. After about five minutes, the flagman gave an all clear signal. The plaintiff and his passenger, after crossing the yard tracks, proceeded west on Third Street for two miles

to a drive-in where the employee transferred to his own automobile. On the return home, the plaintiff approached the trestle driving 30 to 35 miles per hour. His view of the crossing and the street beyond had been cut off by the trestle and its abutments. He had reduced speed to 15 to 20 miles per hour as he approached the crossing. He could then see the lights at the service station and at the intersection of Washington Avenue. As he proceeded downgrade, however, his automobile lights, though in good working order, did not pick up any obstruction in the street until his vehicle leveled off at the end of the decline. He was then 8 to 12 feet from the third track when he discovered, for the first time, that his traffic lane was not clear.

Notwithstanding his efforts to avoid a collision, the left front of his automobile struck the bottom step to the rear platform of the stationary switch engine. The surface of the street was black asphalt. The defendant's engine was also black. The plaintiff did not see any lights on or about the engine. He did not discover that the rear platform protruded into and partially blocked his travel lane. The top of this platform was only about five feet above the level of the crossing. Hence, there is a permissible inference the plaintiff, on his approach, could see the light at the intersection over the platform, but due to the blend in the color of the engine and of the street surface, and to the steep decline of his approach, his automobile light beams were not sufficiently elevated to disclose the protruding platform until the automobile was at or near the level of the tracks. After discovery, it was then too late to avoid the collision.

[1] A front and a rear light near the top of the engine were on, though neither was visible to the plaintiff who approached from almost a right angle. It is a matter of common knowledge that a locomotive headlight casts an intense but narrow beam far ahead in order that the train crew may spot defects in the rails or obstructions on the roadbed. These lights were many feet above the tracks. Their beams were focused outside the range of the plaintiff's view as he approached from the west.

The plaintiff testified he had lived in the vicinity for 10 years. He had crossed the yard tracks 6 or 7 times per week, often at night. When switching operations interfered with travel on Third Street, a flagman was there with a lantern or flare to direct traffic. As the plaintiff approached the crossing from the east on his way to the drive-in, a switching movement blocked the crossing. The flagman present stopped the plaintiff until the street was clear. On the return journey 10 minutes later, the accident occurred. No one was present to direct traffic.

The defendant's engine was stationary on the track. Insofar as the plaintiff could see, it was unlighted and silent — no whistle — no bell. Its color approximated the color of the street surface. There is evidence that near the top of the engine there were reflector strips and spots which became visible if within the beam of approaching automobile lights. But the plaintiff's lights, due to the degree of his approach, were not sufficiently elevated to illuminate these reflectors. The plaintiff testified his lights neither reflected the markings nor gave him notice of the obstruction until, as he said, he was within 8-10-12 feet of the unlighted, stationary roadblock.

According to the measurements, the rear platform of the engine extended across the center line of Third Street into the plaintiff's travel lane a distance of 7 or 8 feet. The plaintiff testified his eyesight was good; his automobile was equipped with good lights and brakes; he was looking straight ahead, but was unable to see the obstruction until he was too close to avoid the accident. He was driving 15 miles per hour at the time he discovered his danger. There was no warning sound to disclose the presence of the engine and no flagman to direct traffic. The plaintiff introduced evidence of his serious personal injuries and extensive damage to his automobile.

The parties have discussed and cited many cases involving a wide variety of factual situations. While the rules of law are easily stated, nevertheless, because of factual differences, their proper application presents difficulty.

[2-4] As a general rule, the law casts upon the operator of a motor vehicle a continuing duty to look and listen before entering upon a railroad crossing. *Johnson v. Railroad,* 255 N.C. 386, 121 S.E. 2d 580. Ordinarily, when a diligent use of one's senses of sight and hearing discloses danger in time to avoid it, failure to take the proper precaution constitutes negligence. *Parker v. Railroad,* 232 N.C. 472, 61 S.E. 2d 370. However, a plaintiff who knows of the railroad's custom to have a flagman at a crossing to direct traffic and to have the engine's whistle blowing and its bell ringing for a crossing has "the right to place some reliance on the custom or usage . . . However, this rule does not mean that plaintiff could rely entirely on a proper performance on the part of the defendant of its custom and usage there, and omit the exercise of all ordinary care on his part for his own safety, because it was his legal duty to take such precautions for his own safety, as an ordinarily prudent man would take under the same or similar circumstances." *Ramey v. Railroad,* 262 N.C. 230, 136 S.E. 2d 638.

The plaintiff's evidence and the inferences favorable to him which

it permits are sufficient to go to the jury on the issue of his contributory negligence. The cases cited by the defendant are distinguishable. For example, the cited case of *Owens v. Railroad,* 258 N.C. 92, 128 S.E. 2d 4, when properly interpreted, discloses the nonsuit judgments were sustained, not on the ground of contributory negligence, but because of failure of the plaintiff to prove defendant's negligence. Likewise, in *Morris v. Railroad,* 265 N.C. 537, 144 S.E. 2d 598, the nonsuit was granted because of failure to offer sufficient evidence to permit a finding of negligence.

[5, 6] Generally, in tort actions involving issues of negligence and contributory negligence, the law casts upon the plaintiff the burden of showing the defendant's negligence. The court should sustain a motion to nonsuit unless there is evidence before the jury from which it may, but not must, find each material fact necessary to make out a case of actionable negligence. Even then, nonsuit is proper if the plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn from that evidence.

> "Under proper pleadings, evidence of actionable negligence takes the case to the jury unless contributory negligence appears as a matter of law. A party whose proof shows his adversary was guilty of actionable negligence is entitled to go to the jury unless he defeats his own cause by showing he was guilty of contributory negligence as a matter of law. With respect to the quantum of proof, there is no essential difference between negligence and contributory negligence. On the latter issue the parties reverse positions. In determining liability each party is charged with the duty of exercising such due care as the exigencies and circumstances of the occasion may require. If the evidence is conflicting on issues of negligence and contributory negligence, such are issues of fact and require jury determination. These issues may not be answered by the court as a matter of law." Southern Railway Co. v. Woltz, 264 N.C. 58.
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> ". . . (A) motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence considered alone and taken in the light most favorable to him, together with inferences favorably to him which may be reasonably drawn therefrom so clearly establishes the defense of contributory negligence that no other conclusion may reasonably be drawn." *Atwood v. Holland,* 267 N.C. 722.
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> "Nonsuit on the issue of contributory negligence should be de-

nied when the relevant facts are in dispute or opposite inferences are permissible from plaintiff's proof." Strong's N.C. Index, 2d Negligence, § 35, p. 72, citing many cases.

[7] In passing on a judgment of nonsuit entered in the trial court, the appellate court must examine all the evidence in the record. However, if the nonsuit is reversed and the cause remanded for trial, the appellate court may, and perhaps should in the usual case, discuss only so much of the evidence as discloses the basis for decision. This is so in order that the jury, in finding the facts, may not be influenced by anything except the evidence produced at the trial and the court's charge.

[8] In this case the plaintiff's evidence does not disclose his contributory negligence as a matter of law. After full review, we conclude: (1) the compulsory nonsuit judgment was improvidently entered in the Superior Court; and (2) the decision of the Court of Appeals affirming the judgment was erroneous. We refrain from discussing or deciding any question except that the evidence was sufficient to go to the jury on the issues of negligence, contributory negligence, and damages. The jury must weigh the evidence and answer the issues according to its findings after both parties have been heard or have had opportunity to be heard.

The decision of the Court of Appeals is

Reversed.

BRANCH, J. did not participate in the decision of this case.

STATE v. JAMES ELLIS COOPER, PETITIONER

No. 26

(Filed 14 May 1969)

1. Criminal Law § 105— motion to nonsuit — motion to dismiss

As used in G.S. 15-173, there is no difference in legal significance between a motion "to dismiss the action" and a motion "for judgment as in case of nonsuit".

2. Criminal Law § 105— motion to dismiss — question presented

The question presented by defendant's motion to dismiss the action is whether the evidence was sufficient to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the indictment.

8. Escape § 1— admissibility of commitment order

Document under which defendant was committed as a prisoner, which document was a duplicate original of the official commitment and which carried the official seal of the superior court and the original signature of an assistant clerk of the superior court, complies fully with G.S. 148-59 and is admissible in evidence to show the lawfulness of defendant's confinement. G.S. 2-10.

4. Indictment and Warrant § 17; Criminal Law § 107— variance between pleading and proof

A defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment.

5. Criminal Law § 107— nonsuit for variance

Whether there is a fatal variance between the indictment and the proof is properly presented by defendant's motion to dismiss.

6. Escape § 1— prosecution — variance between indictment and proof

In prosecution upon indictment charging defendant, a prisoner, with the wilful and felonious failure to return to custody "after being removed from the prison on a work-release pass," a violation of G.S. 148-45(b), trial court erred in refusing to grant defendant's motion to dismiss the action where the State's evidence was to the effect that the prison unit superintendent granted defendant week-end leave to visit his home and family, and there was no evidence that defendant had been granted work-release privileges, G.S. 148-33.1(b), or that the pass, if any, issued to him was related to the "work release plan."

7. Criminal Law § 110— effect of judgment allowing motion to dismiss

A judgment entered in accordance with the allowance of defendant's motion to dismiss will have the force and effect of a verdict of not guilty as to the criminal offense charged in the indictment. G.S. 15-173.

ON *certiorari* to review decision of the Court of Appeals.

Criminal prosecution on a bill of indictment charging that defendant, on July 23, 1967, in Gaston County, "while he the said James Cooper was then and there lawfully confined in the North Carolina State Prison System in the lawful custody of C. A. Meares, Superintendent of North Carolina Department of Corrections Prison Unit #6544, and while then and there serving a sentence for the crime of armed robbery which is a felony under the laws of the State of North Carolina, imposed at the 1964 term Superior Court, Mecklenburg County, then and there unlawfully, wilfully, and feloniously did attempt to escape and escaped from the said C. A. Meares by failing to return at the designated time and place after being removed from the prison on a work-release pass. . . ."

Defendant, represented by court-appointed counsel, pleaded not guilty.

At trial before Snepp, J., at July 22, 1968 Session of Gaston Superior Court, the jury returned a verdict of guilty; and judgment, which imposed a two-year prison sentence, was pronounced.

Defendant excepted and appealed. An order was entered (1) permitting defendant to appeal *in forma pauperis*, (2) appointing defendant's trial counsel to perfect his appeal, and (3) providing that Gaston County pay for the transcript and other documents incident to the appeal.

Upon said appeal, the Court of Appeals found "No error." 3 N.C. App. 308, 164 S.E. 2d 550. This Court granted defendant's application for *certiorari*.

Attorney General Morgan and Staff Attorney Shepherd for the State.

Verne E. Shive for defendant appellant.

BOBBITT, J.

The only evidence was that offered by the State. At the conclusion thereof, defendant moved to dismiss. The court overruled the motion. On appeal, defendant assigned as error the court's ruling and urged reversal thereof. In this connection, see G.S. 15-173 and G.S. 15-173.1.

[1, 2] As used in G.S. 15-173, there is no difference in legal significance between a motion "to dismiss the action" and a motion "for judgment as in case of nonsuit." The question presented by defendant's motion to dismiss was whether the evidence was sufficient to warrant its submission to the jury and to support a verdict of guilty *of the criminal offense charged in the indictment. State v. Vaughan, et al.*, 268 N.C. 105, 150 S.E. 2d 31.

The sole contention made by defendant was that the court erroneously admitted in evidence the document under which defendant was confined as a prisoner; and that, in the absence of this document, there was no evidence defendant was lawfully confined pursuant to a judgment based on defendant's plea of guilty or conviction of a felony.

[3] The document was identified by Captain C. A. Meares, Superintendent of Prison Unit #6544, as the duplicate original of the official commitment from the Superior Court of Mecklenburg County delivered to him at the time defendant was placed in his custody and since then kept under his supervision and control as a part of the official records of Prison Unit #6544. The document itself pur-

ports to bear the official seal of the Superior Court of Mecklenburg County, North Carolina, and the original signature of an assistant clerk of the Superior Court of Mecklenburg County, North Carolina. It complies fully with G.S. 148-59. As to the authority of an assistant clerk, see G.S. 2-10.

In said document, the assistant clerk, over her hand and said seal, certified defendant had pleaded guilty to armed robbery at the May 4, 1964 Regular Term of Mecklenburg Superior Court, and that, "upon said plea, judgment was rendered as follows, to wit: 'That the defendant be imprisoned in the State's Prison for the term of not less than Twelve (12) nor more than Fifteen (15) years.'"

The Court of Appeals held the document was properly admitted in evidence and that defendant was not entitled to dismissal of the action on the ground asserted by him. We agree. Even so, the question presented by defendant's assignment of error is whether the evidence was sufficient rather than whether defendant's particular contention is valid. Consideration of the evidence impels the conclusion, as in *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413, that the evidence was insufficient to support a verdict of guilty *of the criminal offense charged in the indictment.*

The evidence tends to show defendant was committed to the lawful custody of Superintendent Meares to serve a prison sentence of 12-15 years for the felony of armed robbery.

Under G.S. 148-45(a) *escape* from such custody is a felony and is punishable for the first such offense "by imprisonment for not less than six months nor more than two years." G.S. 148-45(b) provides: "(b) Any defendant convicted and in the custody of the North Carolina Department of Correction and *ordered or otherwise assigned to work under the work-release program, G.S. 148-33.1,* or any convicted defendant in the custody of the North Carolina Department of Correction and on a temporary parole by permission of the State Board of Paroles or other authority of law, *who shall fail to return to the custody of the North Carolina Department of Correction, shall be guilty of the crime of escape and subject to the provisions of subsection (a) of this section and shall be deemed an escapee.* For the purpose of this subsection, escape is defined to include, but is not restricted to, wilful failure to return to an appointed place and at an appointed time as ordered." (Our italics.)

[4, 5] "(A) defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149, 131 A.L.R. 143, and cases cited. Whether there is a fatal variance between the indictment and

the proof is properly presented by defendant's motion to dismiss. *State v. Hicks,* 233 N.C. 31, 62 S.E. 2d 497, and cases cited; *State v. Keziah,* 258 N.C. 52, 127 S.E. 2d 784; *State v. Kimball,* 261 N.C. 582, 135 S.E. 2d 568.

In *State v. Kimball, supra,* it was held the evidence did not establish the defendant's guilt *as charged.* Although the indictment charged a violation of G.S. 148-45(a), the State's evidence was to the effect that the defendant had violated G.S. 148-45(b). Referring to G.S. 148-45(b), Sharp, J., for the Court, said: "This section, while providing the same penalties listed in subsection (a) creates a new and distinct offense which can only be committed by a work-release prisoner or a convicted defendant temporarily on parole."

[6] The indictment purports to charge defendant with a violation of G.S. 148-45(b), specifically the wilful and felonious failure to return to custody "after being removed from the prison on a work-release pass."

G.S. 148-33.1(d) provides, in part, that "(t)he State Department of Correction is authorized and directed to establish a work release plan under which an eligible prisoner may be released from actual custody during the time necessary to proceed to the place of his employment, perform his work, and return to quarters designated by the prison authorities," and to establish "(r)ules and regulations for the administration of the work release plan. . . ." See Advisory Opinion *In re Work Release Statute,* 268 N.C. 727, *730,* 152 S.E. 2d 225, *227.* However, the State offered no evidence tending to show defendant had been granted work-release privileges, G.S. 148-33.1(b), or that the pass, if any, issued to him was related in any way to the "work release plan." (Note: No paperwriting purporting to be a pass or copy thereof was offered in evidence.) On the contrary, Superintendent Meares testified he granted defendant permission to leave on Friday night, July 21, 1967, with the understanding defendant was to be back before 8:00 p.m. on Sunday night, July 23, 1967, in order that defendant might be at his home and with his family in Mecklenburg County. If in fact defendant had been granted work-release privileges, it would seem the week-end leave granted defendant by Superintendent Meares was outside the scope and regulations of the work-release plan.

[6, 7] It now appears that defendant's motion to dismiss should have been allowed on the ground the State's evidence did not support the criminal offense charged in the bill of indictment. A judgment entered in accordance with the allowance of defendant's motion to dismiss will "have the force and effect of a verdict of 'not

guilty' " as to the criminal offense *charged in the indictment.* G.S. 15-173; *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558.

It is noted that nothing in the State's evidence shows defendant was released "on a temporary parole by permission of the State Board of Paroles or other authority of law." As to the authority of the Board of Paroles to grant both regular and temporary paroles, see G.S. 148-52. As to the authority of the Commissioner of Correction to permit a prisoner to leave the limits of his place of confinement "unaccompanied by a custodial agent for a prescribed period of time . . .," see G.S. 148-4.

For the reasons indicated, the decision of the Court of Appeals is reversed, and the cause is remanded for the entry of an order remanding the action to the Superior Court of Gaston County for judgment dismissing the action.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DEE D. ATKINSON

No. 22

(Filed 14 May 1969)

1. Criminal Law § 154— service of case on appeal — extension of time

Only the judge who tried the case can extend the time for serving the statement of the case on appeal, and, having granted one extension, he may not grant another after the expiration of the term at which the judgment was entered. G.S. 1-282.

2. Criminal Law § 154— failure to serve case on appeal within authorized time — appellate review

Where the appellant's statement of the case on appeal is not served within the time fixed by statute or within the period of an authorized extension by the trial judge, the Supreme Court is normally limited to a consideration of the record proper, and if no error appears on the face thereof, the judgment will be affirmed.

3. Criminal Law § 154— case on appeal — duty of appellant

It is the duty of the appellant to see that the record is properly made up and transmitted to the appellate court.

4. Criminal Law § 154— invalid extensions of time to serve case on appeal

Where defendant gave notice of appeal to the Supreme Court on the

day judgment was pronounced in the superior court and the presiding judge then extended the time for serving the case on appeal to 60 days, two subsequent orders entered by the trial judge after the expiration of the term at which the judgment was pronounced and a subsequent order entered by another judge undertaking further to extend the time for the service of the statement of the case on appeal were nullities.

5. Criminal Law § 153— jurisdiction of trial court after appeal taken

After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by statute.

6. Criminal Law § 154— extensions of time to serve case on appeal — certiorari

Extensions of time to serve the statement of case on appeal in addition to that allowed by G.S. 1-282 may be obtained only by petition for *certiorari* directed to the court to which the appeal has been taken.

7. Criminal Law §§ 154, 156— failure to serve case on appeal in apt time — appeal treated as petition for certiorari

In this purported appeal from a judgment imposing the death sentence for the crime of first degree murder, where no statement of case on appeal was served within the time allowed by valid order, the Supreme Court upon its own motion treats the appeal as a petition for *certiorari*, allows the same and considers all assignments of error upon their merits as if the case on appeal had been served within the time properly allowed therefor.

8. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of veniremen opposed to capital punishment

Prior to the decision of *Witherspoon v. Illinois*, 391 U.S. 510, it was not error under the law of this State to allow challenges for cause by the State to prospective jurors who stated they had "conscientious scruples against the infliction of the death penalty" in a case where such penalty might be inflicted pursuant to a verdict of guilty.

9. Constitutional Law § 29; Criminal Law § 135; Jury § 7— application of Witherspoon v. Illinois to this State

The Constitution of the United States, as interpreted by the Supreme Court of the United States in the *Witherspoon* decision, is controlling insofar as it conflicts with the law of this State.

10. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty — exclusion of veniremen opposed to capital punishment

Under the decision of *Witherspoon v. Illinois*, 391 U.S. 510, 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.

11. Homicide § 29— instructions — discretion of jury to recommend life imprisonment

In a prosecution for first degree murder, the trial court must instruct

the jury that it might, in its unbridled discretion, render a verdict of guilty with a recommendation that the punishment be imprisonment for life, which would then be binding upon the court in the matter of sentence. G.S. 14-17.

12. Homicide § 31; Criminal Law § 135— death penalty — unanimity of jury verdict

In a prosecution for first degree murder, if one juror refuses to consent to a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the death sentence cannot be imposed on the defendant, since the verdict of a jury must be unanimous.

13. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of venireman who would never return verdict requiring death penalty

In this prosecution for the capital crime of first degree murder, the Constitution of the United States, as interpreted in *Witherspoon v. Illinois*, 391 U.S. 510, is not violated by the allowance of the State's challenges for cause of prospective jurors who made it clear on *voir dire* examination that, before hearing any of the evidence, each of them had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed, whatever the evidence might be.

14. Constitutional Law § 29; Jury § 5— right of State to unbiased jury

The State, as well as the defendant, is entitled to a jury which will give it a fair and impartial verdict upon every issue properly presented by the evidence, including the question of whether, upon the evidence, a defendant believed by them beyond any reasonable doubt to be guilty of first degree murder should be executed or should be imprisoned for life.

15. Constitutional Law § 29; Jury § 7— statement in record relating to examination of prospective jurors as to views on capital punishment

In this appeal from a judgment imposing the death sentence, a statement in the record, following the recital of the *voir dire* examination of three prospective jurors relating to their views on capital punishment and the rulings of the court sustaining the State's challenges to them, to the effect that all 50 prospective jurors called to the stand were asked similar questions concerning capital punishment *is held* not to disclose any violation of defendant's constitutional rights, the statement showing only that 36 prospective jurors were excused since 14 jurors were chosen, but the record failing to show how many of the 36 were challenged by the State for cause or that any successful challenge for cause, other than the three set forth in the record, was based on the answer of the prospective juror with reference to capital punishment.

16. Jury §§ 6, 7— examination with respect to views on capital punishment

Even if a prospective juror's answer to a question relating to his views on capital punishment is not sufficient to support a challenge for cause,

the solicitor may properly ask the question in order to permit the intelligent use of the peremptory challenges allowed by law to the State.

17. Jury § 7— challenge for cause — desire of juror to affirm

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. G.S. 9-14, G.S. 11-11.

18. Jury § 7— erroneous allowance of challenge for cause

Nothing else appearing, the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury, especially where the adverse party does not exhaust his peremptory challenges.

19. Constitutional Law § 29; Jury § 5— right to jury chosen without unconstitutional discrimination

Defendant is not entitled to a jury of his selection or choice but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn.

20. Constitutional Law § 29; Jury § 5— discretion of court to excuse juror not challenged by either party

It is the right and duty of the court to see that a competent, fair and impartial jury is empaneled and, to that end, the court in its discretion may excuse a prospective juror without a challenge by either party and as a result of information voluntarily disclosed by the prospective juror without questioning.

21. Constitutional Law § 29; Jury § 5— waiver of irregularity in forming jury

An irregularity in forming a jury is waived by silence of a party at the time of the court's action.

22. Constitutional Law § 29; Jury § 5— jury drawn from cross section of community — excusal of jurors who refused to take oath

In this prosecution for first degree murder, defendant was not deprived of a jury drawn from a cross section of the community when the trial court in its discretion and on its own motion excused three prospective jurors who refused to take the customary oath for jurors, defendant having failed to show that persons who have conscientious scruples against taking an oath constitute any substantial portion of the prospective jurors of the county of defendant's trial or that jurors without such scruples would be less inclined than others to convict or to impose the death penalty, and defendant having failed to object to the court's action until after the verdict was rendered.

23. Constitutional Law § 29; Jury § 5— group discrimination in jury selection — burden of proof

A defendant complaining of group discrimination in the selection of the jury which tried him has the burden of proving that the jury selected did not represent a fair cross section of the entire community.

24. Criminal Law § 42— admission of bloodstained clothing

In this prosecution for the first degree murder of a child, the court properly admitted articles of bloodstained clothing and a bloodstained washcloth found on the body of the deceased child, such evidence being competent to identify the body, to corroborate the State's theory of the case, and to enable the jury to realize more completely the cogency and force of the testimony of the witnesses.

25. Criminal Law § 43— admissibility of gruesome photographs

The fact that a photograph depicts a horrible, gruesome and revolting scene indicating a vicious, calculated act of cruelty, malice or lust does not render the photograph incompetent in evidence when properly authenticated as a correct portrayal of conditions observed and related by the witness who uses the photograph to illustrate his testimony.

26. Criminal Law § 43— admissibility of photographs

Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words.

27. Criminal Law § 43— color photographs

The fact that photographs are in color does not affect their admissibility.

28. Criminal Law § 43; Homicide § 20— photographs of body

In a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray.

29. Criminal Law § 43— identification of photographs

It is not necessary that the photograph be taken by the witness if the witness testifies that it correctly represents what he observed.

30. Criminal Law § 43; Homicide § 20— photograph of body of deceased after moved from place where found

A photograph of the body of the deceased is not rendered inadmissible by the fact that it was taken after the body had been moved from the place where originally found to the morgue or other place for examination.

31. Criminal Law § 43— photograph showing condition of body at time after homicide occurred

The fact that a photograph was taken and portrays the condition of the body at some time after the homicide occurred does not, of itself, render the photograph incompetent.

32. Criminal Law § 43; Homicide § 20— homicide prosecution — admissibility of photographs of body and location

In this prosecution for the first degree murder of a child, the court did not err in the admission of photographs used by witnesses of the State to illustrate their testimony concerning the location and appearance of the place where the child's body was found buried and the condition of

the body, where the court instructed the jury that the photographs were allowed in evidence for the sole purpose of illustrating the testimony of the witnesses and not as substantive evidence.

33. Criminal Law § 42— homicide prosecution — shovel used to dig grave of victim

In this prosecution for the first degree murder of a child, the court did not err in the admission of a shovel taken from defendant's home with his permission after defendant admitted having used the shovel to dig the grave where the child's body was found.

34. Criminal Law § 34— evidence of other crimes

While evidence of other crimes having no bearing upon the crime for which the defendant is on trial may not be introduced prior to his taking the stand as a witness, all facts relevant to the proof of defendant's guilt of the crime charged may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense.

35. Criminal Law § 34— evidence of other crimes

Evidence of other offenses is competent to show the crime charged was committed for the purpose of concealing another crime, to show a motive on the part of the accused to commit the crime charged, to show the *quo animo*, intent, design, guilty knowledge, or scienter, to make out the *res gestæ*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions.

36. Criminal Law § 34— homicide prosecution — evidence of rape

In this prosecution for the first degree murder of a female child, the court properly allowed a pathologist for the State to testify as to the conditions he observed upon the child's body and his conclusion therefrom that she had been raped, and to use properly authenticated photographs to illustrate his testimony, such evidence being competent to establish the motive, premeditation, deliberation and malice on the part of defendant for and in the murder with which he was charged.

37. Criminal Law § 5— test of insanity as defense of crime

The test of insanity as a defense to an alleged criminal offense is the capacity of the defendant to distinguish between right and wrong at the time of and in respect of the matter under investigation.

38. Criminal Law § 5— defense of insanity — competency of evidence

Evidence tending to show the mental condition of the accused both before and after the commission of the act is competent provided it bears such relation to the defendant's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto.

39. Criminal Law §§ 5, 53— expert testimony as to defendant's mental condition on date of crime

In this prosecution for first degree murder, the court properly allowed a psychiatrist for the State who examined and observed defendant over

a substantial period of time pursuant to a court order entered some three and a half months after the alleged offense to testify that he was of the opinion that defendant "knew right from wrong" on the date of the alleged offense.

40. Criminal Law § 5— defense of insanity — burden of proof

Defendant has the burden of establishing the defense of insanity to the satisfaction of the jury.

41. Criminal Law § 99— comment by trial court during solicitor's argument

Where defendant objected to a statement in the solicitor's argument to the jury that "defendant's mother said that she didn't remember whether she was charged with killing her first husband or not," a comment by the court that "I remember distinctly that she said it," although not supported by the narrative summary of testimony of defendant's mother in the record, did not constitute an expression of opinion as to the credibility of the witness and was not prejudicial error since defendant's mother had admitted her conviction of the murder of her second husband.

42. Criminal Law § 159— case on appeal — statement of evidence

It is not required that the appellant set forth in his statement of the case on appeal the evidence in its entirety.

43. Criminal Law § 161— appeal is exception to judgment

Defendant's appeal is itself an exception to the judgment and brings up for review all matters appearing on the face of the record proper, including the sufficiency of the verdict to support the imposition of the death sentence.

44. Constitutional Law § 29; Criminal Law § 135; Homicide § 31— sentence for first degree murder — G.S. 14-17, former G.S. 15-162.1

G.S. 14-17, providing for the sentence to be imposed for first degree murder upon a verdict returned by the jury, and G.S. 15-162.1, which prior to its repeal by the 1969 Legislature provided for the sentence to be imposed upon an accepted plea of guilty, were separate and distinct statutes; therefore, the validity of G.S. 14-17 cannot be adversely affected by the invalidity, if any, of [former] G.S. 15-162.1.

45. Constitutional Law § 29; Criminal Law § 135; Homicide § 31— capital punishment for first degree murder — jury verdict — U. S. v. Jackson

The decision of *United States v. Jackson*, 390 U.S. 570, did not at the time of defendant's trial prior to the repeal of G.S. 15-162.1 and does not now forbid the courts of this State to impose the sentence of death pursuant to a verdict of the jury in accordance with G.S. 14-17.

46. Constitutional Law § 29; Criminal Law § 135; Homicide § 31— right to jury trial — life sentence upon guilty plea — former G.S. 15-162.1

In this prosecution for first degree murder, [former] G.S. 15-162.1, which at the time of the trial permitted a defendant represented by

counsel to tender a written plea of guilty to a charge of first degree murder which, if accepted by the State and approved by the court, had the effect of a jury verdict of guilty with a recommendation of life imprisonment, did not discourage defendant from exercising his constitutional right to trial by jury where defendant entered a plea of not guilty and was tried by a jury.

47. Constitutional Law § 29; Criminal Law § 135; Homicide § 31— constitutionality of death penalty

The imposition of the death penalty for first degree murder is not unconstitutional *per se*.

48. Criminal Law § 135; Homicide § 31— death penalty for first degree murder

The imposition of the death penalty for first degree murder is expressly authorized by Article XI, § 2, of the Constitution of North Carolina.

49. Criminal Law § 135; Homicide § 31— death penalty for first degree murder

The Fourteenth Amendment to the United States Constitution does not prevent the State of North Carolina from sentencing a defendant to death pursuant to G.S. 14-17.

50. Criminal Law § 135; Homicide § 31— death penalty for first degree murder — determination by Legislature

It is for the Legislature, not the courts, to determine whether the provision imposing the death penalty for the commission of first degree murder is or is not a wise policy for this State.

51. Criminal Law § 146— appellate review of capital case

In capital cases the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu*.

HIGGINS, J., concurring.

BOBBITT, J., dissenting as to death sentence.

SHARP, J., joins in dissenting opinion.

APPEAL by defendant from *Parker, J.*, at the July-August 1968 Criminal Session of WAYNE.

The defendant appeals from a judgment sentencing him to death, the jury having found him guilty of murder in the first degree and having made no recommendation that his punishment be imprisonment for life. The defendant entered a general plea of "not guilty" and further pleas of "not guilty" on the grounds of insanity and of "temporary or transitory insanity at the time of the alleged commitment of the act." The indictment, verdict and judgment were all proper in form.

The regular panel of jurors having been exhausted, additional prospective jurors were summoned. The record discloses no defect in or objection to the procedure followed in so doing. Neither the State nor the defendant exhausted available peremptory challenges. There is no suggestion in the record that any member of the jury which rendered the verdict was not competent.

The following is a summary of the evidence introduced by the State:

Catherine (Kathy) Carr, age four years, was living in Smithfield, Johnston County, with her maternal grandmother on 16 December 1967. The defendant was her stepfather. He lived near Smithfield, separate and apart from the child's mother, who lived in Durham. Prior to the separation they had all lived together at the defendant's home near Smithfield, the defendant demonstrating normal affection for Kathy.

At approximately 5 p.m. on 16 December 1967, the defendant drove his station wagon to the home of the grandmother and told her that he wanted to take Kathy to see her mother in Durham. They located Kathy at the home of a neighbor, picked her up and returned to the grandmother's home, where the grandmother assembled a change of clothing for the child. The State introduced in evidence various articles of clothing after the grandmother identified each as either worn or carried by Kathy when she left the grandmother's home in the company of the defendant at approximately 6 p.m.

The grandmother, an experienced hospital nurse's aid, who had worked with mental patients, observed nothing unusual about the defendant while she was with him when he so came to get Kathy. He then appeared to her to be "normal."

At 9:45 p.m., the defendant drove up to and entered a restaurant in Smithfield. His clothing was disarranged. He went to the rest room and remained there about five minutes. When he emerged therefrom with some adjustment of his appearance, he purchased a coca cola, drank some of it, went out to his station wagon, opened the door to it, returned to the restaurant and announced that someone had kidnapped his child. He made conflicting statements as to where the child had been in the vehicle. At that time the defendant "acted normal" in the opinion of a police officer who was in the restaurant. Spots of blood were observed in the vehicle.

Investigating officers warned the defendant of his constitutional rights. (On voir dire examination, an officer testified that the full

Miranda warning was given to the defendant, the defendant stated he would talk to the officers "without a lawyer being present," and there were no threats or inducements made or given the defendant in order to elicit a statement. The court found as a fact that any statement made to such officers by the defendant was "made freely, understandingly and voluntarily after full and complete warning of all rights guaranteed to said defendant under the State and Federal Constitution, without threat, promise of reward, coercion, duress or any other undue influence.") Thereafter, on 17 December, the defendant drew and gave to the investigating officers a map, showing the location of the place where Kathy's body was buried. This map was introduced in evidence. At that time the officers did not know where the child or her body was.

Using the map or diagram so prepared by the defendant, the officers, together with the defendant, then drove to a point on a rural road in Wayne County, 18 miles from the defendant's home, from which point they walked 75 yards into a pine woods. There the defendant pointed to a spot and told the officers the child's body was buried there. The diagram, so prepared by the defendant, was an accurate portrayal of the route from Smithfield to this point. An abundance of pine needles on the surface at the place so indicated by the defendant made the area compatible in appearance with the surrounding area so that a passerby would not have recognized this as a grave. Kathy's body was found two feet below the surface at this point.

Photographs of the area, the opened grave and the child's body and articles of clothing in the grave were introduced in evidence and used by an investigating officer to illustrate his testimony, each photograph being duly identified as to its accuracy. Other photographs of the child's body, properly identified and authenticated, were introduced in evidence and used by the State's witnesses to illustrate the condition of the body, wounds thereon, the condition of the clothing and profuse blood stains thereon. The articles of clothing, previously identified by the child's grandmother, were identified by the investigating officers as being upon the body or otherwise in the grave when the body was discovered. The court instructed the jury at the time the photographs were offered in evidence that they were not substantive evidence but were allowed only for use to illustrate the testimony of the witnesses, if the jury found they did so illustrate such testimony.

The State also offered in evidence a shovel found at the defendant's home and taken therefrom by the officers with the defendant's

permission on 18 December, immediately after Kathy's body was removed from the burial place. The shovel then had upon it soil of the same type as the soil in the shallow grave.

On 18 December (having been given again the full *Miranda* warning concerning his constitutional rights), the defendant made a detailed statement to the officers concerning the events of the afternoon and evening of 16 December. At the time of making the statement, he did not appear "to be in a highly nervous condition." The officer to whom the statement was made testified that the defendant then told the officer that he left the grandmother's residence with Kathy in his car and took her to his own residence, where they were alone. He then undressed the child and had intercourse with her despite her screams and struggles. Using a washcloth (such bloody cloth having been found upon the child's body upon her removal from the grave), he cleaned the blood from her person and dressed her. He then got his shovel, placed it in the station wagon, led Kathy out and put her in the station wagon, drove with her to the place where her body was found buried (18 miles from his residence), took the shovel, proceeded into the woods, dug the grave, went back to the station wagon and "led Kathy Carr by the hand" to the grave, where he "took his hands and choked her to death." He then placed her in the grave and covered her, spreading pine needles over the grave so it would be "hard to recognize," drove back to Smithfield, went into the restaurant, went back out to his car, returned to the restaurant and told the people Kathy had been left in the car and was "gone."

On 19 December, Kathy's body was examined by an expert in pathology, who testified as such. This witness testified that in his opinion the child "had suffocated to death as the result of being strangled or the hand or some other object being placed over the mouth and nose." He further testified that in his opinion, based upon his examination of her body, her vaginal tract had been penetrated by a male organ and had been severely lacerated and torn in the process, using photographs above mentioned to illustrate his testimony. (The court again instructed the jury that the photographs were allowed in evidence for no purpose other than that of illustrating the testimony of the witness, they not being substantive evidence.) This witness also identified certain articles of clothing and the washcloth, previously introduced in evidence by the State, as having been found upon Kathy's body by him at the time of his examination on the morning of 19 December, and stated that their condition at the time he saw them in the courtroom was the same as at the time of his examination of the child's body. He testified

that in his opinion the blood on the washcloth came from the above mentioned "tear or laceration" of the body of Kathy Carr.

The following is a summary of the evidence introduced by the defendant:

The defendant testified to the effect that he was 27 years of age and had served a term in prison for armed robbery prior to his marriage to Kathy's mother. Upon his release from prison he "felt depressed and worried." He separated from Kathy's mother about six weeks prior to Kathy's death. He then "was becoming worried, depressed and moody" and "felt like" he was losing his "grip mentally as well as physically." He loved Kathy. When he took Kathy from her grandmother's home on 16 December, he "was feeling very depressed, very worried and up-set over the situation" between him and his wife. Leaving the grandmother's home with Kathy, he took her to his home where he decided to give her a bath before taking her to her mother. Kathy then asked him when she and her mother could come back to live with him. He replied that he did not know if they could or not. She kept asking him and he "yelled at her and told her to hush." She began to cry and he spanked her lightly. She cried harder and he "went out of [his] mind." He does not remember what happened from then until he found himself back in his home, except for "impressions, flash glimpses of what happened" or what he thinks happened in those two hours. He drew the map above mentioned showing the location where he thought Kathy was buried. He took the officers to the grave but does not "remember clearly" that he actually buried Kathy. He did not spank her hard enough to make her bleed. He did not tell the officer that he raped Kathy.

The defendant's mother testified that when he came out of prison he was "very nervous" and, in May, 1967, "he seemed to be in a worried and troubled state of mind." On his last visit to his mother, prior to 16 December 1967, "he appeared to be in a very, very nervous state." In her opinion, on 16 December "he was incapable of distinguishing between right and wrong in relation to the charge of murder" and he did not know right from wrong at the time she was testifying. She, herself, was convicted and served a sentence for the murder of her second husband. (The defendant's father was her first husband.)

Other witnesses for the defendant testified that he was "good" to Kathy, "his character and reputation was very good" and he was a good worker on his job. Several of these witnesses, including relatives of the defendant, testified that they observed no indication of insanity in his conduct. One of them, the defendant's parole officer

from the time of his release from prison on the sentence of armed robbery until approximately two months prior to 16 December 1967, testified that in his opinion the defendant "knew right from wrong" when he came under the supervision of the witness, that he did so on 16 December 1967 and still did so at the time of the trial.

Prior to trial, pursuant to an order duly issued, the defendant was sent to one of the State's hospitals for the insane for 60 days for observation. The examining psychiatrist was called as a witness for the State in rebuttal. He testified, as an expert witness, that he saw the defendant at intervals during the defendant's stay at the hospital from 1 April 1968 to 6 June 1968, and in the opinion of the witness the defendant "was sane during the time that he was confined to Cherry Hospital." From his study of the defendant during that period, it is his opinion that the defendant "was sane" and "knew right from wrong" on 16 December 1967, and knew "right from wrong" at the time the witness was so testifying at the trial. At the time the defendant was in the hospital, he had an I.Q. rating of 121, the normal rating being from 90 to 115.

In the examination of prospective jurors three of them stated of their own volition that they do not "swear." One of the three said he would like to be "affirmed." The other two made no statement as to affirmation. In each instance the court excused the juror "in the exercise of its discretion." The record shows an exception to each of these actions of the court but no objection at the time of the court's ruling. In oral argument counsel for the defendant stated that he did not interpose an objection at the time. The record discloses no questioning of or challenge to any of these three prospective jurors by either party. There is nothing in the record to indicate that any of the three would or would not have been acceptable either to the State or to the defendant.

Over the objection of the defendant the court sustained the State's challenge of prospective juror Corum. After explaining the nature of the case to this prospective juror, the solicitor asked:

> "In the event that you are sworn as a juror in this case, and in the further event that the State of North Carolina should furnish you with sufficient evidence in this case which in your opinion warranted a verdict of 'Guilty of Murder in the first degree,' do you or would you have any moral or religious scruples against bringing out a verdict of 'Guilty,' if you knew the penalty for that verdict would be death?"

The prospective juror answered that he would have such scruples. The solicitor then asked:

"Then is your feeling so strong about that, or are your scruples, whether they be religious or moral so strong that in no event you could ever bring out a verdict of guilty if you knew the penalty would be death?"

The prospective juror again answered in the affirmative.

The court then asked the solicitor, "Do you mean in this particular case?" and the solicitor replied that he did. The challenge was thereupon sustained.

Over objection by the defendant the solicitor's challenge for cause of prospective juror Thompson was allowed. The solicitor asked this prospective juror:

"In this particular case, after you have heard all of the evidence for the State and the evidence for defendant, if the evidence of the State should convince you beyond a reasonable doubt that the defendant is guilty, do you have any moral or religious scruples against bringing in a verdict of guilty in this particular case if you knew that the death penalty would be invoked?"

The prospective juror replied that he did have such scruples and had had such scruples ever since he could remember. The challenge was thereupon allowed.

Over the objection of the defendant the State's challenge of prospective juror Best was allowed. The solicitor asked this prospective juror:

"Mr. Best, if you are sworn as a juror in this particular case and if after having heard all of the evidence the State has satisfied you beyond a reasonable doubt that the defendant is guilty, would you and do you have any religious or moral scruples that would prevent you from bringing out a verdict of 'guilty' if you knew the sentence would be death?"

The prospective juror replied that he did have such scruples and had had them ever since he had been old enough to understand. Thereupon the challenge was allowed.

The record contains no other questioning of prospective jurors or statement concerning their selection except the following:

"There were 50 prospective jurors called to the stand before a jury was seated in this case and every juror called to the stand was asked the similar questions as set out above concerning capital punishment."

Fourteen jurors, including two alternates, were selected. The record does not show how many of the remaining 36 were challenged for cause, or for what cause, or peremptorily by the State or how many were so challenged by the defendant. It was conceded in oral argument that neither party had exhausted its peremptory challenges when the selection of the jury was completed.

In the course of the solicitor's argument to the jury, counsel for the defendant objected to the solicitor's statement, "His mother said she didn't remember whether she was charged with killing her first husband or not." The court replied, "I remember distinctly that she said it." The defendant contends that this was an unauthorized expression of an opinion by the court.

The grounds upon which the defendant seeks a new trial are these: (1) The allowance of the State's challenge for cause to the prospective jurors who expressed objections, as above shown, to capital punishment; (2) the court's excusing upon its own motion the prospective jurors who refused to be sworn, as above shown; (3) the overruling of the defendant's objections to the introduction in evidence of the photographs, the clothing and the bloody washcloth found upon the body of Kathy Carr and the shovel, above mentioned; (4) the court's permitting the expert pathologist to testify with reference to the child's having been raped and his use of photographs, above mentioned, to illustrate his testimony; (5) the court's permitting the psychiatrist to testify that the defendant knew right from wrong at the time of the alleged offense, during the time the psychiatrist observed the defendant and at the time of the trial; and (6) the statement of the court, above shown, concerning the testimony of the mother of the defendant.

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

George R. Kornegay, Jr., and John S. Peacock for defendant.

LAKE, J.

G.S. 15-180 provides that an appeal to this Court from a judgment in a criminal action "shall be perfected and the case for the Supreme Court settled, as provided in civil actions." G.S. 1-282 provides that upon an appeal from a judgment in a civil action a copy of the appellant's statement of the case on appeal "shall be served on the respondent within fifteen days from the entry of the appeal taken * * * Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in

which to serve statement of case on appeal and exceptions thereto or counter statement of case."

[1-3] By the terms of the statute, only the judge who tried the case can extend the time for serving the statement of the case on appeal and this Court has held that, having granted one extension, he may not grant another after the expiration of the term at which the judgment was entered. *Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659. Normally, the effect of failure to serve the appellant's statement of the case on appeal within the time fixed by the statute, or within the period of such authorized extension by the trial judge, is that upon such appeal the Supreme Court is limited to a consideration of the record proper and if no errors appear on the face thereof, the judgment will be affirmed. *Machine Co. v. Dixon, supra; Twiford v. Harrison,* 260 N.C. 217, 132 S.E. 2d 321. "It is the duty of appellant to see that the record is properly made up and transmitted to the court." *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262.

[4] The record shows that on the day the judgment was pronounced in the superior court the defendant gave notice of appeal to this Court and the presiding judge then extended the time allowed by the statute for the service of the appellant's statement of the case on appeal to 60 days. The two subsequent orders by the judge presiding at the trial, entered after the expiration of the term at which the judgment was pronounced, undertaking further to extend the time for the service of the appellant's statement of the case on appeal and a subsequent order entered by a different judge, undertaking further to extend the time for the service of the statement of the case on appeal, were nullities.

[5-7] After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by the statute. See *Machine Co. v. Dixon, supra.* Further extensions of time may be obtained only by petitions for certiorari directed to the court to which the appeal has been taken. No such petition was filed by the defendant with this Court. However, in the exercise of our discretion and in view of the imposition of the death penalty in the superior court, we, upon our own motion, treat the appeal as a petition for certiorari, allow the same and consider all assignments of error upon their merits as if the case on appeal had been served within the time properly allowed therefor.

Jurors Challenged Because Of Views Concerning Capital Punishment

[13] The record discloses no error in the rulings of the trial judge

upon challenges for cause by the State to prospective jurors as the result of their stated views on the subject of capital punishment.

[8] Prior to the decision of the Supreme Court of the United States in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, it was well established that, under the law of this State, it was not error to allow challenges for cause by the State to prospective jurors who stated they had "conscientious scruples against the infliction of the death penalty" in a case where such penalty might be inflicted pursuant to a verdict of guilty. *State v. Spence* (first hearing), 271 N.C. 23, 155 S.E. 2d 802; *State v. Bumper* (first hearing), 270 N.C. 521, 155 S.E. 2d 173; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453. See also *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568. In *State v. Vick,* 132 N.C. 995, 43 S.E. 626, the Court quoted with approval the following statement in 17 A. and E. Enc. 1134:

> "Though no such ground for challenge is to be found stated in the *English* cases, in the United States, since the early part of the nineteenth century, the fact that one has conscientious scruples against the infliction of capital punishment has been regarded as disqualifications furnishing ground for challenge by the prosecution, on a trial for an offense which may be punished by death."

The law of this State, as distinguished from the Constitution of the United States, has not been changed in this respect since those decisions were rendered.

[9] The Constitution of the United States, as interpreted by the Supreme Court of the United States in the *Witherspoon* case, *supra,* is, of course, controlling insofar as it conflicts with the law of this State and we so recognized in *State v. Spence* (hearing on remand), 274 N.C. 536, 164 S.E. 2d 593. There we allowed a new trial because the record contained a stipulation that 79 of 150 veniremen were successfully challenged for cause "because of their stated opposition to capital punishment," this being contrary to the *Witherspoon* decision. The question now before us is whether the Constitution of the United States, as interpreted in the *Witherspoon* case, is violated by the allowance of the State's challenges for cause shown in the present record.

[10] The majority opinion in the *Witherspoon* case sharply defines the line drawn by that decision by both positive and negative statements. The Court affirmatively stated its holding as follows:

> "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." (Emphasis added.)

Speaking negatively, the Court said:

"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 they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it." (Emphasis added.)

Again, in Footnote 21, the Court said:

"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.*"

[13] Prospective juror Corum stated specifically that his feeling against capital punishment was so strong that in no event could he ever bring out a verdict of guilty if he knew the penalty would be death.

Prospective juror Thompson stated that even if the evidence should convince him beyond a reasonable doubt of the guilt of the defendant he would have "moral or religious scruples against bringing in a verdict of guilty in this particular case" if he "knew that the death penalty would be invoked." Prospective juror Best stated that even though, after hearing all of the evidence, he was satisfied beyond a reasonable doubt that the defendant is guilty he would have "religious or moral scruples" which would prevent him "from

bringing out a verdict of 'guilty' " if he knew the sentence would be death.

[11, 12] It is true that, at the time of the trial of this defendant in the superior court, G.S. 14-17 provided that the punishment for murder in the first degree would be imprisonment for life if, at the time of rendering its verdict in open court, the jury should so recommend, and, under the decisions of this Court, it was the duty of the trial judge in a capital case to instruct the jury that it might, in its unbridled discretion, render its verdict of guilty with such recommendation, which would then be binding upon the court in the matter of sentence. *State v. Carter,* 243 N.C. 106, 89 S.E. 2d 789; *State v. McMillan,* 233 N.C. 630, 65 S.E. 2d 212. The jury actually selected to try the defendant in the present case was so instructed. Since the verdict of a jury must be unanimous, it necessarily follows that if only one juror had refused to consent to a verdict of guilty of murder in the first degree without a recommendation that the punishment be imprisonment for life, the death sentence could not be imposed upon the defendant. Consequently, prospective jurors Corum, Thompson and Best could each have served upon the jury in the present case and rendered a verdict of guilty without violating his stated moral or religious scruples against the death penalty.

[13] It does not follow, however, that the sustaining of the State's challenges to these prospective jurors violated the rule of the *Witherspoon* case, *supra.* It is perfectly clear from their answers in the record, upon voir dire examination, that each of these prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed, whatever the evidence might be. In the language of the majority opinion in the *Witherspoon* case, these jurors made it clear that "they could never vote to impose the death penalty" and "they would refuse even to consider its imposition in the case before them," and "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."

[14] The State, as well as the defendant, is entitled to a jury which will give it a fair and impartial verdict upon every issue properly presented by the evidence, including the question of whether, upon the evidence, the defendant, believed by them beyond any reasonable doubt to be guilty of first degree murder, should be executed or should be imprisoned for life. The decision in *Witherspoon v. Illinois, supra,* does not deprive the State of this right.

Irving v. Breazeale, 400 F. 2d 231, 236; *Williams v. Dutton,* 400 F. 2d 797, 805; *United States v. Valentine,* 288 F. Supp. 957, 966; *State v. Mathis,* 52 N.J. 238, 245 A. 2d 20, 23, 26; *State v. Smith,* (Wash.), 446 P. 2d 571. As the Supreme Court of the United States said in *Swain v. Alabama,* 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence before them, and not otherwise. * * *
>
> Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should 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.' *Hayes v. Missouri,* 120 U.S. 68, 70."

[15, 16] Following the recital of the voir dire examinations of the above prospective jurors and the rulings of the court sustaining the challenges of the State to them, the record contains the following statement:

> "There were 50 prospective jurors called to the stand before a jury was seated in this case and every juror called to the stand was asked the similar questions as set out above concerning capital punishment."

There is nothing in this statement to show any error entitling the defendant to a new trial. It shows only that 36 prospective jurors were excused, 14, including two alternate jurors, having been selected. The record does not show how many of the 36 were challenged by the defendant or how many were challenged by the State or how many were challenged by either party peremptorily. Of those challenged successfully for cause, with the exception of the three named above, the record does not show that the challenge was based upon the answer of a single prospective juror to any question with reference to capital punishment. Indeed, the record does not show the answer of any juror to any question upon this subject other than the three prospective jurors above mentioned. The statement that "the similar questions as set out above concerning capital punishment" were asked each juror discloses no error, first because it does not show sufficiently the content of any question since those asked the prospective jurors Corum, Thompson, and Best were not identical, and second because there was certainly no error in allowing any ques-

tion identical to that propounded to any one of those three prospective jurors. Even if a prospective juror's answer to such a question were not sufficient to support a challenge for cause, it would certainly be proper to ask the question in order to permit the intelligent use of the peremptory challenges allowed by law to the State. See *Swain v. Alabama, supra.*

We, therefore, conclude that there is nothing in this record indicating any merit in the contention of the defendant that he has been denied any right under the Constitution of the United States, or under the law of this State, in the sustaining of any challenge for cause by the State by reason of the prospective juror's statement of his views on the subject of capital punishment.

Jurors Excused Because Of Unwillingness To Take Oath

[22] The court's action in excusing, in its discretion and upon its own motion, three prospective jurors who refused to take the customary oath, is not ground for granting the defendant a new trial.

According to the record, only one of these prospective jurors expressed a willingness to affirm rather than swear. The record indicates that no question was propounded to any of them. They were not challenged. They were excused by the court. The record discloses no other information about any of them or concerning the reason for the court's action. The record does not state that they were excused because of their objection to taking an oath. While the record shows an exception by the defendant to each of these actions of the court, it does not show any objection thereto interposed at the time. In oral argument in this Court, counsel for the defendant stated frankly that no such objection was then interposed, the exceptions having been entered in preparation of the statement of the case on appeal.

[17-19] The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. See: G.S. 9-14; G.S. 11-11. On the other hand, nothing else appearing, even the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. This is especially true where, as here, the adverse party did not exhaust his peremptory challenges. See: *State v. Vann,* 162 N.C. 534, 77 S.E. 295; *State v. Cunningham,* 72 N.C. 469, 474. The defendant is not entitled to a jury of his selection or choice but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial

group of the community from which the jury panel is drawn. He has no "vested right to a particular juror." *State v. Vann, supra.*

[20] It has long been established in this State that it is the right and duty of the court to see that a competent, fair and impartial jury is empaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. *State v. Vann, supra; State v. Vick, supra; State v. Boon,* 80 N.C. 461; *State v. Jones,* 80 N.C. 415. It is immaterial that this is done as the result of information voluntarily disclosed by the prospective juror without questioning. *State v. Vick, supra.*

[21] We must bear in mind that the trial judge had these prospective jurors before him and thus had an opportunity to observe their apparent qualifications, an advantage which a virtually empty record does not afford us. With nothing in the record to guide us, we cannot say that there was not in the appearance or manner of these three prospective jurors sufficient indication of their lack of qualification to serve as jurors in a case of this serious and important nature. But even if we might have reached a different conclusion in this respect from that reached by the trial judge, it has been settled in this State since as long ago as *State v. Ward,* 9 N.C. 443, that an irregularity in forming a jury is waived by silence of a party at the time of the court's action. There, Henderson, J., later C.J., said, "He shall not by consent of this kind, take a double chance" on acquittal by the jury so selected or a new trial because of such irregularity in the selection. See also *State v. Boon, supra.* For a recent recognition of the discretion of the trial judge in excusing a prospective juror without a challenge, see *State v. Spence* (first hearing), 271 N.C. 23, 32, 155 S.E. 2d 802.

[22] The defendant does not contend that this action of the trial judge was a systematic exclusion from the jury of members of a class to which the defendant himself belongs. His contention is that the court excluded from the jury a class of persons, i.e., those who have scruples against taking an oath, and thereby deprived the defendant of a jury drawn from a fair cross section of the community. See *Witherspoon v. Illinois, supra; Hernandez v. Texas,* 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866; *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181; *Smith v. Texas,* 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

There is nothing in the record to indicate that persons who have conscientious scruples against taking an oath that they will properly perform their duties as jurors constitute any substantial proportion of the prospective jurors in Wayne County and we know of

nothing which would so indicate. Nor does the record show, or circumstances known to us indicate, that jurors with such scruples would be less inclined than others to convict or to impose the death penalty. Such scruples are not limited to members of a single religious denomination or sect. It may well be that such a person would be a strict constructionist of the more retributive provisions of the Mosaic law. In any event, the defendant, having the same opportunity as the trial judge to observe these three prospective jurors in the courtroom, did not object to their being excused from the jury until after the verdict was rendered.

[23] *Hernandez v. Texas, supra,* establishes that a defendant complaining of group discrimination in the selection of the jury which tried him has the burden of proving that persons excluded from the jury are members of a separate class in the county from which the jury comes. *Swain v. Alabama, supra,* states that the first step to be taken by such a defendant is to establish that the persons excluded belong to an "identifiable group in the community which may be the subject of prejudice." That is, the ultimate question in such a situation is whether the jury selected represented a fair cross section of the entire community. The burden is upon the defendant to establish that it did not. *Swain v. Alabama, supra; Hernandez v. Texas, supra.* The record before us does not lead to this conclusion.

Introduction Of Photographs, Clothing, Etc.

[24, 32, 33] The court did not err in the admission, over objection, of the clothing and washcloth found upon the body of the deceased child, the shovel obtained by the officers from the residence of the defendant with his permission or the photographs used by the witnesses of the State to illustrate their testimony concerning the location and appearance of the place where the child's body was found buried and the condition of the body. It is not contended that the articles of clothing and the washcloth were not properly authenticated and identified or that the photographs are in any respect inaccurate portrayals of what they purport to represent or were not properly taken and authenticated.

[24] In *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294, this Court held there was no error in admitting into evidence garments worn by the alleged victim of a rape and murder, which garments bore tears and stains corroborative of the State's theory of the case. In *State v. Vann, supra,* it was held that there was no error in permitting articles found at the place of a homicide to be exhibited to the jury, these being competent to identify the body, or to establish a fact

relevant to the State's theory of the case or to enable the jury to realize more completely the cogency and force of the testimony of witnesses. Thus, clothing worn by the alleged victim of a felonious homicide may properly be introduced in evidence to show the location of a wound upon the person of the deceased. *State v. Fleming,* 202 N.C. 512, 163 S.E. 453. See also: *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653.

[25] In the present case, the jury was properly instructed that the photographs in question were allowed in evidence for the sole purpose of illustrating the testimony of witnesses and not as substantive evidence. See: *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916; *State v. Perry,* 212 N.C. 533, 193 S.E. 727. The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence, 2d Ed., § 34. For a collection of authorities to the same effect from other jurisdictions, see Annot., 73 A.L.R. 2d 769.

[26-28] "Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words." *State v. Gardner, supra.* The fact that the photographs are in color does not affect their admissibility. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *People v. Moore,* 48 Cal. 2d 541, 310 P. 2d 969; *Commonwealth v. Makarewicz,* 333 Mass. 575, 132 N.E. 2d 294; Annot., *supra,* p. 811. Thus, in a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196; *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7.

[29-31] It is not necessary that the photograph be taken by the witness, if the witness testifies that it correctly represents what the witness observed. *State v. Stanley, supra;* Stansbury, North Carolina Evidence, 2d Ed., § 34. A photograph of the body of the deceased is not inadmissible by reason of the fact that it was taken after the body had been moved from the place where originally found and carried to the morgue or other place for examination.

State v. Gardner, supra; State v. Miller, 219 N.C. 514, 14 S.E. 2d 522. Obviously, the fact that the photograph was taken and portrays the condition of the body at some time after the homicide occurred does not, of itself, make the photograph incompetent. *State v. Hill, supra; State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864; *State v. Porth, supra;* Stansbury, North Carolina Evidence, 2d Ed., § 34.

[32] The photographs in question, meeting the test of relevancy and being properly authenticated, were properly admitted in evidence for the limited purpose stated by the trial judge, and, consequently, there was no error in permitting the jury to see them. *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

[33] The shovel taken by the officers from the defendant's home, with his permission, immediately after the child's body was removed from the place where the defendant had admitted he buried it, was clearly competent for admission in evidence. The defendant's statement to the officers was that he had dug the shallow grave with "his shovel" which he then returned to the place behind his house where the officers found it covered with dirt of the same type as that of the soil in the child's burial place.

Evidence Tending To Show Another Crime

[36] There was no error in allowing the pathologist, properly qualified as an expert witness, to testify as to the conditions he observed upon the child's body and his conclusion therefrom that she had been raped, nor was it error to permit this witness to use the properly authenticated photographs of the body to illustrate his testimony.

[34, 35] The defendant contends that this was error because it was testimony tending to show the commission of a criminal offense (rape) other than that of murder for which the defendant was on trial. While it is well established that evidence of other crimes, having no bearing upon the crime for which the defendant is on trial, may not be introduced prior to his taking the stand as a witness in his own behalf, it is equally well settled that all facts, relevant to the proof of the defendant's having committed the offense with which he is charged, may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another criminal offense. *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence, 2d Ed., § 91. Thus, such evidence of other offenses is competent to show "the crime charged was committed for the purpose of concealing another crime," *State v. Beam,* 184 N.C. 730, 115

S.E. 176, or to show "a motive on the part of the accused to commit the crime charged," *State v. McClain, supra,* or to show the *quo animo,* intent, design, guilty knowledge, or scienter, or to make out the *res gestæ,* or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *State v. Christopher, supra; State v. Harris, supra;* Stansbury, North Carolina Evidence, 2d Ed., §§ 91 and 92.

In *State v. Westmoreland,* 181 N.C. 590, 107 S.E. 438, in sustaining a death sentence for murder in the first degree, this Court, speaking through Walker, J., said. "There are authorities for the position that any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of expressed malice, and of premeditation and deliberation in the slaying, depending, of course, upon the peculiar circumstances of the case."

[36] It was entirely proper in the present instance to permit the State to offer this evidence, including the photographs, to establish the motive, premeditation, deliberation and malice on the part of the defendant for and in the murder with which he was charged by the State.

Testimony As To Insanity

[39] There was no error in permitting the psychiatrist, duly qualified as an expert witness, who examined the defendant, pursuant to the order of the court, some three and a half months after the alleged offense, to testify that upon the basis of his observation of the defendant he was of the opinion that the defendant "knew right from wrong" on the date the offense was alleged to have been committed.

This witness was duly qualified as an expert witness in the field of psychiatry and testified to his observation of and examination of the defendant over a substantial period of confinement of the defendant for that purpose in the State hospital. He was called by the State to rebut the testimony of the defendant's mother that, in her opinion, the defendant was not capable of distinguishing between right and wrong in relation to the charge of murder on the date the offense was alleged to have occurred, her testimony being upon the basis of her observation of the defendant prior to and after that date.

[37, 38] In this State, the test of insanity as a defense to an alleged criminal offense is the capacity of the defendant to distinguish

between right and wrong at the time of and in respect of the matter under investigation. *State v. Spence* (first hearing), 271 N.C. 23, 155 S.E. 2d 802; *State v. Matthews,* 226 N.C. 639, 39 S.E. 2d 819. Evidence tending to show the mental condition of the accused, both before and after the commission of the act, is competent provided it bears such relation to the defendant's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto. *State v. Duncan,* 244 N.C. 374, 93 S.E. 2d 421. Obviously, it would not be practicable to limit expert testimony upon this subject to witnesses who had the defendant under observation at the instant the act in question was committed.

[39] In *State v. Matthews, supra,* it is said that a witness may not testify as to his opinion concerning the mental capacity of the defendant to commit the specific crime with which he is charged. The State's expert witness in the present case did not so testify. He testified that in his opinion, based upon his subsequent examination of the defendant, the defendant knew "right from wrong" on the day of the alleged offense. The witness, being an expert in the field of psychiatry, was competent to relate to the jury such opinion though he did not observe the defendant on the precise date of the alleged offense.

[40] It is to be noted that two other witnesses, the only ones who were in the defendant's company and who did observe him on that day, one when he left her home with the child at 6 p.m., and the other when he entered the restaurant and reported the child missing at approximately 9:45 p.m., each testified that he appeared to be and acted "normal." His own witnesses, with the exception of his mother, testified that they observed no evidences of insanity. The burden rests upon the defendant to establish this defense "to the satisfaction of the jury." *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232.

Comment By Trial Judge

[41] The defendant assigns as error the comment of the trial judge in response to the defendant's objection to a statement by the solicitor in the latter's argument to the jury. The statement by the solicitor was, "his [the defendant's] mother said she didn't remember whether she was charged with killing her first husband or not." When the defendant's counsel objected, the court replied, "I remember distinctly that she said it." The defendant is not entitled to a new trial on this account.

The narrative summary of the testimony of the defendant's mother set forth in the record before us does not contain this alleged

statement by her. She did testify: "I have been married twice. I did not kill my second husband but I was convicted and served time for his murder." There was testimony by another witness that her first husband (the father of the defendant) "committed suicide when (the defendant) was only four months old." In reviewing the evidence in his charge to the jury, as he was required to do by the statute, the trial judge again stated that the defendant's mother testified "she was convicted of murdering her second husband, that she did not recall and does not remember whether she was charged with killing her first husband, the father of the defendant." To this statement the defendant did not object and he made no attempt to call its alleged inaccuracy to the attention of the court.

[42] It is not required that the appellant set forth in his statement of the case on appeal the evidence in its entirety. On the contrary, G.S. 1-282 states that the case on appeal shall be "a concise statement of the case," and it is common practice to omit portions of the testimony deemed by the parties of no consequence upon the appeal. Our examination of the entire charge of the court discloses that there were a number of instances in which evidence summarized therein by the judge for the benefit of the jury is not otherwise reflected in the record before us. These indicate that in the preparation of the statement of the case on appeal the appellant did not undertake to set out the evidence in its entirety.

[41] The court correctly instructed the jury that it was to recall all of the testimony and to be guided by its recollection and not by the court's summary of the evidence. While it is error for the court to express an opinion to the jury reflecting upon the credibility of a witness, *State v. Auston*, 223 N.C. 203, 25 S.E. 2d 613, we think it a strained construction of the remark of the court in this instance to call it an expression of opinion by the court as to the credibility of the witness. If it was, it is obvious that the statement was not prejudicial error since the witness had admitted her conviction of the murder of the second husband. It is inconceivable that this statement by the court, even if inaccurate, affected the verdict of the jury. It does not justify awarding a new trial to the defendant. The point is not stressed by the defendant in his brief.

Validity Of The Death Sentence

[43] The defendant does not, in his assignments of error or in his brief, question the validity of the judgment imposing the death sentence, as such. Nevertheless, his appeal is, itself, an exception to the judgment and thus brings before us for review all matters

appearing on the face of the record proper, including the sufficiency of the verdict to support the imposition of the death sentence. 1 Strong, North Carolina Index 2d, Appeal and Error, § 26, and cases there cited. We, therefore, turn to the question of whether the verdict of guilty of murder in the first degree, without more, authorized the superior court to enter its judgment sentencing the defendant to death by asphyxiation.

In *State v. Peele, supra,* we said that the decision of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138, "is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape." Bobbitt and Sharp, JJ., concurring in result, were of the opinion that the *Peele* case did not present for this Court's determination whether the *Jackson* case "invalidates the death penalty under present North Carolina statutes."

In *State v. Spence* (hearing on remand), 274 N.C. 536, 164 S.E. 2d 593, we said, "This Court has already held, in *State v. Peele, supra,* that *United States v. Jackson,* * * * is not authority for holding capital punishment is abolished altogether in North Carolina." Bobbitt and Sharp, JJ., dissented from so much of the decision in the *Spence* case as directed a new trial, their view being "the death penalty provisions of our present statutes, when considered in the light of *Jackson,* are invalid."

Whether or not the question of the effect of *United States v. Jackson, supra,* upon G.S. 14-17 was before us in either *State v. Peele, supra,* or in *State v. Spence, supra,* it is before us in the present case. We reaffirm the views expressed upon this question in the majority opinions of this Court in *State v. Peele, supra,* and *State v. Spence, supra.*

G.S. 14-17 provides:

> *"Murder in the first and second degree defined; punishment.* —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. * * *"

The proviso was added by an amendment enacted in 1949, the remainder of the statute having been enacted in 1893.

G.S. 15-162.1 was enacted in 1953. Though subsequently repealed by Chapter 117 of the Session Laws of 1969, it was in effect at the time of the defendant's trial below. It provided that any person, charged in a bill of indictment with murder in the first degree, might, after arraignment, tender in writing, signed by himself and his counsel, a plea of guilty of such crime, and the State, with the approval of the court, might accept such plea or reject it, in which latter event the trial should proceed upon a plea of not guilty and the tender of the plea of guilty would have no legal significance. G.S. 15-162.1 then provided:

> "(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."

[44] It is to be noted that G.S. 14-17, providing for the sentence to be imposed upon a verdict returned by the jury, and G.S. 15-162.1, providing for the sentence to be imposed upon an accepted plea of guilty, were separate and distinct statutes, G.S. 14-17 having been in full effect long before G.S. 15-162.1 was enacted. It cannot, therefore, be doubted that they were always separate and distinct legislative provisions, that G.S. 14-17 is capable of standing alone as it did for several years and that the validity of G.S. 14-17 cannot be affected adversely by the invalidity, if any, of G.S. 15-162.1. The repeal of G.S. 15.162.1, leaving G.S. 14-17 intact, shows the 1969 Legislature's intent for G.S. 14-17 to stand alone.

In *United States v. Jackson, supra*, the Supreme Court of the United States reversed a judgment of the District Court which had dismissed an indictment for violation of the Federal Kidnapping Act, 18 U.S.C. § 1201. That Act provided:

> "Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * shall be punished (1) by death if the kidnaped 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."

As the Supreme Court of the United States observed in its opinion in the *Jackson* case, the Federal Kidnapping Act, as originally enacted by Congress in 1932, contained no provision for the infliction of capital punishment. An amendment, enacted in 1934, inserted the provision authorizing the death penalty to be imposed under specific circumstances, "if the verdict of the jury shall so recommend." The decision of the Jackson case was that the amendment of 1934 was unconstitutional for the reason that it imposed "an impermissible burden upon the exercise of" the defendant's constitutional right to demand a jury trial.

Prior to the adoption of the 1934 amendment, one accused of violating the Federal Kidnapping Act could exercise his constitutional right to demand a jury trial without risk of the death penalty if the jury found him guilty. Under the 1934 amendment, he could not. For this reason, the Court held the 1934 amendment authorizing the jury to fix the penalty at death was unconstitutional, not because the death penalty, per se, is unconstitutional but because the 1934 amendment discouraged the exercise of the defendant's constitutional right to a trial by jury. The Court then said that the original Federal Kidnapping Act, which contained no provision discouraging the exercise of the right to a jury trial, could and should stand as a separate, divisible statutory enactment apart from the 1934 amendment. Consequently, the Court struck from the act the 1934 amendment, leaving the act in its original form, and held the indictment valid.

[44, 45] The legislative history of G.S. 14-17 and G.S. 15-162.1 bears no similarity whatever to the legislative history of the Federal Kidnapping Act. If there was anything in these two statutes which discouraged the defendant from demanding a jury trial, it was found in G.S. 15-162.1, the later of the two separate and distinct statutes. The constitutionality of G.S. 15-162.1, while in effect, is not presently before us and we express no opinion with reference to its then validity. If, however, that statute is subsequently held invalid upon the ground suggested in *United States v. Jackson, supra,* or otherwise, such decision will not and cannot affect the validity of G.S. 14-17, a wholly separate, independent, previously existing and surviving statute. Thus, the decision in *United States v. Jackson, supra,* did not, at the time of the judgment in this case, and does not now forbid the courts of this State to impose the sentence of death pursuant to a verdict of the jury in accordance with G.S. 14-17.

[46] *United States v. Jackson, supra,* arose on a motion to dismiss the indictment. The present case comes before us after the de-

fendant has pleaded to the indictment. In the *Jackson* case, it was not known how the defendant might wish to plead. In this case, the defendant pleaded not guilty and was tried by a jury. Whatever the effect of G.S. 15-162.1 might have been upon other defendants charged with first degree murder, its being in the statute book at the time of this defendant's arraignment and trial did not discourage him from exercising his constitutional right to a trial by jury.

[47] There remains for decision the question of whether the imposition of the death penalty for first degree murder is unconstitutional per se. The Supreme Court of the United States has not so declared. We find nothing in the Constitution of the United States which leads us to such a conclusion.

[48] The imposition of the death penalty upon a conviction of murder is expressly authorized by Article XI, § 2, of the Constitution of North Carolina, adopted in 1868. G.S. 14-17 was enacted pursuant to that constitutional provision. The history of this provision in our State Constitution is of major significance in the determination of the effect of the Fourteenth Amendment to the Constitution of the United States upon the authority of North Carolina to impose the death penalty. This provision reads as follows:

> "*Death punishment.* — 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."

Prior to the Constitution of 1868, there was no reference to the death penalty in the Constitution of North Carolina. The death penalty was, nevertheless, imposed in many cases in this State from the winning of our independence down to 1868, just as it was imposed during that period by the courts of the other states of the Union, under the provisions of statutes enacted in recognition of the power of the Legislature of a state to fix, in its discretion, a punishment for crime, unless forbidden to do so by a constitutional provision.

It is a matter of well known history that the Constitution of 1868 was adopted by this State in order to meet conditions imposed by the Federal Congress upon the right of this State to send its lawful representatives to the Congress following the Civil War. See: Woodrow Wilson, History of the American People, Vol. V, pp. 37, 44, 46; Hamilton, Reconstruction In North Carolina, pp. 187, 215, 217, 288. It was adopted contemporaneously with the ratification of

the Fourteenth Amendment to the Constitution of the United States. Obviously, the entire Constitution of North Carolina of 1868 was examined with care by the very Congress which proposed the Fourteenth Amendment to the states and was approved by that Congress. See Hamilton, op. cit., p. 288.

[49] In the light of this constitutional history, it is inconceivable that the Congress which submitted the Fourteenth Amendment, or the states which ratified it, regarded anything therein as prohibiting a state to impose the death penalty upon conviction of first degree murder. The widespread and frequent imposition of the death penalty by the courts of the several states in the one hundred years which have elapsed since the adoption of the Fourteenth Amendment, and the acquiescence therein by the Supreme Court of the United States in cases innumerable, clearly refute the suggestion that the Fourteenth Amendment prevents the State of North Carolina from sentencing this defendant to death pursuant to G.S. 14-17.

The constitutionality of a state statute cannot be determined by taking a Gallup poll of the opinion of the public with reference to the efficacy or the morality of a statute authorizing the imposition of the death penalty, even if it be assumed that the question can be framed so as to be understood by all of those reached by the takers of the "straw vote." The power of a sovereign state of this Union to enact legislation is to be determined by the courts, not by public opinion polls or by writings in sociological journals or treatises. It is the duty of this Court to determine whether the State of North Carolina has that power in the light of the history of the constitutional provisions said to forbid its exercise and in the light of the long line of judicial interpretations of those constitutional provisions. Our determination is not to be guided by tabulations of answers to public opinion polls, said to have been received by the poll takers from unknown members of the public, not shown to have been advertent to either the language of such constitutional provisions, their history or their interpretation by the courts of this country.

[50] It is not for this Court, or any other court, to determine whether the provision imposing the death penalty for the commission of first degree murder is or is not a wise policy for a state concerned with the protection of its people from such acts. It is not for us, or any other court, to determine whether a statute providing for the death penalty is a more effective deterrent to first degree murder than some other penal provision would be. It is for the Legislature of North Carolina to make that decision. It has done so in the enactment of G.S. 14-17 and, within recent days, has reaffirmed that

policy determination by its rejection of a proposal to abolish the provision for the imposition of the death penalty. The sole question before us, in this connection, is whether there is any provision of the State or Federal Constitution which prevents the Legislature of North Carolina from adopting such policy and enacting a statute to carry it into effect. We find no such provision in either Constitution.

Review Of The Record Ex Mero Motu

[51] It has long been the rule of this Court that "in capital cases the Supreme Court will review the record and take cognizance of prejudicial error *ex mero motu.*" See *State v. Oakes,* 249 N.C. 282, 106 S.E. 2d 206. We have reviewed the entire record in this case, without limitation to the assignments of error made by the defendant.

The defendant has been represented throughout this proceeding with diligence and skill by two able attorneys, experienced in the practice of criminal law in the courts of Wayne County and in this Court. They were appointed to represent him, without expense to him, several months prior to the calling of his case for trial. He has been given, free of expense to him, expert psychiatric examination to determine his mental competency to plead to the charge brought against him. Without expense to him, the record of his trial and the brief of his able counsel have been prepared and made available to this Court for review. We have carefully considered every part of that record and the earnest arguments of his counsel. The State of North Carolina has afforded him a fair trial in accordance with its established procedures applicable to all such cases.

The evidence is ample to support the finding that the defendant, a sane man, with malice aforethought and with premeditation and deliberation, killed his four year old stepdaughter, Kathy Carr, that, after first grievously injuring her in a manner she could not understand, he took a shovel, placed it and the bleeding child, who had been taught to love and trust him, in his car, drove 18 miles to a lonely area, left the little child in the car, went into the woods, dug her grave, returned to the car and, taking her little hand in his, led her through the dark woods to the hole he had dug, there smothered her to death with his hands, threw her body into the hole and covered it in such a manner that only the defendant and God would know her resting place.

The jury has, upon this evidence, under full and correct instructions of the trial judge as to the law, found him guilty of first degree murder and has concluded that he should be executed in the manner

provided by law. The statute of this State authorized the jury to return such verdict and required the judge, thereupon, to enter the judgment contained in the record. We find no error of law in the trial which would justify us in granting the defendant a new trial or in vacating or modifying the judgment.

No error.

HIGGINS, J., concurring:

The defendant was indicted for murder in the first degree. When arraigned, he entered a plea of not guilty. The parties to the trial selected a jury satisfactory to both. After full hearing and determination, the jury returned a verdict of guilty as charged. The court followed the mandate of G.S. 14-17 and imposed a death sentence. This Court has held the trial was free from error. So long as the verdict stands, no other sentence or judgment is authorized.

In my opinion the rule announced by the Supreme Court in *United States v. Jackson,* 390 U.S. 570 is not applicable in this case. Jackson was indicted for kidnapping. For that offense the law empowered the judge to punish by imprisonment. The Kidnapping Act, however, provides that if the victim is not released unharmed, the jury may fix the punishment at death. The jury, but not the judge, has such power. By a plea of guilty, the kidnapper bypassed the jury and placed himself before the trial judge whose power to punish is limited to imprisonment. The Supreme Court held the fear of the death penalty was a chill on the constitutional right of the accused to plead not guilty and to demand a jury trial. The danger to be avoided is the risk that an innocent man may be caught in a mesh of circumstances which induces him to plead guilty rather than permit a jury with its power of life or death to pass on his case.

In the light of *Jackson,* the defendant Atkinson might have reason to complain if he had entered a plea of guilty under the provisions of G.S. 15-162.1 (now repealed) and submitted to a life sentence. He might allege that his rights to plead not guilty and to have a jury trial were abandoned because he feared the result incident to a jury verdict. These considerations, in no wise, interfered with Atkinson's constitutional right to plead not guilty and to have a jury trial. He pled not guilty. He had a jury trial. His constitutional rights, in no particular, were denied him. So far as the assertion of these rights was concerned, G.S. 15-162.1 was not involved.

If the Court undertakes to determine that punishment for murder in the first degree shall be by imprisonment, it goes beyond the au-

thority of G.S. 14-17 and I think beyond the function of proper appellate review, and invades the legislative field.

I concur in the Court's opinion.

BOBBITT, J., dissenting as to death sentence:

I vote to vacate the judgment imposing the death sentence. In my opinion, the verdict of guilty of murder in the first degree should be upheld and the cause remanded for pronouncement of a judgment imposing a sentence of life imprisonment.

When the loathsome and despicable crime was committed and when defendant was arraigned, tried and sentenced, the statutes in force relating to first degree murder were codified as G.S. 14-17 and as G.S. 15-162.1. G.S. 14-17 has continued and is now in force. G.S. 15-162.1 was repealed (effective March 25, 1969) by Chapter 117, Session Laws of 1969.

G.S. 14-17 and G.S. 15-162.1, when both were in force, were *in pari materia*. Considered and construed together, they set forth a unitary statutory plan for the punishment of first degree murder by death *or* by life imprisonment. The tender and acceptance of a plea of guilty of first degree murder in accordance with G.S. 15-162.1 removed the possibility of a death sentence. The possibility of a death sentence remained if a defendant pleaded not guilty and was placed on trial for first degree murder. If found guilty of first degree murder, the punishment was death unless the jury in its *unbridled* discretion saw fit to recommend that the punishment be imprisonment for life.

It was and is my opinion that, until G.S. 15-162.1 was repealed, decisions 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, and *Pope v. United States*, 392 U.S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145, invalidated *the death penalty provision* of G.S. 14-17 and that no valid sentence of death could be pronounced.

The *death penalty provisions* of the Federal Kidnapping Act (18 U.S.C. § 1201(a)) and of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) were held invalid in *Jackson* and in *Pope*, respectively, because they 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. No other provision of either of these statutes was invalidated. In gist, these decisions held that no *death penalty provision* is valid if applicable only to defendants who assert the right to contest their guilt before a jury.

Reference is made to my (concurring in part and dissenting in part) opinion in *State v. Spence*, 274 N.C. 536, 545, 164 S.E. 2d 593, 598, for the full provisions of G.S. 14-17 and G.S. 15-162.1, and to the discussion therein of each of the following decisions: *United States v. Jackson, supra; Pope v. United States, supra; State v. Harper,* 162 S.E. 2d 712 (S.C. 1968); *State v. Forcella,* 245 A. 2d 181 (N.J. 1968); *Alford v. North Carolina,* 405 F. 2d 340 (4 Cir. 1968); *In re Anderson,* 447 P. 2d 117 (Cal. 1968).

The majority opinion herein seeks to uphold the validity of the death sentence on grounds other than those expressed in support of its validity in *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568, and adopted in *Parker v. State,* 2 N.C. App. 27, 162 S.E. 2d 526. Hereafter, this opinion relates primarily to the asserted new grounds upon which the majority rely.

In my opinion, no provision of the Constitution of the United States prohibits our General Assembly from providing for the punishment by death of a defendant who is convicted of the crime of murder in the first degree. It is the province of the General Assembly to determine whether, as a matter of State policy, murder in the first degree should be punished by death. I am in accord with the majority's holding that the imposition of the death penalty for murder in the first degree is not unconstitutional *per se.* We differ as to whether *Jackson* and *Pope* invalidated the death penalty provision of G.S. 14-17 during the period prior to the repeal of G.S. 15-162.1.

In the majority opinion, emphasis is placed on the fact defendant pleaded not guilty and that the death sentence was pronounced pursuant to the verdict of the jury. In *Jackson* and *Pope,* whether a defendant pleaded guilty or not guilty had no bearing upon the validity of the death penalty provision. It was held the death penalty provision itself was invalid.

In *Jackson,* the defendant did not plead to the indictment but moved to quash it. It was held the *death penalty provision* was invalid but that the statute was otherwise valid and the prosecution would proceed on the indictment but in no event could a death sentence be pronounced. In *Pope,* as in the present case, the defendant pleaded not guilty and the jury which convicted him directed that he be punished by death. Holding the *death penalty provision* invalid, the judgment of the Court of Appeals which sustained the death sentence was vacated and the cause was remanded for further proceedings consistent with the opinion.

In my opinion, the death penalty provision of G.S. 14-17 during the period prior to the repeal of G.S. 15-162.1 was invalid under all circumstances. Its invalidity did not vary from case to case according to each defendant's plea.

The majority opinion asserts that *Jackson* invalidated the 1934 Act, which amended the Federal Kidnapping Act. In my opinion, *Jackson* invalidated only the death penalty provision of the 1934 Act.

The full text of the Act of May 18, 1934, 48 Stat. 781-782, is quoted below.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of June 22, 1932 (U.S.C., ch. 271, title 18, sec. 408a), be, and the same is hereby, amended to read as follows:

" 'Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished *(1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished* by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided, That the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive.*

" 'SEC. 2. The term "interstate or foreign commerce", as used herein, shall include transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia.

" 'SEC. 3. If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of the foregoing Act and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.' "

The 1934 Act, a complete statute, incorporates the provisions of the (original) Federal Kidnapping Act of June 22, 1932, 47 Stat. 326, and in addition the *italicized portion* enacted originally by the 1934 Act. It is noteworthy that the proviso in Section 1, which was enacted originally by the 1934 Act, was not invalidated by the decision in *Jackson.*

The death penalty provision considered in *Pope* was an integral part of the Act of May 18, 1934, 48 Stat. 783, the basic (original) Federal Bank Robbery Act. Section 3 of the 1934 Federal Bank Robbery Act provided: "Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct." In *Pope,* the death penalty provision, an integral part of the original statute, was held invalid. No statute *amending the original act* was involved.

It is noted that the decisions in *Jackson* and in *Pope* did not impair the right of a defendant to tender or the right of the court to accept or refuse to accept a plea of guilty or *nolo contendere* as provided in Rule 11 of the Federal Rules of Criminal Procedure. See my opinion in *Spence,* 274 N.C. at 553, 164 S.E. 2d at 603.

The majority opinion suggests that *Jackson* may have invalidated G.S. 15-162.1 rather than the death penalty provision of G.S. 14-17. I cannot accept this view. G.S. 15.162.1 provided for punishment by life imprisonment when a plea of guilty of first degree murder was tendered and accepted. In such case, neither the judge nor the jury had any discretionary power in respect of punishment. Obviously, the General Assembly had authority to provide for the tender of such plea and for punishment by life imprisonment upon acceptance thereof. I perceive no invalidity whatever in that statute. The impact of this valid statute is what rendered invalid the death penalty provision of G.S. 14-17. G.S. 15-162.1 was based on Chapter 616, Session Laws of 1953, which repealed all laws and clauses of laws in conflict therewith.

Recent decisions in which *Jackson* is considered are noted below.

In *King v. Cook,* 211 So. 2d 517, it was held that *Jackson* did not apply. The Supreme Court of Mississippi, in drawing the distinction between the Federal Kidnapping Statute and the Mississippi statute, said: "A defendant in this jurisdiction who enters a plea of

guilty is not assured that he will not receive the death penalty. Before the death penalty can be imposed under Section 2217 as interpreted in *Yates,* upon an accused's entering a guilty plea, the trial judge must submit the question of the type of punishment to a jury, which may impose either the death penalty or a life sentence."

In *Maxwell v. Bishop,* 398 F. 2d 138, the Court of Appeals for the Eighth Circuit, after a discussion of the Arkansas statutes, said: "Thus, in contrast to the Federal Kidnaping Act, an Arkansas defendant, by entering a plea of guilty in a capital case, does not avoid a trial by jury on the issue of punishment. The critical choice under the federal act which occasioned the result in *Jackson,* is thus not present under the Arkansas statutes."

It should be noted that North Carolina statutes make no provision for separate trials as to guilt and as to penalty by the same jury or by different juries.

Whether *Jackson* applied was only one of several constitutional questions considered in *Maxwell v. Bishop, supra. Certiorari* to review the Eighth Circuit's decision in *Maxwell v. Bishop, supra,* was granted December 16, 1968, 393 U.S. 997, 21 L. ed. 2d 462, 89 S. Ct. 488. In granting *certiorari,* the Supreme Court of the United States limited its review to Questions 2 and 3 of the petition which read as follows:

"2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?

"3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on the guilt issue, violates the Fifth and Fourteenth Amendments?"

Although I rest my dissent primarily on *Jackson* and *Pope,* the questions awaiting decision by the Supreme Court of the United States in *Maxwell v. Bishop, supra,* directly involve the validity of the proviso of our G.S. 14-17. Uncertainty in respect of its validity should be removed by the decision in that case. It is noted that full arguments were heard by the Supreme Court of the United States in March, 1969. 37 U.S.L.W. 3330-3333.

Summarizing my views:

When the crime was committed and when defendant was arraigned,

tried and sentenced, the death penalty, under the North Carolina statutes then in force, was invalid and unenforceable. 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 was life imprisonment. Consequently, my vote is to vacate the death sentence and to remand the case to the superior court for the pronouncement of a judgment of life imprisonment.

SHARP, J., joins in this opinion.

STATE OF NORTH CAROLINA v. CORE BANKS CLUB PROPERTIES, INC.

No. 19

(Filed 19 May 1969)

1. **Eminent Domain § 7— pleadings — allegations that condemnor has complied with statute**

Allegations by the condemnor that it has complied with statutory procedural requirements are a prerequisite in any action to condemn land.

2. **Eminent Domain § 4— delegation of power — Department of Administration — national seashore park**

In the absence of specific legislative authorization, the Department of Administration has no power to condemn Outer Banks property for conveyance to the United States for a national seashore park.

3. **Eminent Domain § 1— nature and extent of power — constitutional limitations**

The right of eminent domain is not conferred by constitutions but is inherent in sovereignty, although its exercise is limited by the constitutional requirements of due process and payment of just compensation for property condemned.

4. **Eminent Domain § 4; Constitutional Law § 7— legislative powers — eminent domain**

Under our division of governmental power into three branches — executive, legislative and judicial — only the legislative can authorize the exercise of the power of eminent domain and prescribe the manner of its use.

5. **Eminent Domain §§ 1, 4— nature and extent of power — legislature**

The right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise.

6. Eminent Domain § 4— delegation of power — Department of Administration

The Department of Administration, as land acquisition agent for the State and its agencies, can effect only the condemnations which the legislature authorizes; it may not decide the public purpose or initiate the project for which the State's power of eminent domain may be used. G.S. 146-22 *et seq.*, G.S. 143-335 *et seq.*, G.S. 143-341(4).

7. Eminent Domain § 1— extent of power — effect of procedural statute

A statute which merely sets forth a mode of procedure will not impliedly grant the power of eminent domain.

8. Eminent Domain § 4— delegation of power — Department of Administration — national seashore park

The State Capital Improvement Act of 1959 (Session Laws of 1959, Ch. 1039), which grants to the Department of Conservation and Development the power to condemn land in connection with preserving and rehabilitating the Outer Banks, does not authorize the State, acting through the Department of Administration, to condemn Outer Banks property in order to convey it to the United States government for a national seashore park, even though shore-erosion control and the preservation of the Outer Banks will be one of the prime objectives of the park.

9. Eminent Domain § 4— delegation of power — Department of Administration — national seashore park

Resolution 66, Session Laws of 1965, wherein the General Assembly endorsed the Cape Lookout National Seashore project, does not authorize condemnation by the State of Outer Banks property for the purpose of conveying it to the United States or for any other purpose.

10. Eminent Domain § 4— delegation of power — statutory construction

In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule.

11. Eminent Domain §§ 1, 4— extent and delegation of power — statute

The right of eminent domain must be conferred by statute, either in express words or by necessary implication.

12. Eminent Domain § 4— delegation of power — G.S. 146-36 — national seashore park

G.S. 146-36, providing that the Governor and Council of State may enter into contract or other agreement binding the State to acquire for and to confers no power of eminent domain upon the State to acquire Outer Banks convey to the United States government land or any interest in land, property for a national seashore park.

13. Eminent Domain §§ 1, 3— exercise of power for use of federal government

Where a partial benefit at least accrues to the State, it may properly

exercise its power of eminent domain for the benefit and use of the United States except in connection with uses which are exclusively national in character.

14. Eminent Domain § 3— public purpose — national seashore park

Condemnation by the State of Outer Banks property for conveyance to the United States for a national seashore park is a condemnation for a public purpose.

HIGGINS, J., dissents.

APPEAL by plaintiff from *Cohoon, J.*, 25 November 1968 Civil Session of CARTERET, certified pursuant to G.S. 7A-31(b)(1) for review by the Supreme Court before determination by the Court of Appeals.

Action for condemnation of land, heard on demurrer. The complaint alleges: The sovereign State of North Carolina, acting through its Department of Administration and with the approval of the Governor and Council of State, is empowered by N. C. Gen. Stat. Ch. 146, Art. 6 (G.S. 146-22 *et seq.*) to condemn land in the manner prescribed by G.S. 136-103 *et seq.* Defendant owns approximately 950 acres in Carteret County lying between the Atlantic Ocean and Core Sound. Acquisition of this specifically described land by the State is necessary "for the creation of a federally-sponsored National Seashore," to protect the Outer Banks of North Carolina, and to preserve their "natural scenic beauty, recreational potential and historical interest." Plaintiff has in good faith negotiated with defendant for the purchase of the described property, but has been unable to buy it. By this proceeding, instituted with the approval of the Governor and Council of State, the State seeks to acquire the property in fee simple.

The prayer for relief is that the court determine the "just compensation" which plaintiff should pay defendant for the land described in the complaint.

At the time of filing the complaint, the State deposited in the office of the clerk of the Superior Court of Carteret County the sum of $64,360.00 as its estimate of just compensation for the property.

Thereafter defendant demurred to the complaint and applied to the court for an injunction restraining plaintiff "from taking possession of the defendant's property and from conveying it to the Federal Government and from otherwise exercising dominion over the property and interfering with the use and enjoyment thereof by defendant." Judge Exum signed a temporary restraining order. It was made returnable before Judge Cohoon, who heard the matter on

25 November 1968. From his judgment sustaining the demurrer and dismissing the action, plaintiff appealed.

Robert Morgan, Attorney General; Parks H. Icenhour, Assistant Attorney General; Rafford E. Jones, Real Property Attorney, for the State.

McLendon, Brim, Brooks, Pierce & Daniels by Hubert Humphrey for defendant appellee.

SHARP, J.

Defendant demurs to the complaint upon the following grounds: (1) It discloses no statutory authority for the State to condemn its property for the purpose alleged — a federally owned park —; (2) it reveals that the condemnation is not for a State public use; and (3) it fails to allege compliance with statutory requirements, which are conditions precedent to the institution of this action.

[1] We postpone at the outset the basic question whether the law now authorizes the condemnation in suit and advert to defendant's third ground for demurrer, *i.e.*, that plaintiff has not alleged compliance with statutory procedural requirements. Such allegations are a prerequisite in any action to condemn land. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391.

G.S. 146-22 through G.S. 146-36, the authority under which plaintiff alleges its right to condemn the land in suit, provides that *all* acquisitions of land by the State or any State agency shall be made by the Department of Administration (Department) and approved by the Governor and Council of State. Before Department can acquire land by purchase or condemnation the following steps must be taken: (1) The agency must file with Department an application setting forth its need for the requested acquisition. (2) Department "must investigate all aspects of the requested acquisition" (including the availability of the necessary funds) as detailed in G.S. 146-23. (3) After investigation, Department must determine that the best interests of the State require that the land be acquired. (4) Department must then negotiate with the owners for the purchase. If terms are agreed upon and the Governor and Council of State approve them, Department buys the land. (5) If negotiations are unsuccessful and the Governor and Council of State give permission, Department institutes condemnation proceedings as provided in G.S. 146-24 and G.S. 136-103.

G. S. 136 - 103 requires, *inter alia,* that the complaint con-

tain "a statement of the authority under which and the public use for which said land is taken."

Defendant concedes that plaintiff has alleged the performance of conditions (4) and (5) as enumerated above. It contends, however, that the performance of conditions (1), (2), and (3) are not alleged; that the requirement of G.S. 136-103 that the complaint contain a statement of the authority under which the land is taken was not met; and that these omissions render the complaint fatally defective and require the dismissal of the action.

Plaintiff's contention is that allegation of these statutory requirements is not necessary, since the State itself — not one of its agencies — seeks to obtain title to unique property for a Federal park. Notwithstanding, the stark allegations of the complaint are unsatisfactory and incomplete. Nevertheless, we pass defendant's contention that the failure to allege compliance with statutory procedural requirements is fatal and consider these questions: (1) Does G.S. 146-22 *et seq.*, the "authority" under which plaintiff states it brings this action, authorize the condemnation? (2) If not, does any authority empower plaintiff to condemn the land for the purpose alleged? We deem this course to be in the public interest.

The complaint alleges no federal law authorizing a "National Seashore" in Carteret County. Although the purpose of such a seashore is stated in general terms, the complaint alone would leave us to deduce from the location of the land that plans for a National Park are in the offing. Plaintiff-appellant's brief confirms this deduction and directs our attention to the following acts of the General Assembly and Congress.

(1) *A Joint Resolution Endorsing The Cape Lookout National Seashore Project.* Resolution 66, S. L. 1965. This resolution states in part:

"WHEREAS, the President of the United States has proposed the establishment of the Cape Lookout National Seashore on the coast of North Carolina; and

"WHEREAS, the State of North Carolina has offered the Federal Government suitable land for the establishment of this facility; and

"* * *

"WHEREAS, the history of Cape Hatteras National Seashore Recreational Area has proved the immeasurable esthetic, economic, and recreational value of such an asset within North Carolina; and

"WHEREAS, the increase in both population and leisure time in

the United States add each day to the importance of outdoor areas for public use:

Now, therefore, be it resolved by the Senate, the House of Representatives concurring:

"Section 1. That the General Assembly does hereby endorse the Cape Lookout National Seashore project and encourage the Governor and all affected agencies of State Government to encourage and assist the project to the end that its establishment may be assured at the earliest possible date.

"* * *"

(2) *16 U.S.C.A. § 459 (1960).* By this enactment, approved 10 March 1966, the Congress of the United States authorized the establishment of the Cape Lookout National Seashore (Seashore) "in order to preserve for public use and enjoyment" the Outer Banks of Carteret County, N. C., between Ocracoke Inlet and Beaufort Inlet. In brief summary, pertinent provisions of the Act are (enumeration ours):

(a) Non-federal land within the seashore, except Shackleford Banks and a very small area on Lookout Bight, adjoining Cape Lookout Lighthouse, may be acquired by the Secretary of the Interior *only through donation.* (The boundaries of the proposed Seashore are shown on map VS-CL-T101B on file in the office of the National Park Service, Department of Interior.)

(b) When title to the lands, acquired under the preceding section, has been vested in the United States, the Secretary of the Interior shall declare the establishment of the Seashore and define its boundaries. After such establishment, and subject to the limitations and conditions of the Act, the Secretary may acquire the remainder of the lands within the Seashore.

(c) The Secretary may exchange federally owned property in North Carolina for nonfederal property within the Seashore and may equalize the values by paying or receiving cash.

(d) A sum not to exceed $3,200,000 is "authorized to be appropriated" for the acquisition and development of the Seashore in accordance with the purposes of this Act.

(Other sections of the Act provide for state and federal control of hunting and fishing, shore-erosion control, and general administration by the Secretary of Interior.)

[2] Plaintiff does not rely upon specific legislative authority to condemn property for the Seashore. Its thesis seems to be: (1) The

State, not one of its political subdivisions or administrative agencies, here seeks to exercise its own sovereign right to condemn. (2) Under G.S. 146-22 the Department is the agency designated to exercise the State's power of eminent domain. (3) This designation not only authorizes the Department to institute condemnation proceedings in the name of the State, but also empowers it to declare a necessary public use. In other words, plaintiff contends that it has the discretion and the power to condemn land for a federal park without specific legislative authorization. This contention is insupportable.

[3] The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned. *Redevelopment Commission v. Hagins, supra; Morganton v. Hutton & Bourbonnais Co.,* 251 N.C. 531, 112 S.E. 2d 111; 3 N. C. Index 2d, Eminent Domain §§ 1, 4 (1967); 29A C.J.S. *Eminent Domain* § 3 (1965).

[4, 5] In *Hedrick v. Graham,* 245 N.C. 249, 256, 96 S.E. 2d 129, 134, and *Lloyd v. Venable,* 168 N.C. 531, 533, 84 S.E. 855, 856, this Court noted and acknowledged this universally accepted principle: Under our division of governmental power into three branches — executive, legislative, and judicial — only the legislative can authorize the exercise of the power of eminent domain and prescribe the manner of its use. The right of eminent domain lies dormant in the State until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise. *Accord, Society of the New York Hospital v. Johnson,* 5 N.Y. 2d 102, 154 N.E. 2d 550 (1958); *Oregon State Highway Commission v. Stumbo,* 222 Ore. 62, 352 P. 2d 478, 2 A.L.R. 3d 1028, 1032 (1960); 29A C.J.S. *Eminent Domain* § 2 (1965); Annot., 22 L.R.A. (NS) 1, 11-22 (1909); *see also* Annot., 79 A.L.R. 515 (1932).

In *Hedrick v. Graham, supra,* Parker, J. (now C.J.), cited with approval 18 Am. Jur. *Eminent Domain* § 9 (1938), which contains the following statement: "The executive branch of the government cannot, without the authority of some statute, proceed to condemn property for its own uses. . . . Once authority is given to exercise the power of eminent domain, the matter ceases to be wholly legislative. The executive authorities may then decide whether the power will be invoked and to what extent, and the judiciary must decide whether the statute authorizing the taking violates any constitutional rights; and the fixing of the compensation is wholly a

judicial question." *Accord,* 26 Am. Jur. 2d *Eminent Domain* § 5 (1966).

Plaintiff argues that G.S. 146-22 *et seq.* and G.S. 143-341(4)(d) give Department (with the approval of the Governor and Council of State) carte blanche to condemn property. The wording of the statutes, their legislative history, and the actualities of political and economic life make it clear that the General Assembly did no such thing. It is not to be supposed that the legislature, which holds the purse strings and must appropriate the money to pay for the lands which Department condemns, would delegate to Department its prerogative to designate the public purpose for which the State's power of eminent domain may be used and its revenues spent. *Vance County v. Royster,* 271 N.C. 53, 155 S.E. 2d 790. *See also State v. Lyle,* 100 N.C. 497, 503, 6 S.E. 379, 380-81, and note G.S. 129-15, G.S. 136-89.64, G.S. 140-5.6.

The Report of the Commission on Reorganization of State Government (Commission), transmitted to the governor on 15 November 1956, recommended that the General Assembly establish a Department of Administration, responsible to the Governor, to direct the "staff and housekeeping activities of the government." It also recommended that "in the interests of better over-all efficiency" the Department as a "single staff agency" be given "the duty of acquiring (as well as renting or leasing) real property for all State agencies other than rights-of-way for the State Highway and Public Works Commission subject to the approval of the Governor and Council of State." *Id.* at 33.

In 1957, the legislature implemented the Commission's Report by creating Department, G.S. 143-335 *et seq.,* and assigning to it the acquisition and control of State realty, G.S. 143-341(4), G.S. 146-22 *et seq.* In its Ninth Report, filed 21 November 1958, the Commission made additional recommendations (not pertinent here) with reference to State land management. It noted that "the principal effect of the 1957 legislation was to transfer to the Department of Administration the power to make all acquisitions and most dispositions of land on behalf of the State and its agencies. The Department, however, can act only upon request of another State agency. . . ." *Id.* at 79.

[6, 7] By G.S. 146-22 *et seq.* the legislature merely appointed Department as acquisition agent and established the procedure it should follow in acquiring land. "[A] statute which merely sets forth a mode of procedure will not impliedly grant the power (of eminent domain)." 1 Nichols, Eminent Domain § 3.213 (1964). Thus, De-

partment can effect only the condemnations which the legislature authorizes; it may not decide the public purpose or initiate the project for which the State's power of eminent domain may be used. *See United States v. 458.95 Acres of Land,* 22 F. Supp. 1017, 1019 (E. D. Pa. 1937); 2 Nichols, Eminent Domain § 7.4 (1963).

[8] The State Capital Improvement Act of 1959 (S. L. 1959, Ch. 1039) is not mentioned in the complaint. Notwithstanding, plaintiff now contends (1) that the Act, which appropriated $600,000 and granted to the Department of Conservation and Development the power to condemn land "in connection with" preserving and rehabilitating the Outer Banks between Ocracoke Inlet and Cape Lookout — when considered along with Resolution 66, G.S. 146-22 *et seq.* and G.S. 143-341(4)(d) — gives Department specific authority to condemn the land in suit, and (2) that after the land is thus acquired, G.S. 146-36 will empower plaintiff to convey it to the Federal Government for the Seashore, authorized by 16 U. S. C. A. § 459 (1960).

The contention refutes itself. Plaintiff is not seeking to condemn the land so that its Department of Conservation and Development can stabilize the Outer Banks south of Hatteras, the purpose authorized by the 1959 Act. Plaintiff seeks to condemn the land in order to convey it to the United States for a National park. The fact that shore erosion control and the preservation of the Outer Banks will be one of the prime objectives of the National Park Service once the Seashore is established does not eliminate the requirement of specific statutory authority for plaintiff to condemn land for a Federal park. The 1959 Act (§ 7.1(c)) contains a provision that all funds to be used by the Department of Conservation and Development in restoring the Outer Banks, "including funds paid to the State by the Federal Government," should be deposited in a special account. Thus it is clear that in 1959 the legislature did not contemplate transferring title to this section of the Outer Banks to the United States.

[9-11] Between 1959 and the passage of Resolution No. 66 in 1965, however, the State apparently began to look to the Federal Government for help in halting erosion on the Outer Banks to the south of the Hatteras Seashore. Resolution No. 66, however, does not authorize the condemnation of these lands for the purpose of conveying them to the United States or for any other purpose. "In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule." *Griffith v. R. R.,* 191 N.C. 84, 89, 131 S.E. 413, 416. The

right must be conferred by *statute,* either in express words or by necessary implication. 29A C.J.S. *Eminent Domain* § 22 (1965).

[12] G.S. 146-36, which plaintiff contends would empower it to convey the Outer Banks to the Federal Government once it acquired title to them, is the last section of "Article 8, Miscellaneous Provisions" of Chapter 146. The section provides:

"Acquisitions for and conveyances to Federal government. The Governor and Council of State may, whenever they find that it is in the best interest of the State to do so, enter into any contract or other agreement which will be sufficient to comply with Federal laws or regulations, binding the State to acquire for and to convey to the United States government land or any interest in land, and to do such other acts and things as may be necessary for such compliance.

"The Governor and Council of State may authorize any conveyance to the United States government to be made upon nominal consideration whenever they deem it to be in the best interest of the State to do so."

We are not here called upon to define the limits of the authority conferred by this section. A literalist might well argue that it would empower the Governor and Council of State, should they deem it in the State's best interest, to convey the Art Museum or any other State property to the Federal Government. Indeed, this is the conclusion to which plaintiff's argument would lead. We are not convinced that this statute, codified under "Miscellaneous Provisions," confers such unlimited powers. However, for now it suffices to say that G.S. 146-36 confers no power of eminent domain; and that plaintiff has alleged no contract between the State and Federal Government binding the State to convey defendant's property to the United States.

Finally, we consider defendant's second ground for demurrer, *i.e.,* that condemnation for a Federal park is not a proper state purpose.

[13] The general rule today is that "where a partial benefit, at least, accrues to the State," it may properly exercise its power of eminent domain for the benefit and use of the United States except "in connection with uses which are exclusively national in character, such as post offices, custom offices or federal courts. . . ." *State v. Tin Yan,* 44 Hawaii 370, 383, 355 P. 2d 25, 32-33 (1960). *Accord, County of San Benito v. Copper Mountain Mining Co.,* 7 Cal. App. 2d 82, 45 P. 2d 428 (1935); *Schooler v. State,* 175 S.W. 2d 664 (Civ. App. Texas 1943); 26 Am. Jur. 2d *Eminent Domain* § 12 (1966); *see* Annot., 143 A.L.R. 1040 (1943). North Carolina is in accord

with the foregoing rule. *Yarborough v. Park Commission,* 196 N.C. 284, 145 S.E. 563.

In the past, North Carolina has transferred title to the United States for a National Park. By P. L. 1927, Ch. 48, the General Assembly created the North Carolina Park Commission. This Act (1) directed the Commission to acquire title in the name of the State to the lands described in the Federal Act authorizing the establishment of the Great Smoky Mountains National Park; (2) authorized the issuance of State of North Carolina Park Bonds in an amount not to exceed two million dollars for the purpose and for their payment pledged the full faith, credit and taxing power of the State; (3) vested the Commission with the power of eminent domain to acquire land "in the name and in behalf of the State"; (4) authorized the Commission "to contract to give, grant, convey and transfer to the United States of America for National Park purposes all right, title and interests" which the State might acquire in the lands; and (5) authorized the Governor, with the attestation of the Secretary of State, to convey these lands to the United States.

In *Yarborough v. Park Commission, supra,* plaintiff, a taxpayer, sought to restrain the issuance of the bonds authorized by P.L. 1927, Ch. 48, for that, *inter alia,* they were for a federal, not a state public purpose. In sustaining the demurrer, this Court said that the Commission's authority to acquire land for the Great Smoky Mountains National Park was not impaired by its authorization "to cede the acquired property to the Federal Government in consideration of the public benefit to be derived from the establishment of a national park. . . . Under the doctrine of eminent domain the title may be acquired on behalf of the State and then by legislative and congressional assent it may be transferred to the United States." *Id.* at 291, 145 S.E. at 568-69. The Court concluded: "As the use contemplated by the act of 1927 is a public use, the extent to which property shall be taken for such use rests in the discretion of the Legislature, subject to the restraint that just compensation shall be made." *Id.* at 293, 145 S.E. at 569.

Citing *Yarborough v. Park Commission, supra,* the Supreme Courts of Tennessee and Virginia upheld legislation similar to P. L. 1927, Ch. 48, by which their legislatures had authorized the condemnation of land for conveyance to the United States for the Great Smoky Mountains National Park (Tenn.) and the Shenandoah National Park (Va.). *State v. Oliver,* 162 Tenn. 100, 35 S.W. 2d 396 (1931); *Rudacille v. State Commission,* 155 Va. 808, 156 S.E. 829 (1931). The Supreme Court of Tennessee observed:

"Notwithstanding the area acquired for park purposes by Tennessee is to be conveyed to the United States and controlled by the latter government, the state of Tennessee will be the chief beneficiary of the undertaking. . . . (It will) be more available to the people of Tennessee than to the people of any other state, with the possible exception of the people of North Carolina. Our people will enjoy every advantage from this park operated by the federal government that they would enjoy if it were operated by our own state. . . . [W]hile the citizens of Tennessee will not have superior rights in the park, they will have superior advantages in enjoying common rights." *State v. Oliver, supra* at 109-10, 35 S.W. 2d at 399. *Accord, Via v. State Commission on Conservation, etc.,* 9 F. Supp. 556 (W. D. Va. 1935).

The foregoing observations of the Tennessee Court with reference to that portion of the Great Smoky Mountains National Park located within its borders can, of course, be made with reference to the advantages which North Carolina citizens would derive from the Point Lookout National Seashore. Even more important, however, the Federal Government would assume responsibility for the control of the shore erosion which threatens the unique Outer Banks. Their preservation is of vital importance not only to Eastern North Carolina but also to the entire State.

[2, 14] There is no merit in defendant's contention that the proposed condemnation is not for a proper public purpose. Notwithstanding, specific legislation will be required to authorize the condemnation of land within the proposed Seashore before it can be conveyed to the United States for that purpose. *United States v. Martin,* 140 F. Supp. 42 (M.D.N.C. 1956); *Uhlmann v. Wren,* 97 Ariz. 366, 401 P. 2d 113 (1965); *County of San Benito v. Copper Mountain Mining Co., supra; Greater Baton Rouge Port Commission v. Morley,* 232 La. 87, 93 So. 2d 912 (1957); *Volden v. Selke,* 251 Minn. 349, 87 N.W. 2d 696 (1958); *Richardson v. Cameron County,* 275 S.W. 2d 709 (Civ. App. Texas 1955). In 1965 the General Assembly expressed its desire that the Cape Lookout National Seashore be established "at the earliest possible date." If that is still its wish, it may yet enact the necessary legislation.

The order of Cohoon, J., sustaining the demurrer and dismissing the action is

Affirmed.

HIGGINS, J., dissents.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ELECTRO LIFT v. EQUIPMENT CO.

No. 50 PC.

Case below: 4 N.C. App. 203.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

HIGHWAY COMM. v. REALTY CORP.

No. 45 PC.

Case below: 4 N.C. App. 215.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

McMANUS v. CHICK HAVEN FARMS

No. 44 PC.

Case below: 4 N.C. App. 177.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

ROSS v. SAMPSON

No. 49 PC.

Case below: 4 N.C. App. 270.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

SHORT v. HOSIERY MILLS

No. 47 PC.

Case below: 4 N.C. App. 290.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 May 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. FURR

No. 42 PC.

Case below: 3 N.C. App. 300.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 6 May 1969.

STATE v. GODWIN

No. 46 PC.

Case below: 3 N.C. App. 55.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

STATE v. SMITH

No. 48 PC.

Case below: 4 N.C. App. 261.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 19 May 1969.

YATES v. BROWN

No. 38 PC.

Case below: 4 N.C. App. 92.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 19 May 1969.

STATE OF NORTH CAROLINA v. DERMONT JARRELL CONRAD, TALTON GALLIMORE, JR., AND TERRY JAMES DAVIS

No. 30

(Filed 18 June 1969)

1. Criminal Law § 15— change of venue — unfavorable pre-trial publicity

No error is disclosed in the trial court's denial of defendants' motion for a change of venue on the ground of unfavorable pre-trial publicity where the trial judge conducted a full inquiry, examined the newspaper articles and other news releases, considered affidavits presented by defendants and the State, and concluded that an impartial jury could be selected from the county, and the record fails to show that any juror objectionable to either defendant was permitted to sit on the trial panel or that either defendant exhausted his peremptory challenges.

2. Indictment and Warrant § 13; Conspiracy § 4— indictment for conspiracy — co-conspirators — bill of particulars

In a prosecution upon an indictment charging that the three named defendants conspired "among themselves, with each other, and diverse others" to commit murder, the trial court did not err in denying defendants' motion for a bill of particulars setting forth the names of the "diverse others" referred to in the indictment where the solicitor advised the court that he did not know the names of any others and the State did not offer evidence involving anyone except those charged by name in the indictment. G.S. 15-143.

3. Conspiracy § 3— continuing offense

Even though the offense of conspiracy is complete upon the formation of the illegal agreement, the offense continues until the conspiracy is consummated or is abandoned.

4. Conspiracy § 6— order of proof of conspiracy

Because of the nature of the offense of criminal conspiracy, courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide lattitude in the order in which pertinent facts are offered in evidence, and a verdict rested thereon will not be disturbed if at the close of the evidence every constituent of the offense charged has been proved.

5. Conspiracy § 5— acts and declarations of co-conspirators

When evidence of a *prima facie* case of conspiracy has been introduced, the acts and declarations of each party to the conspiracy in furtherance of its objectives are admissible against the other members.

6. Conspiracy § 5— consideration of acts of one conspirator against other conspirators — necessary findings

Consideration of the acts and declarations of one conspirator as evidence against his co-conspirators should be conditioned upon a finding that (1) a conspiracy existed, (2) the acts were done or the declarations were made by a party to the conspiracy and in pursuance of its objectives, and (3) the acts or declarations occurred while the conspiracy was active.

7. Conspiracy § 5— consideration of acts of conspirator before or after existence of conspiracy

Acts performed and declarations made before the conspiracy was formed or after it terminated are admissible only against the person who committed the acts or made the declarations.

8. Conspiracy § 5— admission of acts and declarations of one conspirator

In this joint trial of three defendants for conspiracy to commit murder, the trial court did not err in the admission of evidence of the acts and declarations of one defendant over objections of the remaining defendants where the acts were performed or the declarations were made during the active existence of the conspiracy and concerning its purpose, and the court limited the jury's consideration of such acts and declarations to those defendants who were present and participating at the time.

9. Conspiracy § 5; Constitutional Law § 31; Criminal Law §§ 76, 95— joint trial — admission of acts and declarations of one conspirator — right to confrontation

In this joint trial of three defendants for conspiracy to commit murder, the "right to confrontation rule" enunciated in *Bruton v. United States*, 391 U.S. 123, is not violated by the admission of evidence of the acts or declarations of one defendant in furtherance of the conspiracy for consideration against other defendants who were present and participating at the time.

10. Criminal Law §§ 89, 99, 165— comment by trial court — expression of opinion on evidence

Comment by the trial judge in ruling on the solicitor's objection to defense counsel's questions concerning the attempt of a key State's witness to commit suicide that "I don't see the relevancy, but I don't see the harm," *is held* not to constitute prejudicial error where the court required the witness to answer, notwithstanding evidence of the witness's attempt at suicide may have some relevancy as to her mental balance and her recollection sufficient to be impeaching.

11. Criminal Law § 164— appellate review of nonsuit question — failure to move for nonsuit in trial court

The sufficiency of the State's evidence in a criminal case is reviewable on appeal without regard to whether a motion was made pursuant to G.S. 15-173 in the trial court. G.S. 15-173.1.

12. Conspiracy § 6; Property § 4— sufficiency of evidence of conspiracy and malicious destruction of property by explosives

The evidence *is held* sufficient to be submitted to the jury as to defendants' guilt of conspiracy to commit murder and of malicious damage to an occupied dwelling and an automobile by use of explosives.

13. Appeal and Error § 5— fatal error on face of record — notice by Supreme Court ex mero motu

The Supreme Court will take notice ex mero motu of a defect or fatal error which appears upon the face of the record proper in matters of importance or to prevent injustice.

14. Property § 4— malicious injury to property by explosives

Both G.S. 14-49 and the amendment to that statute, G.S. 14-49.1, involve (1) wilful and malicious injury, (2) to real or personal property, (3) by the use of explosives, G.S. 14-49.1 providing additional punishment if the real or personal property is occupied by one or more persons.

15. Property § 4— malicious injury to property by explosives — gist of offense

The gist of the offense created by G.S. 14-49 is malicious injury or damage to property, real or personal, by use of high explosives.

16. Property § 4— definition of "malicious"

The word "malicious" as used in G.S. 14-49 connotes a feeling of animosity, hatred or ill will toward the owner, the possessor or the occupant.

17. Property § 4— malicious damage to property by explosives — indictment

An indictment under G.S. 14-49 should contain an identifying description of the property which the defendant damaged or attempted to damage by use of the explosive.

18. Property § 4— malicious damage to property by explosives — indictment

If the real or personal property was occupied at the time of the explosion, the indictment should be drawn under G.S. 14-49.1 and should name the occupant and describe the occupied property and any other property injured or attempted to be injured by the explosion, so that if proof of occupancy fails, the jury may consider whether defendant is guilty under G.S. 14-49 of the lesser included offense of malicious injury to unoccupied property.

19. Property § 4— malicious damage to occupied dwelling and automobile — separate indictments — one explosion — possible verdicts

In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, the indictment charging damage to the automobile will be treated as an additional count in the bill charging damage to the occupied dwelling, and where the evidence discloses that there was but one explosion which damaged the occupied dwelling and the automobile, the court should instruct the jury that if it finds defendant guilty of malicious injury to the occupied dwelling by use of dynamite, such would be the major offense in the indictment and the jury should not consider any other count or verdict.

20. Property § 4— verdicts of guilty of malicious damage to occupied dwelling and automobile — one explosion

In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, where the evidence discloses but one explosion and the jury returns a verdict finding defendant guilty of malicious damage to the occupied dwelling, a further jury verdict finding defendant guilty of malicious damage to the automobile should be treated as surplusage, since

the verdict of dynamiting the occupied dwelling contains the maximum charge under G.S. 14-49 as amended by G.S. 14-49.1.

THE defendants, Talton Gallimore, Jr. and Terry James Davis, petitioned for and were granted certiorari to review the decision of the North Carolina Court of Appeals filed February 26, 1969 finding no error in their trial, convictions and prison sentences on three felony charges tried at the June 24, 1968 Mixed Session, DAVIDSON Superior Court.

Robert Morgan, Attorney General; Andrew A. Vanore, Jr., Staff Attorney for the State.

Barnes and Grimes by Jerry B. Grimes for the defendants Gallimore and Davis.

HIGGINS, J.

The indictment in Case No. 13,678 charged that Dermont Jarrell Conrad, Talton Gallimore, Jr. and Terry James Davis "unlawfully, willfully, feloniously, wickedly . . . did conspire, confederate, agree and scheme among themselves, with each other and diverse others . . ." feloniously, wilfully, and deliberately to kill and to murder one Fred C. Sink.

In Case No. 13,664 Terry James Davis was indicted for the wilful, malicious and felonious damage, by the use of dynamite, to the dwelling house of Fred C. Sink, located at 318 Spruce Street in Lexington and occupied at the time by Fred C. Sink, his wife, and four daughters. In Case No. 13,665 Talton Gallimore, Jr. was separately indicted on the same charge. Both indictments were drawn under G.S. 14-49.1.

In Case No. 13,679, the defendant Gallimore was indicted for the wilful, malicious and felonious damage by the use of dynamite to the 1966 Mercury Comet automobile, the property of Fred C. Sink, and located at 318 Spruce Street in Lexington. In case No. 13,680, the defendant Davis was separately indicted on the same charge. The indictments were drawn under G.S. 14-49. All indictments were returned by the Grand Jury on January 22, 1968.

After a long trial, the jury returned guilty verdicts against Gallimore and Davis on all charges. The jury failed to agree as to Conrad. The court ordered a new trial as to him. In the conspiracy case, the court imposed on Gallimore and Davis sentences of 10 years in prison, to run concurrently with other sentences they were then serving. On the charges of malicious injury to the automobile, the court

imposed prison sentences of 20 years, to begin at the expiration of the sentences for conspiracy. On the charge of malicious damage to the occupied dwelling house of Fred C. Sink by the use of dynamite, the court imposed on each defendant a prison sentence of 40 years, to begin at the expiration of the sentence for malicious damage to the automobile.

The decision of the Court of Appeals finding no error in the trial is reported in 4 N.C. App. 50. In their petition for the review here, the defendants allege the trial court committed four prejudicial errors sufficient to require a new trial. The petitioners pray that the decision of the Court of Appeals be reversed. We discuss the four alleged errors in the order in which they are stated in the petition for certiorari.

[1] The petitioners allege the trial court erroneously, and in violation of their constitutional rights, denied their motion for a change of venue based upon the ground the pre-trial publicity in the area was so general and so adverse as to prevent the selection of a fair and impartial jury from Davidson County. The record discloses that the presiding judge conducted a full inquiry, examined the newspaper articles, other news releases, and the affidavits presented in support of the motion. The court also considered voluminous affidavits of representative citizens who expressed the opinion the defendants could receive a fair trial from a Davidson County jury. After careful review, the court concluded an impartial jury could be selected from Davidson County and denied the motion.

The record fails to show that any juror, objectionable to either defendant, was permitted to sit on the trial panel, or that either had exhausted his peremptory challenges before he passed the jury. Error in denying the motion for change of venue is not disclosed. *State v. Porth,* 269 N.C. 329; 153 S.E. 2d 10; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *Irvin v. Dowd,* 366 U.S. 717.

[2] As a second ground for a new trial, the petitioners allege the trial court committed error in denying their motion for a bill of particulars in the conspiracy case. The indictment charged that the defendants and one Dermont Jarrell Conrad conspired "among themselves, with each other, and *diverse others*" to murder Fred C. Sink. The petitioners contend they were entitled to know the identity of "*diverse others*" in order to make adequate trial preparations. In response to the motion, the solicitor stated: "At the present time we do not know any others." Thereafter, the State did not offer evidence

involving anyone except those charged by name in the bill. Obviously the solicitor could not disclose the identity of persons unknown to him.

In *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505, this Court indicated that an indictment charging conspiracy should name the conspirators if known to the solicitor at the time the bill is drawn. If unknown at the time the bill is submitted to the Grand Jury, the solicitor, upon demand, should disclose the identity of others when ascertained and the disclosure should be made in time for counsel to complete trial preparations. In the instant case, however, the defendants were in no wise prejudiced by the inclusion of *"diverse others"* in the indictment. The evidence involved only the two petitioners and Conrad, the third defendant, as to whose guilt the jury was unable to agree. The trial court did not commit error either in denying the motion for particulars or in refusing to quash the indictment. G.S. 15-143; *State v. Banks,* 263 N.C. 784, 140 S.E. 2d 318; *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849; *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901; *State v. Van Pelt,* 136 N.C. 633.

[3, 4] As a third ground for a new trial, each appellant contends evidence of the acts and declarations of the other defendants were introduced in evidence over his objection. Actually the court cautioned the jury to consider acts and declarations of one as evidence against him only, unless the other was actually present and participating. Due to the nature of the charge, the limitation was more favorable to the defendants than they had any right to expect. The charge is conspiracy — a partnership in crime. Generally, an unlawful agreement is made in secret and known only to the guilty parties. They conceal and cover up their unlawful activities. The more reprehensible the objective, the more carefully they plan to prevent detection and exposure. "Even though the offense of conspiracy is complete upon the formation of the illegal agreement, the offense continues until the conspiracy is consummated or is abandoned." *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *United States v. Kissel,* 218 U.S. 601, 54 L. Ed. 1168. Because of the nature of the offense courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence. "(A)nd if at the close of the evidence every constituent of the offense charged is proved the verdict rested thereon will not be disturbed. . . ." *State v. Thomas,* 244 N.C. 212; *State v. Jackson,* 82 N.C. 565.

"It (conspiracy) may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little

weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside,* 204 N.C. 710, 169 S.E. 711. "A declaration or act of one conspirator, to be admitted against his co-conspirators, must have been made when the conspiracy was still in existence and in progress." 16 Am. Jur. 2d, Conspiracy, § 40, p. 148, citing many decisions.

[5-7] The general rule is that when evidence of a prima facie case of conspiracy has been introduced, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Smith,* 221 N.C. 400, 20 S.E. 2d 360; 16 Am. Jur. 2d, Conspiracy, §§ 35, 36, 37, 38, pp. 146, 147 (citing authorities). Consideration of the acts or declarations of one as evidence against the co-conspirators should be conditioned upon a finding: (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended. *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556; *State v. Lea,* 203 N.C. 13, 164 S.E. 737; 11 Am. Jur. 571. Of course a different rule applies to acts and declarations made before the conspiracy was formed or after it terminated. Prior or subsequent acts or declarations are admissible only against him who committed the acts or made the declarations.

[8, 9] In the instant case, however, Judge Collier, in each instance throughout the trial, limited the acts and declarations to those actually present and participating at the time. These declarations were made by a party to the conspiracy during its active existence and concerning its purposes. The admissions do not violate the "right to confrontation rule" enunciated by the United States Supreme Court in *Bruton v. United States,* 391 U.S. 123. Bruton and one Evans were indicted in the United States District Court for a postal robbery. During the interrogation, Evans confessed to the investigating officer, and implicated Bruton in the robbery. At the trial the officer was permitted to relate to the jury the statement made to him by Evans implicating both Bruton and himself. The Supreme Court granted Bruton a new trial on the ground he was denied the right to cross examine Evans whose statements, implicating him, were relayed to the jury by the officer. The Court held the trial judge's instruction to the jury not to consider the admission of Evans to the officer as evidence against Bruton was insufficient to defeat the right of confrontation.

[10] As a fourth and final ground for a new trial, the appellants allege the court made a prejudicial remark in ruling on the solici-

tor's objection to defense counsel's questions concerning the attempt of a State's witness to commit suicide. Hattie Dean Proctor had given testimony strongly implicating both Gallimore and Davis in the conspiracy and in the substantive offenses. She and Gallimore had a falling out and had separated because of another woman. According to her story, Gallimore had assaulted her. Defense counsel, on cross examination, sought to establish bias or the mental instability of the witness.

"Q. At the time you split up in May, 1966 what did you do?

A. I took a bunch of pills and cut my arm.

Q. As a result of that were you hospitalized anywhere?

A. Yes.

OBJECTION BY SOLICITOR

COURT: I don't see the relevancy, but I don't see the harm. Objection overruled. Answer the question.

A. The Cherry Hospital in Goldsboro."

In the light of the prejudicial testimony which the witness had given against both Gallimore and Davis, her attempt at suicide conceivably might have some relevancy as to her mental balance and her recollection sufficient to be impeaching. *State v. Exum,* 213 N.C. 16, 195 S.E. 2d 7. Conceding but not deciding defense counsel's question and the witness' answer may have had some materiality, although the court thought otherwise, nevertheless, the court required the witness to answer. The chance remark that the judge failed to see relevancy does not amount to prejudicial error. "In the circumstances, the court's statement, if phrased as appears in the record, does not constitute *prejudicial* error." *Pickens v. Pickens,* 258 N.C. 84, 127 S.E. 2d 889.

[11] The petition for certiorari does not allege the failure to nonsuit as error in the trial. However, defense counsel strenuously argued on the review here the insufficiency of the evidence to warrant its submission to the jury. The case is one of great importance both to the State and to the defendants. "The sufficiency of the evidence of the State in a criminal case is reviewable upon appeal without regard to whether a motion has been made pursuant to G.S. 15-173 in the trial court." G.S. 15-173.1.

[12] The State examined many witnesses. Its evidence, bit by bit, when fitted together, appears to disclose a clear picture of a plot to kill Sheriff Sink and to blow up his automobile and his occupied home. Gallimore and Davis are shown to have been active in the con-

spiracy and in the substantive offenses charged. However, it is not necessary to discuss the evidence against Conrad. The jurors considered it and were unable to agree as to his guilt.

The keystone of the State's case against Gallimore and Davis is disclosed by short excerpts from the evidence of two witnesses. Hattie Dean Proctor, formerly Gallimore's girlfriend, testified that she went with Gallimore to a hardware store in Kinston and while there she purchased for him 50 dynamite caps and 25 feet of dynamite fuse.

Later, she and Gallimore were arrested in Sumter, South Carolina. They were returned to Davidson County by Sheriff Sink and Jack Richardson and placed in jail. After they were released on bond, she and Gallimore went to the home of her mother where the defendant Davis joined them. She detailed this conversation: "Talton said he was going to blow Fred and Jack to hell and Jimmy Davis said 'that's the thing we ought to do' ". The witness went with Gallimore to his grandmother's home in Davidson County. They got 20 sticks of dynamite from the attic. "I asked him what he was going to do with it. He said he was going to blow Fred and Jack to hell. He said, 'make it look like an accident'. . . ."

Larry Hedrick testified that on Saturday (before the explosion the following morning) he drove Gallimore and Davis to the old Gallimore home near Denton. On the way they talked about blowing up a car. They went to an old shack behind the house and got some dynamite. "On the way back they was [sic] talking about putting it on Fred Sink's car and blowing it up." Back at the garage after the explosion "Talton asked Jimmy did he think the F.B.I. would be investigating. Jimmy told him 'yes' because explosives were involved."

The State's evidence disclosed that on and prior to November 27, 1967 Sheriff Sink had been actively pursuing Gallimore, Davis and Conrad for their alleged violations of the criminal law. At that time the sheriff lived in a brick house on Spruce Street in Lexington. On Saturday night, November 26, Sheriff Sink, his wife and four (named) daughters, aged 2 to 12 years, were in the house. All were asleep. The sheriff's automobile was parked in the drive near the front of the house. At about 8 minutes after 12:00 on Sunday morning, November 27, the automobile was completely destroyed by an explosion. The rear axle, with one of the wheels attached, was blown across the street into a neighbor's yard. The explosion forced open the front door to the house, breaking the lock. Windows were blown out and broken glass scattered over all rooms. Window screens were bent double. Window sills on the side of the house near the explosion

were shattered. The explosion opened cracks in the outside walls and in the plaster inside. Windows in neighbor's houses across the street were smashed.

[12] Neither of the defendants testified as a witness. The trial court and the Court of Appeals on the review correctly held the evidence presented jury questions. The weight of the evidence was for the jury. *State v. Whiteside, supra.*

[13] We have reviewed all legal objections raised by the defendants and have found them without merit. Nevertheless, we have examined the record proper and have concluded that error appears on the face of that record with respect to one of the charges. In matters of importance or to prevent injustice, the Court, *ex mero motu,* will take notice of a defect or fatal error which appears upon the face of the record proper. *In Re Burton,* 257 N.C. 534, 126 S.E. 2d 581; *Skinner v. Transformadora,* 252 N.C. 320, 113 S.E. 2d 717; *In Re Davis,* 248 N.C. 423, 103 S.E. 2d 503.

An indictment was returned against each defendant charging the wilful and malicious damage to the sheriff's occupied dwelling by the use of dynamite. The bills were drawn under G.S. 14-49.1, which provides:

> "Any person who shall wilfully and maliciously damage or attempt to damage any dwelling, building, vehicle, real or personal property of any kind or nature, being at the time occupied by one or more persons, by the use of nitroglycerine, dynamite, gunpowder or other high explosive, shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State prison for not less than 10 years and not more than life."

[14] An indictment was also returned against each defendant for the wilful and malicious damage to the sheriff's automobile by the use of explosives. These bills were drawn under G.S. 14-49, which provides:

> "Any person who shall wilfully and maliciously injure or attempt to injure any person, or any building, equipment, real or personal property of any kind or nature belonging to another person, firm or corporation, by the use of nitroglycerine, dynamite, gunpowder or other high explosive, shall be guilty of a felony, and on conviction shall be punished by imprisonment in the State prison for not less than five years and not more than thirty years."

G.S. 14-49.1, enacted as Chapter 342, Session Laws of 1967, amended G.S. 14-49. Both the original and the amendment involve (1) wilful

and malicious injury, (2) to real or personal property, (3) by the use of explosives. G.S. 14-49.1 provides additional punishment *if the real or personal property is "occupied by one or more other persons".*

[15-17] The gist of the offense created by G.S. 14-49 is malicious injury or damage to property, real or personal, by the use of high explosives. The word "malicious" as used in the statute connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant. The word "property" is defined in the statute as "real or personal property of any kind or nature". No distinction whatever is made between real and personal property. One blast from a high explosive may injure both real and personal property. The indictment should contain an identifying description of the property which the defendant damaged or attempted to damage by the use of the explosive.

[18] If the property, real or personal, was occupied at the time of the explosion, the indictment should describe the property and name the occupant. The indictment should be drawn under G.S. 14-49.1 and should include not only the description of the occupied property but any other property injured or attempted to be injured by the explosion so that if proof of occupancy fails, the jury could consider whether the defendant is guilty under G.S. 14-49 of the lesser included offense of malicious injury to unoccupied property. *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834.

[19, 20] All the evidence discloses that there was a single explosion which seriously damaged Sheriff Sink's occupied dwelling and his automobile parked beside the house. We may treat the indictments in Nos. 13,679 and 13,680 charging the damage to the automobile as additional counts in the bills in Nos. 13,664 and 13,665 which charge damage to the occupied dwelling. "Ordinarily where separate bills of indictment are returned and the bills are consolidated for trial as authorized by G.S. 15-152, the counts contained in the respective bills will be treated as though they were separate counts in one bill. . . ." *State v. Austin,* 241 N.C. 548, 85 S.E. 2d 924; *State v. Braxton,* 230 N.C. 312, 52 S.E. 2d 895. However, since there was one explosion, the court should have charged the jury that if it found the defendants were guilty of malicious injury to the occupied dwelling house by the use of dynamite, that such would be the major offense in the indictment and the jury should not consider any other counts or verdicts. Since the verdict of dynamiting the occupied dwelling contains the maximum charge under G.S. 14-49, as amended by G.S. 14-49.1, the verdicts for dynamiting the auto-

mobile should be treated as surplusage, should be set aside, and the judgments should be arrested. This Court said in *State v. Stone,* 240 N.C. 606:

> "The conviction for an assault on a female may be treated as surplusage. This is a lesser offense included in the charge of assault with attempt to commit rape. A conviction of an assault on a female could only be sustained provided the jury acquitted of the greater offense."

This Court said in *State v. Birckhead,* 256 N.C. 494:

> "Where the second indictment is for a crime greater in degree than the first and where both indictments arise out of the same act, it is held that an acquittal or conviction for the first is a bar to prosecution for the second." *State v. Midgett,* 214 N.C. 107, 198 S.E. 613.

The effect of the 1967 amendment (G.S. 14-49.1) increasing the penalty if the property is occupied, is analogous to the effect of G.S. 14-87 on the crime of robbery. The section drastically increased the penalty for robbery if the perpetrator committed or attempted to commit the offense by the use or threatened use of firearms or other dangerous weapons. The charge of robbery with firearms will support a verdict for common law robbery as a lesser included offense if the lesser offense is embraced within the allegations of the indictment and supported by the evidence. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869. This Court said in *State v. Bell, supra:*

> "It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or a lesser offense, such as common law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial." (Citing authorities)

Since the judgments provide the sentences on the charges of malicious injury to the occupied dwelling are to begin at the expiration of the sentences imposed for damage to the automobile (which we have ordered vacated) it is necessary for the judgments and the commitments to be corrected to the end that the prison sentences shall begin at the expiration of the sentences on the conspiracy charge.

The decision of the Court of Appeals in No. 13,678 charging conspiracy if affirmed. Likewise, the decision of the Court of Appeals in Nos. 13,664 and 13,665 charging malicious damage to the occupied dwelling of Sheriff Sink is affirmed. In Nos. 13,679 and 13,680 charg-

ing malicious injury to the Sheriff's automobile by the use of explosives, the decision of the Court of Appeals is reversed, the verdicts will be set aside, and the judgments will be arrested.

The Court of Appeals will remand to the Superior Court of Davidson County for disposition in accordance with this opinion. As a matter of precaution, the solicitor should notify defense counsel and have the defendants in court at the time the change is made in the judgments with respect to the date on which service of the sentences in Nos. 13,664 and 13,665 shall begin.

As to Case Nos. 13,678, 13,664 and 13,665 — Affirmed.

As to Case Nos. 13,679 and 13,680 — Judgment arrested and cases remanded with directions.

PARKER, C.J., did not participate in the decision of this case.

WAYNE CRAWFORD B/N/F MARY V. CRAWFORD v. WAYNE COUNTY BOARD OF EDUCATION

No. 23

(Filed 18 June 1969)

1. State § 7— Tort Claims Act — requisites of affidavit

It is necessary to a recovery under the Tort Claims Act that the affidavit of claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon.

2. State § 7— tort claim — failure of affidavit to name employee — jurisdiction of Commission

In this tort claim action against a county board of education based upon the alleged negligence of a school bus driver, the Industrial Commission had jurisdiction to hear the claim, notwithstanding the affidavit failed to name the allegedly negligent bus driver, where prior to the hearing claimant was permitted to amend the affidavit to name the bus driver, and defendant's counsel stipulated that the named bus driver was an employee of defendant and was paid out of the nine months school fund and stated that he was not taken by surprise by the amendment.

3. Administrative Law § 4—necessity for fair trial

While a hearing before an administrative agency need not be as formal as that before a court, no essential of a fair trial may be dispensed with.

4. State § 7— hearings by different members of Industrial Commission — waiver of objection

In this tort claim proceeding before the Industrial Commission, defend-

ant *is held* to have waived objection to procedure whereby a second hearing at which defendant presented its evidence was conducted by a different hearing officer than the one who conducted the original hearing and entered the opinion and award of the Commission, where defendant had notice beforehand of the identity of the officer who would conduct the second hearing but failed to object thereto.

5. Administrative Law § 4— decision by officer not present when evidence presented

An administrative decision is not invalid merely because an officer who was not present when the evidence was taken made or participated in the decision, provided he considers and acts upon the evidence received in his absence.

6. State § 8— Tort Claims Act — contributory negligence

The State Tort Claims Act does not authorize recovery unless the claimant is free from contributory negligence.

7. State § 8— Tort Claims Act — contributory negligence by minor claimant

Substantive case law concerning a minor's capability for negligence applies to claims under the State Tort Claims Act, and six-year-old claimant is incapable of contributory negligence as a matter of law.

ON *certiorari* to review decision of the North Carolina Court of Appeals (3 N.C. App. 343, 164 S.E. 2d 748).

This is an action for damages for personal injuries brought by an infant claimant by his next friend under the provisions of the State Tort Claims Act against the Wayne County Board of Education on account of the alleged negligence of a school bus driver in the operation of a school bus on 3 June 1965. Claimant's affidavit was substantially in the form prescribed by G.S. 143-291 and G.S. 143-300.1, except that the space provided for the name of the alleged negligent employee of the defendant on the printed forms used was left blank. When the claim came on for hearing before Deputy Commissioner Thomas, defendant demurred *ore tenus* contending that the affidavit was fatally defective for failure to contain the name of the alleged negligent employee of the defendant. Plaintiff's counsel advised the Deputy Commissioner that he would like to amend the affidavit to include the name of Roy Batten, the driver of the school bus. The Deputy Commissioner granted the request, and although the record contains the request and permission to amend, the amendment was never written on the affidavit.

The record also discloses that the Deputy Commissioner inquired of defendant's counsel if he was being taken by surprise by the amendment. Defendant's counsel replied that he had discussed the proposed amendment with plaintiff's counsel prior to the hearing. At

the suggestion of the Deputy Commissioner, defendant's counsel expressed his willingness to stipulate that Roy Batten was an employee of defendant and that Roy Batten was paid out of the nine months school fund. Thereafter, evidence was introduced by the plaintiff. Because of the unavailability of certain witnesses at the original hearing, an additional hearing was held on 2 October 1967 before Commissioner Shuford, at which time defendant put on its evidence. Later, on 15 February 1968, the parties stipulated to admit narrative medical reports into evidence. Deputy Commissioner Thomas filed his order 16 February 1968 awarding the claimant $8,000, which award was affirmed by the Full Commission on 7 May 1968.

The facts of the case in respect to the accident were not in substantial controversy and tended to show the following: The claimant was a six-year-old first grade student at Pikeville School in Wayne County, North Carolina. The school had a half-circle driveway with the entrance at the north end and exit at the south end. Defendant's bus No. 116 was driven by Milton LeRoy (Roy) Batten. When Batten arrived at the school, two other buses were there. The children riding on Batten's bus were lined up in front of bus No. 121. Batten drove to the left of bus No. 121 with his left wheels off the edge of the 19-foot-wide drive at a speed of about 15 miles per hour. As bus No. 116 neared the front of bus No. 121, the claimant ran into the path of bus No. 116 to retrieve his shoe. Batten applied the brakes of the bus when he saw the claimant but skidded some twelve feet over the claimant's left leg, severely tearing the muscle of the left calf. When the bus was stopped, the front door of bus No. 116 was approximately even with the front end of bus No. 121.

The Full Commission affirmed the report of the Hearing Commissioner. The Hearing Commissioner found this as a fact:

> "7. In operating defendant's school bus, as above set forth, on the school grounds, in close proximity to young children, Batten did that which a reasonably prudent person would not have done under the same or similar circumstances, and this constituted negligence on his part, which was a proximate cause of the minor plaintiff's injuries and damage.
>
> "8. There was no contributory negligence on the part of the minor plaintiff."

From the order and award of the Industrial Commission, defendant appealed to the Court of Appeals. The unanimous opinion of the Court of Appeals, sitting in a panel of three, affirming the opinion and award of the Industrial Commission, was handed down 31 December 1968.

George K. Freeman, Jr., and Attorney General Robert Morgan by Staff Attorney Richard N. League for defendant appellant.

Braswell, Strickland, Merritt & Rouse for plaintiff appellee.

PARKER, C.J.

[2] Defendant relies upon three points in his assignments of error, the first of which is as follows:

> "Defendant submits that when the name of an employee is omitted from the affidavit in an action brought under G.S. 143-291 or G.S. 143-300.1 of the State Torts Claims Act, it is a jurisdictional defect and cannot be cured by amendment, but only by beginning the action anew. . . ."

[1] This Court has held that it is necessary to a recovery that the affidavit of claimant set forth the name of the allegedly negligent employee and the acts of negligence relied upon. *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703.

The case of *Tucker v. Highway Commission,* 247 N.C. 171, 100 S.E. 2d 514, is apposite. The first headnote in our Reports reads as follows:

> "In a proceeding under the Tort Claims Act, where, prior to the hearing, the parties stipulate the name and position of the State employee charged with negligence, such stipulation meets the statutory requirement that the negligent employee be named and obviates error in naming the employee in the affidavit and claim, and the allowance of an amendment to this effect on appeal to the superior court is immaterial."

In the opinion Higgins, J., used the following language upon which the headnote is based:

> "In considering the validity of the defendant's contentions, it must be borne in mind that the purpose of the statute requiring the negligent employee to be named is to enable the department of the State against which the claim is made to investigate, not all of its employees, but the particular ones actually involved. *Floyd v. Highway Commission,* 241 N.C. 461, 85 S.E. 2d 703. The claim as filed is against the State Highway & Public Works Commission, arising by reason of the negligence of John Billie Harris, supervisor under Bob Moore, superintendent. Conceding that Bob Moore is not charged as being a negligent employee, John Billie Harris, *supervisor* under Bob Moore, is so charged. The name of the negligent employee and his position

(supervisor) are both designated. At the beginning of the hearing both parties stipulated that R. W. (Bob) Moore was Supervisor for Franklin County and was in charge of maintenance at the time of the accident. Thereafter, the plaintiff, at least, dismissed Harris from further consideration.

"We hold the stipulation of the parties was equivalent to and served all the purposes of an amendment to the claim. The stipulation eliminated Harris because he was not the supervisor and included R. W. Moore because he was. The amendment in the Superior Court substituting Moore for Harris added nothing to the claim."

Defendant in its brief relies upon the case of *Anderson v. Atkinson,* 235 N.C. 300, 69 S.E. 2d 603, and 1 McIntosh, N.C. Practice and Procedure, 2d Ed., §§ 1284, 1285, and 1287. These citations are clearly not in point.

1 McIntosh, N. C. Practice and Procedure, 2d Ed., § 1281, states:

"It is the general policy of the code to have actions tried upon their merits, and to that end very liberal powers of amendment are exercised. The courts have inherent power, independent of statute, to amend pleadings, and they may exercise this power in their discretion, unless prohibited by some statute, or vested rights would be disturbed, or the rights of the parties would be injuriously affected. . . ."

[2] We can find no case in our Reports precisely on all-fours, but in our opinion, since defendant's counsel said he was not taken by surprise and expressed his willingness to stipulate that Roy Batten was an employee of the defendant and that Roy Batten was paid out of the nine months school fund, the court had jurisdiction, and the demurrer was bad.

[4] The appellant's second contention is as follows:

"Defendant submits it is error for a Hearing Commissioner to write the Decision and Order when he is not present to hear the testimony given by the witnesses for the defendant, because courts may not use such procedure, such procedure violates the concept of fair play, and such procedure does not comply with the language of the applicable statute."

According to the record before us, these facts appear: Deputy Commissioner Thomas heard evidence at the first meeting. Because of the unavailability of certain witnesses at the original hearing, an additional hearing was held on 2 October 1967 before Commissioner

Shuford, at which time defendant put on its evidence. Later, on 15 February 1968, the parties stipulated to admit narrative medical reports into evidence. Deputy Commissioner Thomas filed his order on 16 February 1968 awarding the claimant $8,000, which award was affirmed by the Full Commission and the Court of Appeals. Thus, it appears that Deputy Commissioner Thomas heard the plaintiff's evidence, and it appears that he did not at that time hear defendant's evidence because of the unavailability of defendant's witnesses, and that later Commissioner Thomas had before him the stipulated narrative medical reports.

From the record before us, Deputy Commissioner Thomas filed his decision and award to plaintiff on 16 February 1968. There is nothing in the record to show that defendant had objected to Deputy Commissioner Thomas's deciding the case. On 5 April 1968 defendant appealed the award to the Full Commission. In its appeal for the first time defendant said: "It was error for Hearing Commissioner Robert F. Thomas to write the Decision and Order filed February 16, 1968, since he was not present to hear the testimony given by the witnesses for the defendant at the hearing held on October 2, 1967, pursuant to the order entered by Commissioner Thomas on February 7, 1967 (EXCEPTION No. 2.)." The Full Commission overruled "each and every one of the defendant's exceptions and adopts as its own the findings of fact and conclusions of law of the hearing deputy commissioner, together with the award based thereon, and orders that the result reached by him be, and the same is hereby AFFIRMED." From the Full Commission, defendant appealed to the Court of Appeals. On this point the Court of Appeals used the following language:

> "The defendant next contends that the Industrial Commission erred in allowing Commissioner Shuford to preside at the hearing in which defendant put on the bulk of its evidence, when the first hearing was held and the opinion and award entered by Deputy Commissioner Thomas. The record discloses that Commissioner Shuford served with the full Commission in reviewing the findings and affirming the order of Deputy Commissioner Thomas. Defendant joined in requesting the additional day of hearing and had notice of the identity of the presiding officer prior to the second hearing. It made no objection to Commissioner Shuford's conducting the second hearing, either at or before the time of the hearing. Without conceding that this procedure was improper, we conclude that defendant waived any objection thereto. This conclusion is supported, on the point of waiver, by *Ostrowski v. Zolnierowicz,* 125 NJL 516, 16 Atl. 2d

803; *Worden v Alexander,* 108 Mont. 208, 90 P. 2d 160, and 48 C.J.S., Judges, Sec. 56, p. 1021. Furthermore, as indicated in the quoted statement from defendant's brief, the facts in this case are not seriously controverted — even the finding of negligence is not challenged."

[3, 4] While a hearing before an administrative agency need not be as formal as that before a court, no essential element of a fair trial may be dispensed with. However, due process and the concept of a fair hearing require only that an administrative officer who was absent when the evidence was taken consider and appraise the evidence himself. See *Morgan v. United States,* 298 U.S. 468, 80 L. Ed. 1288. But we need not base our decision on the proposition that claimant might not have insisted that he be allowed to present his entire case before the same hearing officer, since it appears that under the facts of the case that right, if it existed, was waived.

A similar decision was reached by the Supreme Court of Oklahoma in *Knapp v. State Industrial Commission,* 195 Okla. 56, 154 P. 2d 964. In that case appellant filed with the State Industrial Commission a motion wherein he alleged that his injury had resulted in permanent disability and asked for a hearing and an award of compensation. Pursuant to said motion hearings to determine the extent of his disability were conducted at Bristow on 29 September 1942 and 29 March 1943 by Commissioner Snow and at Tulsa on 5 May 1943 by Chairman Greer and again at Tulsa on 9 June 1943 by Commissioner Cook. Thereafter, Chairman Greer made findings of fact and disposed of the case. Chairman Greer's order was affirmed by the entire Commission. Upon appeal to the Supreme Court of Oklahoma, appellant contended that the action of Chairman Greer, who had not heard all the testimony, in rendering a decision in the matter was without authority and void and constituted denial of due process of law.

In disposing of this contention, the Supreme Court of Oklahoma said:

"The contention of petitioner relative to the conduct of hearings before different commissioners and at places other than the county in which petitioner resided requires no discussion for the reason that petitioner is not shown to have been prejudiced in any manner thereby and for the further reason that it is not necessary that the entire case be heard before a single commissioner or that all commissioners participate in the hearing of each individual case. The petitioner participated in all the hearings conducted and was afforded full opportunity to cross-ex-

amine all witnesses and to present his cause upon the entire record and oral argument before the entire Commission. A careful examination of the entire record reveals that the finding and order here under review are fully supported by the competent evidence shown therein and the order made was the proper one under the facts found."

[5] While there are some decisions reaching a contrary result upon specific statutes involved, and not as a matter of due process, it is generally held that an administrative decision is not invalid merely because an officer who was not present when the evidence was taken made or participated in the decision, provided he considers and acts upon the evidence received in his absence. See Annot. 18 A.L.R. 2d 606, and cases cited therein.

Appellant in the instant case, in addition to failing to object to Commissioner Shuford's conducting the second hearing, sought and obtained a review of the award by the Full Commission. G.S. 97-85 provides that the Full Commission "shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . ." The opinion and order entered by the Full Commission stated that, upon consideration of the evidence in the record, the oral arguments of the attorneys and the written briefs submitted by them, the Commission adopted as its own the findings of fact and conclusions of law of the hearing officer, together with the award based thereon. The Commission had statutory authority to reconsider the evidence or take additional testimony and, if they felt it was so indicated, amend the award. This they failed to do. Therefore, it can be assumed that the Commission felt that appellant had not been prejudiced, and that the findings were proper.

The appellant's third and last contention is as follows:

"Defendant submits that the defense of contributory negligence is available against all minors in G.S. 143-291 and G.S. 143-300.1, claims. . . ."

Thus, defendant contends that the State Tort Claims Act makes the defense of contributory negligence available regardless of the age of the claimant.

Greene v. Board of Education, 237 N.C. 336, 75 S.E. 2d 129, was a claim for the wrongful death of a seven-year-old girl under the State Tort Claims Act of 1951. In its opinion, the Court after holding there was plenary evidence of negligence on the part of the defendant's driver, said this:

"So far as this record discloses, there was no testimony of any conduct on the part of the deceased which evidenced any want of due care on her part. Hence we need not discuss or decide whether a child of her age could by her conduct bar her right of recovery."

In *Smith v. Board of Education,* 241 N.C. 305, 84 S.E. 2d 903, the headnote in our Reports is as follows:

"Evidence tending to show that a fourteen-year-old pupil on a school bus was assaulted by another pupil who had been designated by the principal as 'bus captain' but who was not an employee of the State or the Board of Education, that she immediately jumped up and rushed to the front door of the bus, jerked the door open, and jumped to her fatal injury, and that the driver did not see anything that happened until she was going out the door, *is held* insufficient to support a finding of negligence on the part of the driver of the bus, and nonsuit is proper."

The Superior Court entered a judgment reversing the order of the Industrial Commission awarding judgment to the plaintiff. On appeal the Court in a *per curiam* opinion concluded that the evidence did not support a finding of negligence on the part of the driver of the school bus and then used this language:

"While the ruling of the court below on the defendants' exception with respect to the failure of the hearing Commissioner and the Full Commission to find that the deceased was guilty of contributory negligence resulted in a verdict for the defendants, we affirm the result on the ground that the evidence does not support the finding of negligence on the part of the driver of the bus rather than upon the conclusion that the deceased was contributorily negligent."

In *Brown v. Board of Education,* 269 N.C. 667, 153 S.E. 2d 335, this Court, in reversing the decision of the Superior Court and affirming the Industrial Commission, used this language:

"The plaintiff, being only twelve years of age, is presumed incapable of contributory negligence. *Weeks v. Barnard,* 265 N.C. 339, 143 S.E. 2d 809. The Commission did not find such negligence by her and the evidence is not sufficient to require such a finding."

[6] It is well-settled law with us that the State Tort Claims Act does not authorize recovery unless the claimant is free from contrib-

utory negligence. *Huff v. Board of Education,* 259 N.C. 75, 130 S.E. 2d 26. The claimant in the *Huff* case was 17 years of age.

G.S. 143-299.1 reads as follows:

> "Contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant or the person in whose behalf the claim is asserted was guilty of contributory negligence."

[7] This Court has not in the past held that the language of the State Tort Claims Act requires a departure from our substantive case law concerning a minor's capability for negligence. We do not so hold now. Claimant, a six-year-old child, is incapable of contributory negligence as a matter of law. *Walston v. Greene,* 247 N.C. 693, 102 S.E. 2d 124.

The facts found by the Commission are sufficient to support its conclusion that the claimant's injuries were proximately caused by the negligence of the driver of the bus.

Affirmed.

MAGGIE A. BOWEN v. DANNY CLIFTON GARDNER, APPEARING HEREIN BY HIS GUARDIAN AD LITEM, MILDRED D. GARDNER, AND JAMES GARDNER

No. 35

(Filed 18 June 1969)

1. Trial § 21— nonsuit — consideration of evidence

Upon motion for nonsuit, all the evidence which supports 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 legitimately may be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor.

2. Trial § 21— nonsuit — consideration of evidence

Upon motion for nonsuit, defendant's evidence which contradicts that of plaintiff or tends to show a different state of facts and acts of contributory negligence not alleged in the answer should be disregarded.

3. Negligence § 35— nonsuit for contributory negligence

When opposing inferences are permissible from plaintiff's evidence, nonsuit on the basis of contributory negligence as a matter of law should be denied.

4. Automobiles § 8— duty to maintain lookout

The operator of a motor vehicle is under a duty in the exercise of due care to keep his vehicle under control and to keep a reasonably careful lookout so as to avoid collision with persons and vehicles upon the highway, this duty requiring that the operator be reasonably vigilant and that he anticipate and expect the presence of others.

5. Automobiles § 8— duty to maintain lookout

It is the duty of a driver not merely to look but to keep a lookout in the direction of travel, and he is held to the duty of seeing what he ought to have seen, it being required that he increase his vigilance when the danger is increased by darkness or other conditions obscuring his view.

6. Automobiles § 62— striking pedestrian — failure to keep proper lookout

Plaintiff pedestrian's evidence tending to show that she was struck by a motorcycle operated by the minor defendant as she was crossing a city street at night in an unmarked crosswalk at an intersection, that the street was straight, level and dry, that the weather was clear and the intersection was well lighted, but that defendant failed to see plaintiff until he was within 20 feet of her, *is held* sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout.

7. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of contributory negligence is proper only if plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn therefrom.

8. Automobiles § 83— pedestrian in unmarked crosswalk — contributory negligence

In this action for injuries received when plaintiff pedestrian was struck by defendant's motorcycle, the Court of Appeals erred in concluding that plaintiff was contributorily negligent as a matter of law for failure to see the motorcycle and to use ordinary care for her own safety where plaintiff's evidence would support the inference that she was crossing the street at an unmarked crosswalk at an intersection and thus had the right-of-way under G.S. 20-173(a), and the evidence shows nothing unusual in the motorcycle's approach which would have put plaintiff on notice that the cyclist did not intend to obey the law and yield the right-of-way.

9. Automobiles § 40— pedestrian in unmarked crosswalk — assumption that motorist will yield right-of-way

In the absence of anything which gives or should give notice to the contrary, a pedestrian crossing in an unmarked crosswalk at an intersection is entitled to assume and to act upon the assumption, even to the last moment, that others will observe and obey the statute which requires them to yield the right-of-way.

10. Automobiles § 105— proof of vehicle registration — prima facie evidence of ownership and agency

In an action against a minor defendant and his father for injuries received when plaintiff was struck by a motorcycle operated by the minor

defendant, proof of registration in the name of the father is *prima facie* evidence of ownership by him and agency in the driver under G.S. 20-71.1(b) and is sufficient to carry the case to the jury against the father, notwithstanding plaintiff's further evidence is sufficient, if true, to rebut the *prima facie* evidence that the father owned the motorcycle and that the minor defendant was driving it as the owner's agent.

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

ON certiorari to review decision of the Court of Appeals reported in 3 N.C. App. 529, 165 S.E. 2d 545.

This is a civil action to recover damages for personal injuries. Plaintiff alleges she was struck by a motorcycle owned by James Gardner and operated by his son, Danny (Donny) Clifton Gardner, as the agent of his father within the meaning of the family purpose doctrine. Plaintiff charges Danny with (1) failure to keep a proper lookout; (2) excessive speed; (3) failure to yield the right of way; (4) failure to take necessary action to avoid colliding with plaintiff; (5) driving recklessly and failing to use due caution and circumspection; and (6) operating the motorcycle in the nighttime without proper headlight.

Defendants deny all allegations of negligence, deny family purpose ownership, and plead contributory negligence on part of plaintiff in that she failed to keep a proper lookout and failed to yield the right of way to defendant Danny Clifton Gardner in violation of G.S. 20-174(a).

Motion for judgment of nonsuit at the close of plaintiff's evidence was allowed. On appeal to the Court of Appeals the nonsuit was affirmed. We allowed certiorari.

Connor, Lee, Connor & Reece, by Cyrus F. Lee, Attorneys for the plaintiff appellant.

Boyce, Lake & Burns, by Eugene Boyce, Attorneys for defendant appellees.

HUSKINS, J.

Did the Court of Appeals err in sustaining the judgment of nonsuit? The answer lies in application of established rules governing motions for nonsuit. These rules may be enumerated as follows:

[1] 1. 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 her the benefit of every reasonable inference which

legitimately may be drawn therefrom. *Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329.

2. Contradictions, conflicts and inconsistencies 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.

[2] 3. Defendants' evidence which contradicts that of the plaintiff, or tends to show a different state of facts is disregarded. *Bundy v. Powell,* 229 N.C. 707, 51 S.E. 2d 307; *R. R. v. Woltz,* 264 N.C. 58, 140 S.E. 2d 738; *Eason v. Grimsley,* 255 N.C. 494, 121 S.E. 2d 885. Only that part of it which is favorable to plaintiff can be considered. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330.

4. Acts of contributory negligence not alleged in the answer should be ignored. *Maynor v. Pressley,* 256 N.C. 483, 124 S.E. 2d 162; *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785; *Skinner v. Jernigan,* 250 N.C. 657, 110 S.E. 2d 301.

[3] 5. When opposing inferences are permissible from plaintiff's evidence, nonsuit on the basis of contributory negligence as a matter of law should be denied. *Atwood v. Holland,* 267 N.C. 722, 148 S.E. 2d 851. See 6 N.C. Index 2d, Negligence, Sec. 35.

[6] Plaintiff's evidence in its light most favorable to her, when subjected to these rules, would permit a jury to find the following facts:

In the City of Wilson, Downing Street runs north and south while Jordan Street runs east and west. Downing Street is thirty-two feet wide with a paved sidewalk on each side. Jordan Street is approximately the same width but has no paved sidewalks. These two streets intersect at right angles. The intersection is well lighted by a large overhead street lamp but has no traffic control signal. A view of the intersection looking north and south along Downing Street is unobstructed for 300 to 400 feet. Plaintiff, a 72-year-old woman, lived with Mrs. Etta Tyson whose home was located in the southeast corner of said intersection. On 15 November 1966 about 7:50 p.m., immediately before plaintiff's injury, several ladies had met at Mrs. Tyson's house to go from there to a Sunday school class meeting. Plaintiff intended to go with them. One of the class members drove her car by Mrs. Tyson's house to pick them up. The car stopped close to the curb beside the Tyson house and on the left side of Jordan Street facing Downing Street. When the car was loaded, there was no room for plaintiff, and she decided to go across Downing

Street and stay with her friend Mrs. Morey, whose house was on the southwest corner of the intersection, until Mrs. Tyson returned. At that time she was standing in a grassy area (where a sidewalk would have been had there been one) on the south side of Jordan Street. When she left her friends in the car, she was on "what you would call the sidewalk going to the corner." Before stepping off the curb at the corner, she looked both ways to see if the way was clear. She didn't see anything and started walking straight across Downing Street. Meanwhile, defendant Danny Clifton Gardner had stopped at a filling station a block away. He left there on his motorcycle riding south on Downing Street and had accelerated his speed to 30 miles per hour. There was no other traffic and the street was straight, level and dry. The weather was clear and cold. His headlight was on low beam and would render clearly visible a person ahead of him for a distance of about 100 feet. He failed to see plaintiff until he was within 20 feet of her. At that time she was in the center of Downing Street walking rapidly toward its western curb and sidewalk. He cut his motorcycle to his right and struck plaintiff when she was 6 or 8 feet from the western curb. She suffered a cerebral concussion, a broken leg and other permanent injuries. She was delirious and disoriented for several weeks and continues to incur large medical bills.

Evidence unfavorable to plaintiff tended to show she was running across Downing Street at an angle and that the collision occurred at a point 60 feet south of the intersection and 7 or 8 feet from the west curb. This evidence is contained in the adverse examination of Danny Gardner which was offered by plaintiff. On motion to nonsuit, however, this testimony is ignored.

[4, 5] The Court of Appeals held the evidence sufficient to support a finding of actionable negligence on the part of Danny Gardner, and we concur. Even in the absence of statutory requirements, "[I]t is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty also requires that the operator must be reasonably vigilant, and that he must anticipate and expect the presence of others." *Adams v. Service Co.*, 237 N.C. 136, 141, 74 S.E. 2d 332, 336. It is the duty of a driver not merely to look but to keep a lookout 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. Such duty requires increased vigilance when

the danger is increased by darkness or other conditions obscuring his view. *Chesson v. Teer Co.,* 236 N.C. 203, 72 S.E. 2d 407; *Bradham v. Trucking Co.,* 243 N.C. 708, 91 S.E. 2d 891.

[6] Manifestly, defendant Danny Gardner's alleged failure to keep a proper lookout is supported by evidence sufficient to go to the jury on the negligence issue. We put aside further discussion of the evidence bearing on his negligence.

[7-9] The Court of Appeals sustained a judgment of nonsuit on the premise that plaintiff was contributorily negligent as a matter of law. Nonsuit on that ground is proper only if plaintiff's evidence, considered in the light most favorable to her, so clearly establishes her own negligence as one of the proximate causes of her injury that no other reasonable inference may be drawn therefrom. *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607; *Black v. Wilkinson,* 269 N.C. 689, 153 S.E. 2d 333; *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38; *Pruett v. Inman,* 252 N.C. 520, 114 S.E. 2d 360. Let us look at the evidence. In the light most favorable to plaintiff it tends to show that she looked both ways before leaving the curb; that she kept looking as she was crossing; that she started straight across the street from the corner; that the motorcycle was moving at 30 miles per hour or 44 feet per second; that she was struck after walking 24 to 26 feet and before she ever saw it. The evidence fails to show where the motorcycle was when she left the curb. It would have traveled over 300 feet in 7 seconds. How long it took her to walk 26 feet is unknown. Does this evidence so clearly establish negligence on her part that no other reasonable inference or conclusion can be drawn therefrom? We think not. It is sufficient to support a jury finding that plaintiff was crossing Downing Street in an unmarked crosswalk at an intersection and thus had the right of way under G.S. 20-173(a). The Court of Appeals so held. Its unfavorable aspects would permit the jury to find that she was crossing Downing Street 60 feet south of the intersection at a point where there was no marked crosswalk and thus was required to yield the right of way to all vehicles upon the street under G.S. 20-174(a). These are opposing inferences permissible from plaintiff's evidence, and only the jury may make the choice. Nonsuit as a matter of law should therefore be denied. *Byers v. Products Co.,* 268 N.C. 518, 151 S.E. 2d 38; *Stewart v. Gallimore,* 265 N.C. 696, 144 S.E. 2d 862; *Montford v. Gilbhaar,* 265 N.C. 389, 144 S.E. 2d 31; *Murray v. Bottling Co.,* 265 N.C. 334, 144 S.E. 2d 1. Hence, it was error to conclude that she was contributorily negligent as a matter of law for failure to see the motorcycle and to use ordinary care for her own safety. If she was crossing in

an unmarked crosswalk at an intersection, she was not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, she was entitled to assume and to act upon the assumption, even to the last moment, that others would observe and obey the statute which required them to yield the right of way. *Reeves v. Staley,* 220 N.C. 573, 18 S.E. 2d 239; *Carr v. Lee,* 249 N.C. 712, 107 S.E. 2d 544; *Gamble v. Sears,* 252 N.C. 706, 114 S.E. 2d 677. Had plaintiff seen the motorcycle approaching, this rule of law would still apply. Whether its speed, proximity, or manner of operation were such that plaintiff, simply by failing to see it, failed to exercise due care for her own safety is a jury question on this record. The evidence shows nothing unusual in the motorcycle's approach which would have put plaintiff on notice that the cyclist did not intend to obey the law and yield the right of way. Thus the circumstances permit opposing inferences, and this carries the case to the jury.

Cases followed by the Court of Appeals — *Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305; *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347; *Blake v. Mallard,* 262 N.C. 62, 136 S.E. 2d 214; *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; and *Garmon v. Thomas,* 241 N.C. 412, 85 S.E. 2d 589 — are all factually distinguishable. The principles of law enunciated in them are perfectly sound and are applied in each case to a litigant who *did not* have the right of way. True, right of way is not absolute. It was plaintiff's duty here, even with the right of way, to exercise ordinary care for her own safety. *Carr v. Lee, supra.* On that aspect of her conduct, however, there is evidence to support a finding either way. It becomes a question of fact for the jury rather than a matter of law for the court. Both sides allege right of way in themselves and each charges the other with failure to yield. This is the crux of the case. The rights and liabilities of the parties largely hinge upon the jury's answer to that proposition.

[10] Plaintiff alleges that the motorcycle which struck her was owned and maintained by James Gardner as a family purpose vehicle for the use and pleasure of members of his family and particularly his 18-year-old son Danny Gardner who was a member of his father's household; and further, that Danny was operating the motorcycle as his father's agent and with his father's permission and consent. These allegations are denied in the answer of both defendants. In the adverse examination of Danny Gardner, offered in evidence by plaintiff, Danny testified: "I own it but the motor vehicle registration certificate is in my father's name. He applied for the registration so it could be issued in his name. I use the motorcycle for my own use and pleasure. No one else uses it." Proof of registra-

tion in the name of James Gardner is prima facie evidence of ownership by him and agency in the driver under G.S. 20-71.1(b). Such prima facie evidence of ownership in the father is sufficient to carry the case to the jury against him. *Travis v. Duckworth*, 237 N.C. 471, 75 S.E. 2d 309; *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E. 2d 644. And this is true even though plaintiff's proof goes further and shows by the testimony of Danny Gardner that he, not his father, owned the motorcycle, maintained it for his own use, and was on a mission of his own at the time of the collision out of which plaintiff's injuries arose. This evidence is sufficient, if true, to rebut the prima facie evidence that James Gardner owned the motorcycle and Danny Gardner was driving it as the owner's agent. Even so, proof of registration in James Gardner's name is evidence to the contrary. Since discrepancies, conflicts and contradictions in plaintiff's evidence do not justify nonsuit, the decision of the Court of Appeals sustaining the nonsuit as to James Gardner is erroneous. *Perkins v. Cook*, 272 N.C. 477, 158 S.E. 2d 584.

The decision of the Court of Appeals is reversed as to both defendants. The case is remanded to that Court where it will be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

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

CYRUS N. HICKS, APPELLEE v. JUANITA J. HICKS, APPELLANT

No. 29

(Filed 18 June 1969)

1. Divorce and Alimony § 5— defense of recrimination

This jurisdiction recognizes the defense of recrimination, which allows a defendant in a divorce action to set up a defense in bar of plaintiff's action that plaintiff was guilty of misconduct which in itself would be a ground for divorce.

2. Divorce and Alimony § 5— recrimination — burden of proof

A defense under the doctrine of recrimination is deemed controverted and the burden to establish such affirmative defense is on the person pleading it, who must prove it with the same character of evidence and the same certainty as if he were setting up a ground for divorce.

3. Evidence § 12— testimony by spouse in civil action — G.S. 8-56

At common law husband and wife could not testify in an action to which either was a party; however, G.S. 8-56 makes husband and wife both competent and compellable to testify for or against each other in all civil actions except for certain statutory prohibitions.

4. Divorce and Alimony §§ 5, 14; Evidence § 12— recrimination — testimony by husband of wife's adultery — G.S. 8-56

G.S. 8-56 does not prohibit testimony by plaintiff husband as to the adultery of defendant wife to explain his separation from defendant and to establish a defense in bar of her cross-action for alimony without divorce under former G.S. 50-16 where, at the time the testimony was offered, plaintiff's action for divorce on the ground of adultery had been dismissed, since it was not offered "in any action or proceeding for divorce on account of adultery" or "within any action or proceeding in consequence of adultery."

5. Divorce and Alimony § 16— alimony without divorce — applicability of G.S. 50-10

An action for alimony without divorce under former G.S. 50-16 is a divorce action within the purview of that portion of G.S. 50-10 which controverts all material facts in every divorce action.

6. Divorce and Alimony §§ 14, 16; Evidence § 12— alimony without divorce — testimony of adultery by spouse

Provision of G.S. 50-10 which prohibits the husband or wife from testifying to prove adultery is applicable to actions for alimony without divorce.

7. Divorce and Alimony §§ 5, 14, 16; Evidence § 12— cross-action for alimony without divorce — husband's testimony as to wife's adultery — recrimination

Where the wife cross-claimed for alimony without divorce under former G.S. 50-16 in husband's action for absolute divorce on the ground of one year separation, provisions G.S. 50-10 render the husband incompetent to testify as to the adultery of the wife to refute the wife's allegation of wilful abandonment and to establish his defense of recrimination in bar of her cross-claim.

APPEAL by defendant wife from decision of the North Carolina Court of Appeals filed on 26 February 1969 and reported in 4 N.C. App. 28.

On 10 August 1965 plaintiff, Cyrus N. Hicks, filed an action for divorce based on one year separation, alleging that he and his wife, defendant Juanita J. Hicks, had separated on 8 January 1964.

On 19 August 1965 defendant filed her answer denying the separation, and by cross-action alleged acts of indignity which made her condition intolerable and life burdensome. Defendant prayed for ali-

mony pendente lite and permanent alimony, custody of and support for the children and possession of the family residence.

On 24 August 1965 plaintiff filed a reply pleading the adultery of defendant in response to her cross-action and withdrawing his prayer for absolute divorce based on the separation.

On 3 February 1967 Martin, J., ordered that plaintiff be allowed to amend his complaint and reply. On 3 August 1967 Anglin, J., ordered that all the pleadings in the action be consolidated into an amended complaint, an amended answer and cross-action, and an amended reply.

Plaintiff filed his amended complaint on 2 August 1967 in which he alleged that, in addition to the period of separation beginning on 8 January 1964, plaintiff had lived continuously separate and apart from defendant since 10 August 1965, the date the original complaint was filed. As a second cause of action plaintiff alleged that on 8 January 1964 defendant committed adultery with one Walter Hale, Sr. Plaintiff prayed for an absolute divorce.

On 4 August 1967 defendant filed her amended answer denying the allegations of the amended complaint and alleging as a cross-action that on 11 August 1965 plaintiff abandoned defendant and his children and that plaintiff offered such indignities to defendant's person as to render her life burdensome and intolerable. Defendant prayed for temporary and permanent alimony, custody of and support for the children, and exclusive possession of the family residence.

On 1 September 1967 plaintiff filed his reply to the amended answer denying the allegations of the cross-action and alleging adultery on the part of defendant in bar of her cross-action and in justification of his separation from defendant.

The case was tried before Martin, S.J., at the 1 April 1968 Session of Forsyth Superior Court. At the close of plaintiff's evidence, defendant's motion for nonsuit as to the cause of action for absolute divorce based on adultery was granted. At the close of all the evidence, the jury answered the issues of abandonment and indignities against plaintiff. The judgment of the trial court granted defendant possession and control of the home as alimony and assessed the costs of court and defendant's counsel fees against plaintiff. Plaintiff was also ordered to pay $30.00 per week for the support of his two children.

Plaintiff appealed from this judgment to the North Carolina Court of Appeals. The Court of Appeals, with one judge dissenting, granted

plaintiff a new trial on the grounds that the trial court committed error when it refused to allow plaintiff to testify as to the adultery of defendant to establish his defense of recrimination to her cross-action based on abandonment.

Defendant appealed to this Court pursuant to N. C. Gen. Stat. § 7A-30(2).

David P. Mast, Jr., for plaintiff appellee.

Booe, Mitchell, Goodson and Shugart for defendant appellant.

BRANCH, J.

[7] The question presented to this Court for decision is whether plaintiff husband may testify as to the adultery of defendant wife to explain his separation from defendant and to establish a defense in bar of her cross-action based on N. C. Gen. Stat. § 50-16.

The allegations in defendant's amended cross-action were sufficient to allege a cause of action for divorce from bed and board under N. C. Gen. Stat. § 50-7, or for alimony without divorce under N. C. Gen. Stat. § 50-16 as it then existed. (The 1967 General Assembly repealed N. C. Gen. Stat. § 50-16 effective October 1, 1967.) However, from an examination of the pleadings as explained by the relief demanded, it is apparent that defendant proceeded with her cross-action pursuant to N. C. Gen. Stat. § 50-16.

[1] This jurisdiction recognizes the doctrine of recrimination, which allows a defendant in a divorce action to set up a defense in bar of the plaintiff's action that plaintiff was guilty of misconduct which in itself would be a ground for divorce. *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471. N. C. Gen. Stat. § 50-16, in part, specifically provided:

> Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees.

[2] Defenses under the doctrine of recrimination are deemed controverted and the burden to establish such affirmative defense is on the defendant. *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492. And in order for such a defense to succeed, the person pleading it must prove it with the same character of evidence and the same certainty

as if he were setting up a ground for divorce. 1 Lee, North Carolina Family Law, § 88, at 343 (2d ed. 1963); 1 Nelson, Divorce and Annulment § 10.05, at 366 (2d ed. 1945).

Here, plaintiff by his amended pleadings set up the defense of recrimination as a bar to defendant's cross-action and to nullify defendant's allegation of wilful abandonment by showing the separation to be with just cause. He offered his own testimony to prove the alleged act of adultery by defendant.

[3] At common law husband and wife could not testify in an action to which *either* was a party. However, N. C. Gen. Stat. § 8-56 makes husband and wife both competent and compellable to testify for or against each other in all civil actions except for certain statutory prohibitions. N. C. Gen. Stat. § 8-56 in part provides:

> In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. *Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery;* . . . (Emphasis ours).

[4] We agree with the Court of Appeals that the factual situation of instant case precludes defendant from invoking the prohibitions contained in N. C. Gen. Stat. § 8-56, since, as stated by the Court of Appeals, "at the time the challenged testimony was offered, plaintiff's action for divorce on the grounds of adultery had been dismissed; therefore, it was not offered 'in any action or proceeding for divorce on account of adultery' as forbidden by G.S. 8-56," and that "it was not offered 'within any action or proceeding in consequence of adultery'. . . ."

The other statute pertinent to decision is N. C. Gen. Stat. § 50-10, which, in part, is as follows:

> The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such com-

plaint until such facts have been found by a jury and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact.

[7] The Court of Appeals reasoned that the provisions of N. C. Gen. Stat. § 50-10 were not applicable because "a divorce action grounded on adultery was not being tried at the time." We do not agree with this disposition of the applicability of N. C. Gen. Stat. § 50-10 to the facts here presented.

[5, 6] This Court has held that suits for alimony without divorce are within the analogy of divorce laws, *Rector v. Rector,* 186 N.C. 618, 120 S.E. 195, and that an action under N. C. Gen. Stat. § 50-16 was a divorce action within the purview of that portion of N. C. Gen. Stat. § 50-10 which controverted all material facts in every divorce action. *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865; *Blankenship v. Blankenship,* 256 N.C. 638, 124 S.E. 2d 857; *Schlagel v. Schlagel,* 253 N.C. 787, 117 S.E. 2d 790. Thus, it reasonably follows, and we so hold, that the other portion of N. C. Gen. Stat. § 50-10 which prohibits the husband or wife from testifying to prove adultery is equally applicable to actions brought under N. C. Gen. Stat. § 50-16. Moreover, the applicability of N. C. Gen. Stat. § 50-10 to instant facts is buttressed by the fact that at the time the challenged testimony was offered plaintiff's action for divorce on the ground of one year's separation under N. C. Gen. Stat. § 50-6 was before the court.

The cases relied upon by the parties to this action and pertinent to this decision are *Becker v. Becker,* 262 N.C. 685, 138 S.E. 2d 507; *Biggs v. Biggs,* 253 N.C. 10, 116 S.E. 2d 178; *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933; *Broom v. Broom,* 130 N.C. 562, 41 S.E. 673; and *Perkins v. Perkins,* 88 N.C. 41. We deem it necessary for decision of this case to briefly review and analyze these cases.

In the case of *Broom v. Broom, supra,* two witnesses offered by the plaintiff husband testified that they had had sexual intercourse with the defendant since her marriage to the plaintiff. The defendant testified that the statements were untrue. The plaintiff, after judgment for the defendant, excepted to the defendant's denial on the grounds that it was prohibited by what is now N. C. Gen. Stat. § 8-56. The Court rejected this contention. This case is not decisive of instant case since the Court construed only the section now codified as N. C. Gen. Stat. § 8-56. *Broom* is also distinguishable from instant case, since the wife's testimony did not attempt to prove the act of adultery on the part of her husband.

Hooper v. Hooper, supra, is a case in which the plaintiff husband sought divorce from the defendant wife on account of adultery. The plaintiff testified to facts which tended to show that the plaintiff and the defendant were married in September 1912, and that sometime after and following a visit to Savannah, Georgia, the defendant wife developed a venereal disease. The defendant had no such disease at the time of their marriage, and the plaintiff had not given his wife the disease. The Court held that it was error to allow the plaintiff to testify as to the venereal disease under such circumstances as would necessarily establish adultery on her part. In finding error, the Court considered the sections now codified as N. C. Gen. Stat. § 50-10 and N. C. Gen. Stat. § 8-56. The Court stated:

> These regulations, which have long existed in this State, express the settled purpose of our Legislature that, in actions for divorce on account of adultery, neither the husband nor the wife shall be competent or compellable to give evidence which fixes or tends to fix either with adultery and the inhibition extends to any and all admissions or confessions by the other, of like tenor, either in the pleadings or otherwise. *Perkins v. Perkins,* 88 N.C. 41; *Hansley v. Hansley,* 32 N.C. 506.
>
> True, in the case of *Broom v. Broom,* 130 N.C. 562, the statute was held not to apply where a wife was offered for the sole purpose of denying the statement of third persons, witnesses, as to specific acts of adultery on her part, but the restriction undoubtedly exists, and extends, as stated, to any and all testimony by either the husband or the wife which has a tendency to establish the adultery of the other.

In *Biggs v. Biggs, supra,* the husband instituted action for absolute divorce on grounds of adultery. The defendant denied the adultery charged but alleged that if the jury should so find, the plaintiff forgave her and condoned the acts by resuming marital relations. The plaintiff offered evidence of non-access in answer to defendant's plea of condonation. The Court allowed plaintiff to so testify over defendant's objection. This Court held that the trial court ruled correctly, and, quoting extensively from *Broom v. Broom, supra,* construed N. C. Gen. Stat. § 8-56 as not disqualifying defendant to so testify. However, the Court recognized a difference between the statutes, N. C. Gen. Stat. § 8-56 and N. C. Gen. Stat. § 50-10, and in holding that N. C. Gen. Stat. § 50-10 did not apply because of the factual situation, stated:

> But this statute does not apply to the factual situation here presented. The husband gave no testimony with respect to the

allegations of adultery in his complaint. Nothing said by him would have any tendency to prove the issue of adultery in the case. In the challenged testimony he merely states that he did not have sexual intercourse with his wife in Florida and was in her room only one and one-half minutes. But defendant insists that the testimony permits an inference of adultery. If so, it is because of evidence elicited by her from her husband on cross examination and her own later testimony that pregnancy resulted from intercourse with plaintiff during the Florida visit. Plaintiff's voluntary testimony contains no charge of adultery against defendant. It was competent in denial of condonation. If an inference of adultery resulted from defendant's own later testimony and evidence elicited by her on cross examination, it has no tendency to "prove" the issue of adultery according to the allegations of the complaint, and cannot avail her on this appeal. She will not be heard to complain of error induced by her, if error there be.

Decision in *Biggs* rested largely on the interpretation of N. C. Gen. Stat. § 8-56 and upon the reasoning that the public policy against collusion or the opportunity for collusion in divorce actions was not violated. In instant case it would seem that public policy would also demand that the wife be protected against the absolute defense of adultery which the husband sought to prove by his own testimony.

In *Becker v. Becker, supra,* a case factually similar to the case before us, the plaintiff sued for a divorce on the ground of two years' separation. The defendant counterclaimed for divorce on the ground of adultery. At trial term, the defendant withdrew his counterclaim but amended his pleading to allege adultery as a matter of recrimination and as a bar to plaintiff's action. The defendant then sought to support his allegations of recrimination by his own testimony as to his wife's adulterous disposition. The Court, holding that in an action for divorce the defendant husband could not testify in regard to the adulterous conduct of his wife, stated:

> Likewise, it is provided in G.S. 50-10 that in a trial pursuant thereto, "neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."
>
> In the case of *Perkins v. Perkins,* 88 N.C. 41, Ruffin, J., said: "The provision of the statute (Battle's Revisal, Chapter 17, Section 341, now G.S. 8-56) is so pointed and its language so plain — that in such trials, neither the husband nor the wife

shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact — as to leave no room for doubt or construction."

Our research reveals that headnote No. 1 in the case of *Perkins v. Perkins, supra,* incorrectly cited Battle's Revisal, Ch. 17, § 341 (1873) (now N. C. Gen. Stat. § 8-56). This error in citation was inadvertently carried forward in *Becker v. Becker, supra.* It is obvious that in *Perkins* the Court relied upon and interpreted Battle's Revisal Ch. 37, § 7 (1873) (now N. C. Gen. Stat. § 50-10) rather than Battle's Revisal, Ch. 17, § 341 (1873) (now N. C. Gen. Stat. § 8-56).

We agree with the reasoning of Ruffin, J., in *Perkins v. Perkins, supra,* upon which the decision in *Becker v. Becker, supra,* rests, that "The provision of the statute is so pointed and its language so plain — that in such trials, neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact — as to leave no room for doubt or construction."

[7] The provisions of N. C. Gen. Stat. § 50-10 are not limited to "any action or proceeding for divorce on account of adultery" or "actions or proceedings in consequence of adultery," but includes "every complaint asking for a divorce." Thus, its declaration that the husband and wife are incompetent witnesses to prove the adultery of the other refers to *all* divorce actions, including actions for alimony without divorce. N. C. Gen. Stat. § 50-10 clearly makes plaintiff an incompetent witness to prove the adultery of defendant in this action.

The decision of the Court of Appeals is

Reversed.

STATE v. MARY BENTON BENTON

No. 27

(Filed 18 June 1969)

1. Criminal Law § 10; Homicide §§ 2, 12; Indictment and Warrant § 11— accessory before the fact of murder — sufficiency of indictment

In this prosecution of defendant as an accessory before the fact to the murder of her husband, judgment must be arrested on the ground that the bill of indictment does not charge defendant with the crime for which she was tried, convicted and sentenced, or with any criminal offense,

where the indictment charges that defendant became an accessory before the fact to the murder of her husband "by counseling, procuring or commanding Raymond Epley to commit a felony, to wit: kill and murder Raymond Epley," and that Raymond Epley consequently murdered defendant's husband.

2. Criminal Law § 13— jurisdiction — valid indictment

A bill of indictment is insufficient to confer jurisdiction unless it charges all essential elements of a criminal offense.

3. Criminal Law § 127— arrest of judgment — defective indictment

Judgment must be arrested where no crime is charged in the warrant or bill of indictment upon which defendant has been tried and convicted.

4. Indictment and Warrant § 9— charge of crime

A charge in the bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged.

5. Criminal Law § 127; Indictment and Warrant § 9— defective indictment — consideration of allegations in warrant

Allegations in the warrant on which defendant was originally arrested cannot be used to supply a deficiency in the bill of indictment.

6. Criminal Law § 127; Indictment and Warrant § 9— defect in indictment not cured by evidence

Only what appears on the face of the record proper may be considered in determining whether a judgment should be arrested, and the evidence, not being a part of the record proper, cannot supply a fatal defect or omission in a bill of indictment.

7. Criminal Law § 127— effect of arrest of judgment

The legal effect of arresting the judgment because of a fatally defective indictment is to vacate the verdict and sentence of imprisonment, and the State, if so advised, may proceed against defendant upon a sufficient bill of indictment.

8. Criminal Law § 10— accessories before the fact — elements of offense

Elements which must concur in order to justify conviction of one as an accessory before the fact are: (1) that he advised and agreed, or urged the parties or in some way aided them, to commit the offense, (2) that he was not present when the offense was committed, and (3) that the principal committed the crime.

9. Criminal Law § 10— accessories before the fact — proof of guilt of principal

Although under G.S. 14-5 an accessory before the fact can be indicted and tried independently of the principal felon, the guilt of the principal must in all cases be alleged and proved to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt.

10. Criminal Law § 10; Homicide §§ 2, 21— accessory before fact of murder — duty of State to prove guilt of principal

In order to convict defendant as an accessory before the fact to the

murder of her husband, it is incumbent upon the State in defendant's trial to satisfy the jury from the evidence beyond a reasonable doubt that the principal felon named in the indictment murdered defendant's husband.

11. Criminal Law § 10; Homicide §§ 2, 23— accessory before the fact of murder — instructions — duty of State to prove guilt of principal

In this prosecution of defendant as an accessory before the fact to the murder of her husband, the trial court erred in giving the jury instructions which implied or assumed "the crime" was committed when defendant "was not present" and that "the crime was committed" by the principal felon named in the indictment, and in failing to instruct the jury that, in order to justify conviction of defendant as an accessory before the fact, the State was required in this case to satisfy the jury from the evidence beyond a reasonable doubt that the principal felon named in the indictment murdered defendant's husband.

APPEAL by defendant from *Beal, Special Judge,* November 11, 1968 Special Criminal Session of BURKE.

Defendant was tried on a bill of indictment returned by the grand jury at February 1968 Session, viz.:

"The jurors for the State upon their oath present, that Mary Benton Benton late of the County of Burke, on the 27 day of November, in the year of our Lord one thousand nine hundred and Sixty-seven, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously be and become an accessory before the fact to the murder of Marshal Adam Benton, *by counseling, procuring, or commanding Raymond Epley to commit a felony, to wit: kill and murder Raymond Epley,* and in confirmation of said counseling and procuring or commanding of the said Raymond Epley, he, the said Raymond Epley, on or about the 27th day of November, 1967, did unlawfully, willfully and feloniously, with premeditation and deliberation, and with her malice aforethought, kill and murder the said Marshall Adam Benton, in violation of General Statutes of North Carolina Section 14-5, against the form of the statute in such case made and provided and against the peace and dignity of the State." (Our italics.)

Defendant pleaded not guilty and was placed on trial during the second week of the May 27, 1968 Session. The record before us shows that the court, on June 5, 1968, withdrew a juror and declared a mistrial "due to the critical degree of the pregnancy of the defendant."

At defendant's trial at November 1968 Special Criminal Session, the jury returned a verdict of "guilty." Thereupon, defendant moved in arrest of judgment and excepted to the court's denial of her mo-

tion. The court pronounced judgment that the defendant be confined in the State Prison for the term of her natural life.

Defendant excepted and appealed, assigning as error, *inter alia,* the court's denial of her motion in arrest of judgment.

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

Byrd, Byrd & Ervin for defendant appellant.

BOBBITT, J.

[1] Fidelity to sound legal principles requires that the judgment be arrested on the ground the bill of indictment does not charge defendant with the crime for which she was tried, convicted and sentenced, or with any criminal offense.

The bill alleges explicitly and fully that Raymond Epley murdered Marshall Adam Benton on or about November 27, 1967. It alleges that defendant became an accessory before the fact to the murder of Marshall Adam Benton "by counseling, procuring, or commanding Raymond Epley to commit a felony, to wit: kill and murder Raymond Epley," and that Raymond Epley murdered Marshall Adam Benton "in confirmation of said counseling and procuring or commanding of the said Raymond Epley."

The warrant on which defendant was arrested and the evidence at trial indicate clearly it was intended that defendant be charged as an accessory before the fact to the murder of Marshall Adam Benton by Raymond Epley *by counseling, procuring, or commanding* Raymond Epley to kill and murder Marshall Adam Benton. Unfortunately, the bill of indictment does not contain this *essential allegation.* Decision must be based on what the bill of indictment in fact charges, not on what the draftsman or grand jury may have intended. Therefore, under the well-settled legal principles stated below, the bill of indictment was insufficient to vest the court with jurisdiction to try defendant.

[2, 3] A bill of indictment is insufficient to confer jurisdiction unless it charges all essential elements of a criminal offense. *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770, and cases cited; *State v. Morgan,* 226 N.C. 414, 38 S.E. 2d 166, and cases cited. "(W)here no crime is charged in the warrant or bill of indictment upon which the defendant has been tried and convicted the judgment must be arrested." *State v. Morgan, supra,* and cases cited. Accord: *State v. Fowler,* 266 N.C. 528, 146 S.E. 2d 418.

[4-6] "A charge in a bill of indictment must be complete in itself, and contain all of the material allegations which constitute the offense charged." *State v. Guffey,* 265 N.C. 331, 333, 144 S.E. 2d 14, 17. As held in *Guffey,* allegations in the warrant on which defendant was originally arrested cannot be used to supply a deficiency in the bill of indictment. Accord: 42 C.J.S., Indictments and Informations § 108, p. 990. Only what appears on the face of the record proper may be considered in determining whether a judgment should be arrested. *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311. Accord: *State v. Stokes, supra.* Evidence, which is not a part of the record proper, cannot supply a fatal defect or omission in a bill of indictment.

The bill of indictment under consideration is fatally defective. It does not charge defendant with the murder of Marshall Adam Benton. Nor does it charge that she counseled, procured or commanded Raymond Epley to murder Marshall Adam Benton. The verdict relates to the accusation in the bill of indictment. The allegations thereof being insufficient to charge a criminal offense, the judgment predicated on said indictment and verdict must be arrested.

[7] The legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment. The State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment. *State v. Fowler, supra.*

The present case demonstrates the need for great care in the drafting of pleadings in criminal actions and for close scrutiny thereof prior to the arraignment and trial of the accused. "(I)t is impossible to overmagnify the necessity of observing the rules of pleading in criminal cases. The first rule of pleading in criminal cases is that the indictment or other accusation must inform the court and the accused with certainty as to the exact crime the accused is alleged to have committed." Ervin, J., in *State v. Thorne,* 238 N.C. 392, 78 S.E. 2d 140.

Our reluctance to arrest judgment on account of the defect in the bill of indictment is assuaged by the realization that, even if the bill of indictment had alleged what the draftsman intended, defendant would be entitled to a new trial on account of error in the court's instructions to the jury. Since it is probable there will be a new trial on a proper bill of indictment, we deem it appropriate to call attention to a deficiency in the court's charge.

G.S. 14-5 provides in part: "If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the

person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. . . ."

[8] "There are several elements that must concur in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them, to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime." 22 C.J.S., Criminal Law § 90, p. 269. This statement was quoted with approval by Moore, J., speaking for this Court, in *State v. Bass*, 255 N.C. 42, 51, 120 S.E. 2d 580, 587.

[9] Although under G.S. 14-5 an accessory before the fact can be indicted and tried independently of the principal felon, "the guilt of the principal must in all cases be alleged and proved." 1 Wharton's Criminal Law and Procedure (Anderson) § 116, p. 251. "In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt." 22 C.J.S., Criminal Law § 105, p. 296.

It would seem more appropriate if allegation and proof "(t)hat the principal committed the crime" were stated as the *first* rather than the *third* element to justify the conviction of one as an accessory before the fact. Compare statement of essential elements that must concur in order to justify the conviction of one as an accessory after the fact. *State v. Williams*, 229 N.C. 348, 49 S.E. 2d 617; *State v. Potter*, 221 N.C. 153, 156, 19 S.E. 2d 257, 259.

After charging the jury substantially in accordance with the quoted statement from Corpus Juris Secundum, the court instructed the jury: "(I)f you find from the evidence and beyond a reasonable doubt that the defendant, Mary Benton Benton, on or about 27th day of November 1967, did counsel, advise, encourage, warn, instruct, command, procure the principal, Raymond Epley, to kill and slay Marshall Benton on the 27th day of November 1967, and that she was not present at the time that the crime was committed, and if you so find beyond a reasonable doubt, it is your duty to return a verdict of guilty against the defendant, Mary Benton Benton."

[10] Prerequisite to the conviction of defendant as an accessory before the fact, it was incumbent upon the State *in this case* to satisfy the jury from the evidence beyond a reasonable doubt that Raymond Epley murdered Marshall Adam Benton. There was plenary evidence from which the jury could so find. However, the court's instructions were deficient. They imply or assume "the crime" was committed when defendant "was not present" and that "the crime was committed" by Raymond Epley. There were no instructions as to the elements of the crime of murder. Nor were there instructions purporting to apply the law relating to murder to the facts in evidence. There should have been, but was not, an instruction to the effect that, in order to justify the conviction of defendant as an accessory before the fact, the State was required *in this case* to satisfy the jury from the evidence beyond a reasonable doubt that Raymond Epley murdered Marshall Adam Benton. Compare *State v. Jackson,* 270 N.C. 773, 155 S.E. 2d 236, where, in the separate trial of the defendant as a principal in the second degree to armed robbery, it was held incumbent upon the State to establish beyond a reasonable doubt by evidence *in that separate trial* the guilt of those referred to as principals in the first degree.

The court may have considered that the testimony of Raymond Epley and the proffer of stipulations by defendant's counsel rendered unnecessary the instructions we hold should have been given. Raymond Epley testified, and defendant's counsel proffered a stipulation, to the effect that Raymond Epley had been indicted for the murder of Marshall Adam Benton on November 27, 1967; that, at May 12, 1968 Session, he had tendered, and the State had accepted, a plea of guilty of murder in the second degree; and that, based on said plea, he had been sentenced to imprisonment for a term of not less than twenty nor more than thirty years. Too, defendant's counsel, incident to their objections to the introduction of photographs of the deceased, proffered stipulations (1) "that the deceased died as a result of a gunshot wound from the bullet that (had) been introduced as State Exhibit (1)," and (2) that Raymond Epley "did kill Marshall Benton, which death resulted from a gunshot wound that occurred on November 27, 1967." Assuming, without deciding, that defendant's counsel, without defendant's full understanding and express approval, had authority to stipulate facts of which neither they nor their client had personal knowledge, that is, that Raymond Epley did kill Marshall Adam Benton, the proffered stipulations fall short of a judicial admission that Raymond Epley *murdered* Marshall Adam Benton.

It is noteworthy that, although G.S. 14-17 provides that a person who is convicted or pleads guilty to murder in the second degree "shall be punished with imprisonment of not less than two nor more than thirty years in the State's Prison," G.S. 14-6 provides that a person who is convicted as an accessory before the fact of the crime of murder, whether first degree or second degree, "shall be imprisoned for life in the State's Prison." See *State v. Mozingo,* 207 N.C. 247, 176 S.E. 582.

Although we have discussed a deficiency in the charge, decision on this appeal is that, for the reasons set forth in the first portion of this opinion, the judgment of the court below must be and is hereby arrested.

Judgment arrested.

BESSIE PRICE (WIDOW) v. TOMRICH CORPORATION AND WILLIAMS E. ARANT, JR., TRUSTEE FOR FIRST UNION BANK

No. 33

(Filed 18 June 1969)

1. Adverse Possession § 17— color of title

Color of title is a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance.

2. Adverse Possession § 17— color of title — description in deed

When the description in a deed embraces not only land owned by the grantor but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own.

3. Adverse Possession § 17— color of title — valid deed

A valid deed — a muniment of title — may serve as color of title.

4. Adverse Possession § 17— color of title — commissioner's deed

Commissioner's deed, which was executed and delivered to plaintiff's predecessor in title in a special proceeding brought by an administrator C.T.A. to make assets to pay debts, constitutes color of title to all the land described therein.

5. Adverse Possession § 6— tacking possession — beneficiary under a will

Plaintiff, who succeeded to her title as beneficiary under a will, is entitled to tack her adverse possession of lappage to such possession by the testator as she is able to establish.

6. Adverse Possession § 18— color of title — presumptive possession to outermost boundaries of deed

When one enters upon a tract of land and asserts his ownership of the whole under color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed, provided no part of the premises is held adversely by another; and his exclusive and uninterrupted possession for seven years will ripen title to all the land embraced within the deed.

7. Adverse Possession § 4— lappage in description of deeds

Where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title.

8. Adverse Possession § 4— lappage in description of deeds

If one of two rival claimants to land is seated on the lappage and the other not, the possession of the whole interference is in the former.

9. Adverse Possession § 4— lappage in description of deeds

If both rival claimants have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other.

10. Adverse Possession § 4— lappage in description of deeds — possession under junior grant — presumption

To mature a title under a junior grant when a portion of the boundary of the junior grant laps on a superior title, there must be shown adverse and exclusive possession of the lappage or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant.

11. Adverse Possession § 1— possession — telephone right-of-way

Where telephone company acquired from defendant's predecessors in title a right-of-way across a tract of land for its lines and an underground cable, its possession of the right-of-way did not inure to the benefit of defendant for purpose of showing possession of the tract by defendant.

12. Adverse Possession § 4— adverse possession of lappage — boundaries of lappage — proof

When a junior grant incorporates a portion of a senior grant, it is not necessary for the junior grantee claiming title by seven years adverse possession under color to show that the boundaries of the lappage were visible on the ground, although the claimant must establish the required adverse possession within those lines.

13. Trial § 21— motion to nonsuit — consideration of evidence

In passing upon a motion for nonsuit, the evidence and every legitimate inference from it must be considered in the light most favorable to plaintiff.

14. Adverse Possession § 25— color of title — sufficiency of proof

In proving title by continuous, open and adverse possession of land under color of title for seven years, nothing must be left to conjecture.

15. Adverse Possession § 1— what constitutes adverse possession

Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be repeated as to show they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser; it must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

16. Adverse Possession § 25— lappage — color of title — continuous possession — sufficiency of evidence

In an action in trespass to try title wherein plaintiff and defendant dispute a lappage of 2.82 acres and defendant has the superior record title to the lappage but is not in possession of it, plaintiff's evidence *is held* insufficient to show continuous possession of the lappage by her and her predecessor in title for more than seven years under color of title.

17. Adverse Possession § 1— permission to hunt

Permission to hunt, like the payment of taxes, is evidence of an adverse claim, but it is not possession.

18. Adverse Possession § 25— nature of the adverse possession

Adverse possession is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser.

19. Adverse Possession § 1— cutting timber or pulpwood

When cutting timber or pulpwood is relied upon to show adverse possession it must be kept up with such frequency and regularity as to give notice to the public that the party cutting it or having it cut is claiming the land as his own.

PARKER, C.J., did not participate in the decision of this case.

ON certiorari to review decision of the Court of Appeals reported in 3 N.C. App. 402, 165 S.E. 2d 22.

This action of trespass to try title and to recover damages was instituted 25 May 1968. Plaintiff appealed to the Court of Appeals from the judgment of nonsuit entered by Godwin, J., at the July 1968 Session of Durham. The Court of Appeals reversed. This Court allowed defendant Tomrich Corporation's petition for certiorari.

Bryant, Lipton, Bryant & Battle for plaintiff appellee.

Powe, Porter and Alphin by Willis P. Whichard for defendant appellant.

SHARP, J.

The question presented is the sufficiency of plaintiff's evidence to withstand defendant's motion for nonsuit. The following facts are established by the pleadings and stipulations or are not controverted:

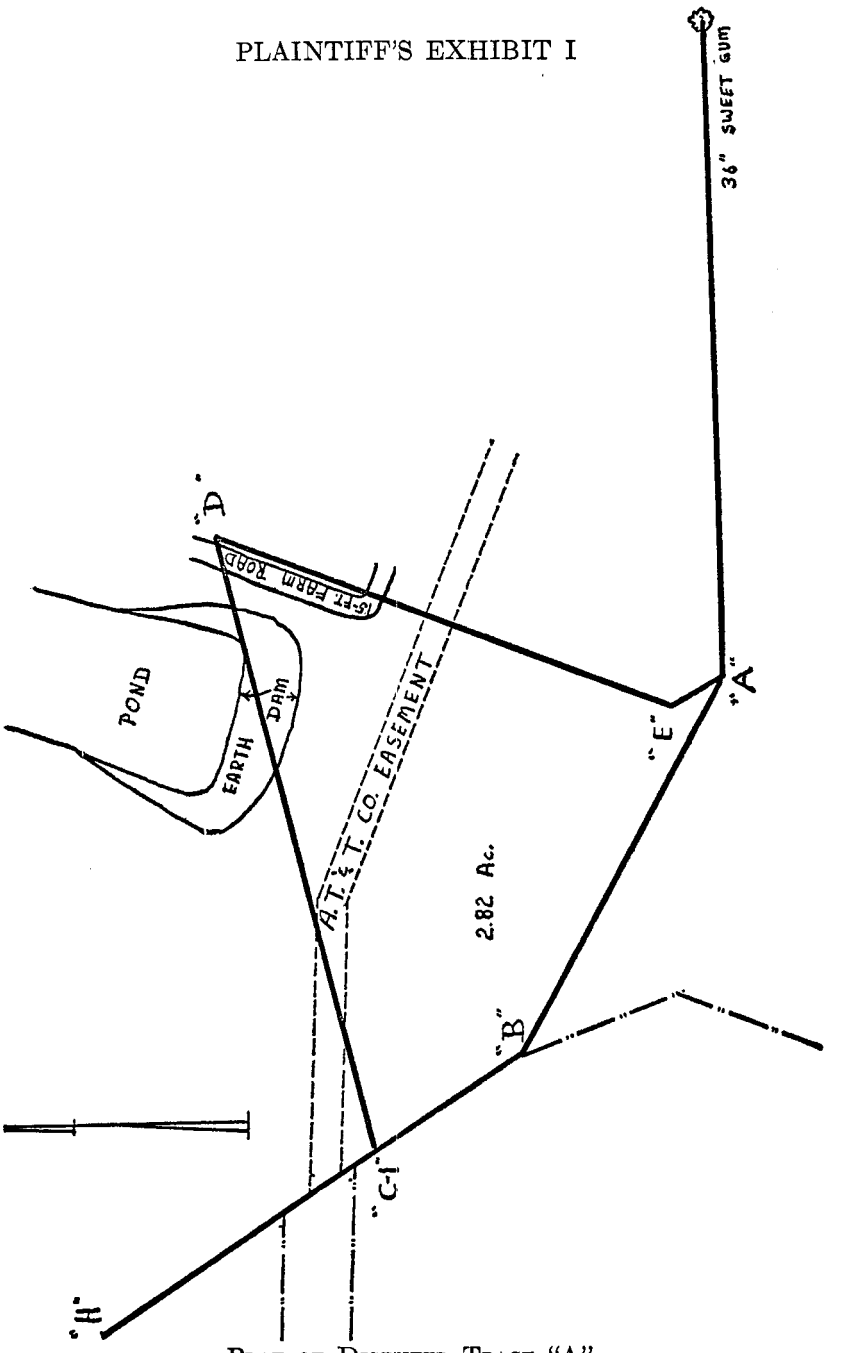
Plaintiff and defendant Corporation (defendant) own adjoining land in the Bragtown area of Durham County. They dispute a lappage of 2.82 acres. In September 1887 all the property now owned or claimed by the parties was owned by Hawkins Chisenhall. The division of this property is shown on a map, made 22 July 1968 by George C. Love, Jr., registered land surveyor (D-4). An outline of the pertinent portions of this map is reproduced herein. The disputed area, triangular in shape, is designated as Tract A on D-4. A map, made by J. W. Copley on 11 June 1968 (P-I), shows Tract A only. An outline of it is likewise reproduced.

Defendant, with an unbroken chain of title from Hawkins Chisenhall, has the superior record title to Tract A. Defendant also has record title to Tract B, 20.7 acres adjoining Tract A on the south, and to Tract C, a smaller area adjoining Tract B on the east. Defendant acquired record title to these three tracts on 13 March 1968 by two deeds, which described the property as one tract and referred to a map made December 1937. Each deed conveyed a one-half interest and excluded from the warranty of title the 2.82 acres "claimed by J. Y. Hinson in Deed Book 200 at page 507, Durham County Registry." Reference was also made to Plat Book 24 at page 49.

Plaintiff's claim to Tract A stems from a deed from Charles W. White, Commissioner, to her predecessor in title, Dr. J. Y. Hinson. This deed was executed and delivered to Hinson on 5 December 1952 pursuant to an order of the Clerk of the Superior Court of Durham County in a special proceeding brought by the administrator C.T.A. of David M. Chisenhall to sell decedent's land (supposed to contain about 75 acres) to make assets to pay debts. Before advertising the land for sale, the Commissioner employed a civil engineer, Hunter Jones, to locate the property, mark the lines, and provide an accurate description of it.

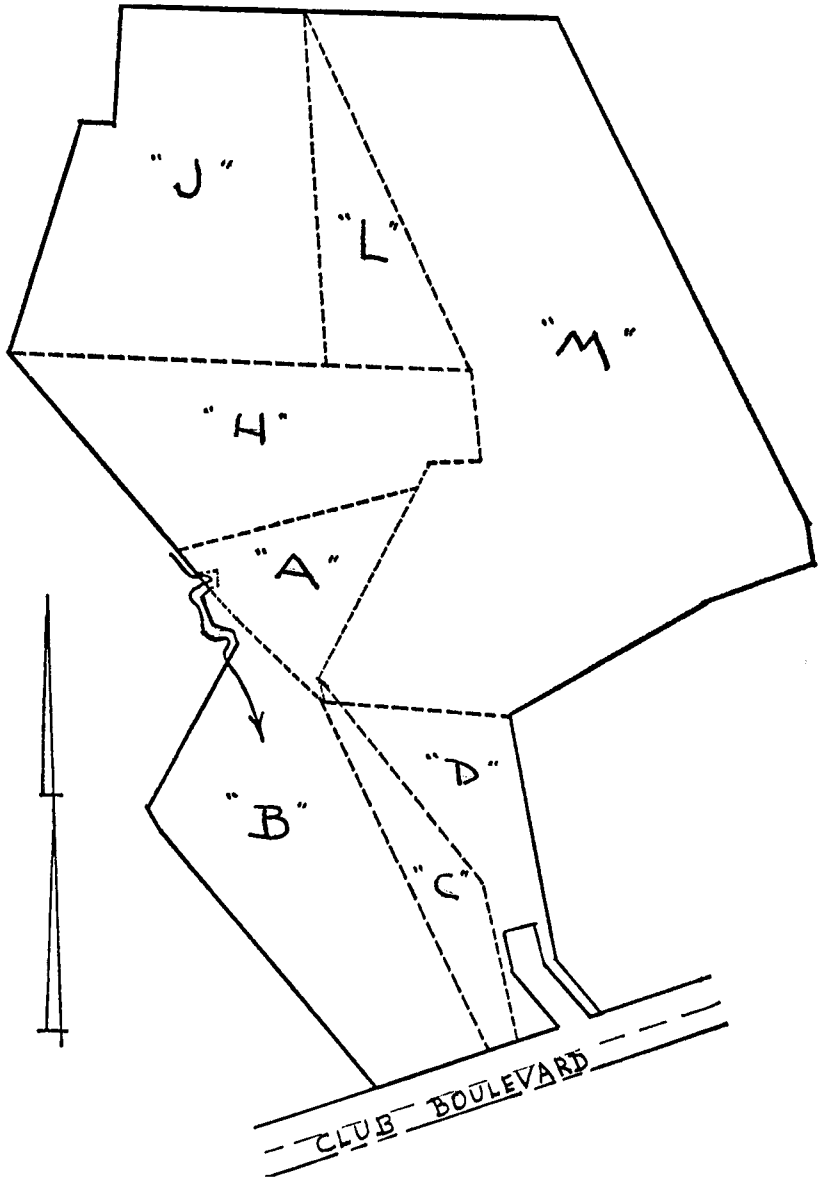
The map and description which Jones furnished showed a single tract of 77.75 acres. By mistake Jones included within its perimeter 2.82 acres (Tract A), which David M. Chisenhall did not own. The land was advertised and sold, and the deed to Hinson was prepared,

PLAINTIFF'S EXHIBIT I



PLAT OF DISPUTED TRACT "A"
Prepared by J. W. Copley, 11 June 1968

DEFENDANT'S EXHIBIT 4



PLAT OF PROPERTY OF PLAINTIFF AND DEFENDANT
Prepared by George C. Love, Jr., 22 July 1968

in accordance with the Jones map, which was recorded in Plat Book 24 at page 49, Durham County Registry.

As already noted, in both plaintiff's and defendant's deeds, the disputed 2.82 acres is not described as a separate lot but is included within the boundaries of the single tract described in each. On the map of the property described in defendant's deed, Tract A is shown as a projection which is the northeastern portion of defendant's land. Tract A is a triangle wedged into the southwestern portion of the 77.75-acre tract. One side of the triangle is a part of the outside boundaries of the larger tract. Thus, two sides of the lappage are defined by defendant's deed. The 77.75-acre tract embraces lots A, J, L, M, and H, as shown by D-4. Defendant stipulated that, by mesne conveyances from Hawkins Chisenhall, plaintiff has record title to Tract H, which adjoins Tract A on the north. Although there was no stipulation with reference to Tracts J, L, and M, the transcript discloses that defendant does not dispute plaintiff's title to these lots, and plaintiff does not challenge defendant's title to Tracts B and C.

Plaintiff first learned that defendant claimed Tract A in March or April 1968. In May 1968 defendant began leveling the property described in its deed, and plaintiff fenced the line between Tracts A and B. Defendant tore down the fence and continued its operations until restrained by Hall, J., upon the institution of this action.

Plaintiff is the sister of Dr. J. Y. Hinson, who died 29 March 1963. As the sole beneficiary under his will, which was probated 4 April 1963, she acquired his interest in the property conveyed to him by White, Commissioner.

[1-3] Plaintiff claims ownership of Tract A by adverse possession for more than seven years under color of title. G.S. 1-38. Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. *Justice v. Mitchell,* 238 N.C. 364, 78 S.E. 2d 122; *Trust Co. v. Parker,* 235 N.C. 326, 69 S.E. 2d 841; 1 Strong, N. C. Index, Adverse Possession § 15 (1957). When the description in a deed embraces not only land owned by the grantor but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. *Lane v. Lane,* 255 N.C. 444, 121 S.E. 2d 893; *Trust Co. v. Miller,* 243 N.C. 1, 89 S.E. 2d 765. However, should the grantee in such a deed be required to establish his ownership of that portion of the tract which it actually conveyed, he could use the deed

as color of title and avail himself of method 3 detailed in *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142, for a valid deed — a muniment of title — may also serve as color of title. *Cothran v. Motor Lines,* 257 N.C. 782, 127 S.E. 2d 578; *Lofton v. Barber,* 226 N.C. 481, 39 S.E. 2d 263. *See Marr v. Shrader,* 142 Colo. 106, 349 P. 2d 706 (1960).

[4, 5] The deed from White, Commissioner, to Dr. J. Y. Hinson constituted color of title to all the land described therein. *Johnson v. McLamb,* 247 N.C. 534, 101 S.E. 2d 311; *Trust Co. v. Parker, supra.* Plaintiff, being in privity with Dr. Hinson, is entitled to tack her adverse possession of the lappage to such possession by Dr. Hinson as she is able to establish. *Trust Co. v. Miller, supra; Newkirk v. Porter,* 237 N.C. 115, 74 S.E. 2d 235; 1 Strong, N. C. Index, Adverse Possession § 6 (1957); 3 Am. Jur. 2d *Adverse Possession* § 58 (1962).

Plaintiff offered plenary evidence that Dr. Hinson entered upon, and adversely possessed for more than seven years, that portion of the land described in his deed *to which his grantor had title.* From November 1953 (at least) until his death in 1963 he lived on the farm, cultivated portions of it by tenants, raised cattle, which he pastured on the northern part of the tract, constructed three ponds, and paid taxes on all of it. When plaintiff succeeded to his title, she also farmed it through tenants. *Inter alia,* she cut the timber and pulpwood, permitted hunting on the entire farm, including Tract A, and allowed fishing in the ponds upon payment of a fee. Since September 1965, she has lived in the dwelling which Dr. Hinson had occupied.

[6-9] If defendant had the senior title to the entire tract of 77.75 acres described in Dr. Hinson's deed, plaintiff's evidence of adverse possession under color would be sufficient to transfer title to the entire acreage to her. When one enters upon a tract of land and asserts his ownership of the whole under an instrument which constitutes color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed — provided no part of the premises is held adversely by another. His exclusive possession, if continued uninterruptedly for seven years, will ripen title to all the land embraced within the deed. *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56; *Vance v. Guy,* 224 N.C. 607, 31 S.E. 2d 766; *Ware v. Knight,* 199 N.C. 251, 154 S.E. 35; *Mintz v. Russ,* 161 N.C. 538, 77 S.E. 851. *Simmons v. Box Company,* 153 N.C. 257, 69 S.E. 146. Here, however, the disputed area (Tract A) is a lappage, and the following rules fix the rights of the parties:

"1. Where the title deeds of two rival claimants to land lap upon

each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. . . .

"2. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. . . .

"3. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. . . ." *Vance v. Guy, supra* at 611, 31 S.E. 2d at 768. *Accord, Lane v. Lane, supra; Shelly v. Grainger,* 204 N.C. 488, 168 S.E. 736; *Penny v. Battle,* 191 N.C. 220, 131 S.E. 627; *Currie v. Gilchrist,* 147 N.C. 648, 61 S.E. 581; *Boomer v. Gibbs,* 114 N.C. 76, 19 S.E. 226.

[10] Plaintiff's case seems to have been tried in the Superior Court upon the theory that possession of any portion of the 77.75-acre tract described in Dr. Hinson's deed extended his or her possession to its outer boundaries. However, since defendant has the superior title, no possession by plaintiff or Dr. Hinson outside the lappage will extend their possession to the lappage. As Hoke, C.J., said in *Land Co. v. Potter,* 189 N.C. 56, 62, 127 S.E. 343, 346, when a portion of the boundary of a junior grant laps on a superior title "to mature a title under the junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant." *Accord, Boomer v. Gibbs, supra; McLean v. Smith,* 106 N.C. 172, 11 S.E. 184; *Sucro v. Worthington,* 104 F. 2d 472, 473 (4th Cir. 1939).

[11] The transcript contains no evidence tending to show any actual possession of the lappage by defendant and its predecessors, the owners of the senior title. In January 1930, one of defendant's predecessors granted to American Telephone and Telegraph Company a one-hundred-foot right-of-way. It was constructed across Tract A as shown by P-I. The Company cleared the right-of-way and thereafter it remained a visible easement, marked by poles in the center of the clearing. In January 1942, another of defendant's predecessors confirmed the 1930 easement and granted the Telephone Company the right to use a strip one rod wide for the installation of underground cables. Although they reserved the right to fence and cultivate any part of the right-of-way not required for telephone purposes, so far as the transcript discloses, the owners of the fee never made any use of the easement. Since the Telephone Company held in its own right and for its own benefit under a grant from the owners, its possession of the right-of-way did not inure to the bene-

fit of the defendant. "[W]here the purchase is of part of a tract of land, the vendee's possession will not inure to the benefit of the vendor as to the remainder of the tract." 2 C.J.S. *Adverse Possession* § 39C. (1936). *Accord, Sucro v. Worthington, supra; Neill v. Cody,* 26 Texas 286 (1862).

[8] There being no evidence of any actual possession of the disputed area by defendant's predecessors in title, if Dr. Hinson was seated on any part of it, under Rule 2 as stated in *Vance v. Guy, supra,* he had constructive possession of the whole lappage. Therefore, if he and plaintiff successively continued in exclusive, actual, continuous, adverse possession of any part of it for seven consecutive years before the suit was brought, plaintiff has title to the lappage. *Vance v. Guy, supra; Currie v. Gilchrist, supra.*

In her brief filed with the Court of Appeals plaintiff says, "The plaintiff's main burden in this case was to show she and her predecessor in title had possessed the 2.82-acre tract in question *under known and visible lines and boundaries* and under color of title for seven years." (Emphasis added.) By this requirement she imposed upon herself an impossible task, for the only visible line of the 2.82-acre tract was its southwestern boundary (the line A-B-C(1) shown on P-I). Jones marked this line as a part of the perimeter of the tract described in Hinson's deed when he made his survey in 1952. The other two lines of the lappage, C(1)-D and D-E-A, being within the perimeter, were not surveyed or marked then. So far as the evidence discloses they were never marked or visible lines.

[12] When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years adverse possession under color to show that the boundaries of the lappage were visible on the ground. *Vance v. Guy, supra* at 413, 27 S.E. 2d at 121; *Land Co. v. Potter, supra; McQueen v. Graham,* 183 N.C. 491, 111 S.E. 860; *Currie v. Gilchrist, supra* at 652, 61 S.E. at 584; *see Scott v. Elkins,* 83 N.C. 424, 427-28. The claimant, however, must establish the required adverse possession within those lines. Here the lines of the lappage must be located from the calls in defendant's deed, the only instrument which defines them. Whether these lines were marked or not, at any time Dr. Hinson crossed them to perform acts of ownership on the lappage "his liability as a trespasser to one having a better title was unquestionable." *Boomer v. Gibbs, supra* at 85, 19 S.E. at 229.

[13, 14] We now cull from the transcript and consider plaintiff's evidence tending to show adverse possession of the lappage in the light of two established rules: (1) In passing upon a motion for

nonsuit, the evidence and every legitimate inference from it must be considered in the light most favorable to plaintiff. *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347. (2) "In proving title by continuous, open and adverse possession of land . . . under color of title for seven years, nothing must be left to conjecture." *Price v. Whisnant, supra* at 386-87, 72 S.E. 2d at 855; *accord, Locklear v. Savage, supra; Ruffin v. Overby,* 105 N.C. 78, 83, 11 S.E. 251, 253.

[15] The most frequently quoted definition of adverse possession was written by Walker, J., in *Locklear v. Savage, supra at* 237, 74 S.E. at 348:

". . . It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit affording unequivocal indication to all persons that he is exercising thereon the dominion of owner." *See Mallett v. Huske,* 262 N.C. 177, 181, 136 S.E. 2d 553, 556; *Cothran v. Motor Lines, supra* at 784, 127 S.E. 2d at 580.

[16] To establish the required seven years' adverse possession of the lappage, plaintiff relies upon the construction of a portion of a dam upon it and upon evidence which (she argues) is sufficient to show that Dr. Hinson "grew timber" and pulpwood there, that he and she used and maintained a farm road "which traversed the disputed area" and that she "gave hunting permission" and cut the trees on Tract A.

[17] Permission to hunt, like the payment of taxes, is evidence of an adverse claim, but it is not possession. *Bowers v. Mitchell,* 258 N.C. 80, 128 S.E. 2d 6. Furthermore, any acts which plaintiff performed after Dr. Hinson's death in March 1963 necessarily occurred within five years of the institution of this suit and are, therefore, insufficient to mature title unless they can be added to Dr. Hinson's adverse possession of the lappage.

[16] All the evidence tends to show that there were no fields on Tract A and that no part of it is suitable for cultivation. The center and western portions are low and swampy, and the terrain slopes sharply from the east to the center. Only trees and underbrush grew on the lappage.

There were no buildings on the disputed land. Dr. Hinson's dwelling, barns, and packhouse were all located north of Tract A. Except for the Telephone Company's installations on the right-of-way, the only improvement or structure of any kind on the lappage was a portion of the dam of the southernmost fishpond which Dr. Hinson built. As shown by the Copley map, at one point the waterline of this pond comes to the north line of Tract A, and a section of its earthen dam extends at the fartherest point, 40 feet onto the lappage. This was the last pond which Dr. Hinson built. It covered about three acres. The evidence fails to establish the date on which this pond was built. It was not there in November 1957; it was there in the summer of 1963.

Walter G. Price, plaintiff's son and Dr. Hinson's nephew, testified that in November 1957 he walked over the farm with Dr. Hinson. At that time Dr. Hinson had just completed a fishpond of about 2 or 2½ acres 300-400 yards south of the dwelling and north of Tract A. In locating this pond Walter G. Price testified that it was now the center pond, "the first one to the south of the house." He identified it by pointing to the northernmost pond shown on the blackboard map (plaintiff's Exhibit J), which was being used to illustrate the witness' testimony. It was in this pond, located north of Tract A, that most of the fishing was done.

The photograph of Exhibit J which comes to us shows only two ponds. All the evidence, however, tends to show that Dr. Hinson constructed three — two fishponds and a minnow pond. The latter (not shown on the map) was north of his dwelling.

When the witness Price returned to the farm in the summer of 1963, after the death of Dr. Hinson, he observed that the southernmost pond had been finished and stocked with bream and bass. It is obvious that the evidence relating to this pond is not sufficient to show that the encroaching dam was constructed more than seven years prior to the institution of the action.

Walter G. Price, when asked on direct examination if there "were any farm *roads* on the farm" replied that there were; that they "led from the house down by the pond going directly by the ponds and then coming over toward this, and the road wasn't continued much further — sometime it was continued further, but mostly began cultivating along here (indicating), and usually stopped here — it was maintained over to the pond along in this area, but nobody had occasion to go over it except tractors. This was maintained for automobiles and traffic."

Plaintiff testified that during his lifetime Dr. Hinson kept up the

farm roads on the property and that after his death she looked after them. In March 1968, when Copley surveyed the property for plaintiff he found a 15-foot wide farm road north of the telephone easement. The road ran for about 150 feet within the lappage along its northeast line and continued in a southeasterly direction to an undisclosed point. (See P-I) The testimony with reference to the road on the lappage fails to disclose when it was constructed, who constructed and used it or the nature and extent of its use. Patently, more specific and definite information is required before the existence of the road will amount to evidence that plaintiff and Dr. Hinson were seated on the lappage for the necessary seven years.

Plaintiff relies heavily upon the testimony of Robert Dunn to get her to the jury. He testified that the spring after Dr. Hinson moved on the farm he "bush-n-bogged" portions of it, that is, cleared it of "scrubb stuff" so that it could be cultivated; that thereafter Dr. Hinson did cultivate it and that he built ponds "there where he cut up a whole lot of land." Clearly this testimony was not related to the disputed area. No part of Tract A was ever cultivated and the three ponds (except for that portion of the dam of the third and last pond which extended into the lappage) were not located on Tract A. Dunn must have been referring to the area north of the lappage, for he did not "cut up" Tract A.

When asked if he was familiar with the southernmost pond he said he "broke that land down in there" and that he had cut up the land south of the dam "back to that power line," but he did not remember in what year he did this. The evidence discloses that in January 1953 Dr. Hinson granted to Duke Power Company a right-of-way over the property he acquired from White, Commissioner, but it does not disclose where this power line was located. However, it was not located on Tract A. It is possible that Dunn was referring to the telephone line and not the power line, but this uncertainty, as well as the inability of the witness to fix the time, renders this evidence insignificant.

In 1957 Tract A was overgrown with pine and hardwood trees, none of which had been cut down. Walter G. Price testified that between 1957, when he went over Dr. Hinson's purchase with him, and the summer of 1963, when he cruised it for his mother, there had been no cutting at all on the property. Within two years after Dr. Hinson's death — between 1963 and 1965 — plaintiff had cut the timber and pulpwood from the farm.

The only evidence tending to show that Dr. Hinson himself ever cut any trees on the lappage came from the witness Robert Dunn.

He was asked what if anything Dr. Hinson did during his life "with reference to any pulpwood on that shaded area (Tract A) below the pond there." He replied, "He cut that off and put it in pulpwood and put them ponds in there." When Dr. Hinson did this, Dunn did not attempt to say. Since all the evidence tends to show that two of the three ponds were located entirely outside the lappage and that only a portion of the dam retaining the waters of the southernmost pond encroached upon Tract A, it is clear that Dunn was speaking of the area north of Tract A. In any event, however, in view of his failure to fix the time, Dunn's testimony is no evidence tending to show possession of the lappage by Dr. Hinson in the character of owner for seven years prior to the institution of the action.

[18] Such possession "is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser." *Lindsay v. Carswell,* 240 N.C. 45, 51, 81 S.E. 2d 168, 173. There must be "a continuous possession of public notoriety." "Occasional entries upon the land will not serve, for they may either be not observed, or, if observed, may not be considered as the assertion of rights." *Williams v. Wallace,* 78 N.C. 354, 356. *Accord, Price v. Whisnant,* 236 N.C. 381, 72 S.E. 2d 851, wherein cases illustrating the rule applicable to cutting trees are collected.

[19] When cutting timber or pulpwood is relied upon to show adverse possession it must be "kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own. . . ." *Alexander v. Cedar Works,* 177 N.C. 137, 143, 98 S.E. 312, 315; *accord, Bartlett v. Simmons,* 49 N.C. 295.

We conclude that plaintiff has failed to show that "continuity of possession for the full statutory period in plain terms, or by necessary implication." *Ruffin v. Overby, supra* at 83, 11 S.E. at 253. The judgment of the trial judge nonsuiting the case was correct, and the decision of the Court of Appeals ordering a retrial is reversed.

Reversed.

PARKER, C.J., did not participate in the decision of this case.

WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, AND THE ALEXANDER CHILDREN'S CENTER, A CHARITABLE CORPORATION v. JOHN THOMASSON CONSTRUCTION CO., INC., A CORPORATION

No. 11

(Filed 11 July 1969)

1. Trusts § 4— charitable trust — duration — rule against perpetuity

The rule against perpetuity does not apply to charitable trusts, and such trusts may continue indefinitely. G.S. 36-21.

2. Trusts § 10; Wills § 42— private trust — restraint on alienation

A restraint on alienation is against public policy and void as to private trusts.

3. Trusts § 4— charitable trust — restraint on alienation

An absolute restraint against alienation in a gift to a charitable trust is not void.

4. Trusts § 4— charitable trust — modification of trust — equitable jurisdiction

Courts in the exercise of their equitable jurisdiction may modify the terms of a charitable trust in order to preserve the trust estate or protect the cestuis, when it appears that some exigency, contingency or emergency not anticipated by the trustor has arisen requiring a disregard of a specific provision of the trust.

5. Trusts § 4— charitable trust — change of circumstances — sale of property

In order to accomplish the ultimate purpose or intent of the trustor, the court may order real property sold and reinvested in other property when a change in circumstances makes such sale necessary to accomplish the purposes of the trust, even though the trust forbids the trustees to mortgage or sell the property.

6. Trusts § 4— charitable trust — restraint on alienation — sale of trust property — sufficiency of evidence

In trustee's action to determine its right to convey fee simple title to property which it holds in trust for benefit of a charity under deed providing that the trustee is to hold the property forever with no power of alienation, trial court properly exercised its equitable jurisdiction in permitting the sale of the property on the ground that changed conditions unforeseen by the trustor threatened the purposes of the trust, where there is evidence that (1) the property, consisting of some 450 acres, was a thriving dairy farm at the time the trustee acquired the property more than thirty years ago but is now unproductive as result of the unprecedented growth of a nearby city to the property's boundaries, (2) the property has a value in excess of one million dollars but does not produce income sufficient to pay ad valorem taxes, which amounted to $2367 in a recent year, (3) the trustee has no funds to pay the taxes, and (4)

the most productive use of the property is sale for single-family residential development and reinvestment of the proceeds of the sale.

BOBBITT, J., concurring in result.

SHARP, J., joins in concurring opinion.

ON writ of *certiorari* to the North Carolina Court of Appeals. Same case reported below in 3 N.C. App. 157, 164 S.E. 2d 519.

Civil actions alleging two causes of action: The first cause of action is for specific performance of a land sale contract executed by a charitable trust; the second cause of action is that if the restraint on alienation of the trust property is valid, the court in the exercise of its equity jurisdiction should permit the trustees of the charitable trust to deviate from the terms of the trust because, owing to circumstances not known to the creator of the trust and not anticipated by him, compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, and that defendant be required to carry out his contract for the purchase of a part of the trust property by accepting a deed from the trustees for the same and to make payment for it.

These facts appear from the allegations and admissions in the pleadings and from the unchallenged findings of fact by the trial judge: Plaintiff, The Alexander Children's Center (hereafter called Alexander), is a non-profit charitable corporation which was organized as "The Alexander Home of Charlotte, North Carolina," pursuant to Chapter 225 of the 1903 Private Laws of North Carolina. The object of the institution was generally to promote and protect the well-being of the young, and the institution for many years was primarily engaged in custodial care of children. In 1946 the Board of Directors of Alexander requested a survey of the program by a professional team from the Child Welfare League of America. This team found that the need for strictly custodial care for orphans and other needy children was declining, that the need for specialized institutional treatment for emotionally disturbed children was increasing, and that there was no community treatment center of this sort in North Carolina. As a result of this survey, the type of care offered by Alexander was modified to consist of in-patient care for emotionally disturbed children, and the name of Alexander was changed on 9 September 1963, by amendment to the charter duly adopted, to the Alexander Children's Center.

By deed dated 17 October 1930, duly recorded in the Mecklenburg County Public Registry, E. T. Garsed conveyed certain lands

to the Charlotte National Bank (hereafter called Charlotte) as trustee for the benefit of Alexander. Wachovia Bank and Trust Company (hereafter called Wachovia), a corporation organized and doing business in the State of North Carolina, is the corporate successor of Charlotte. The deed from Garsed to Charlotte conveyed to Charlotte the land therein described, at the expiration of the natural life of Garsed, the remainder in and to this land upon the following trusts: "To hold said land forever for the sole use and benefit of the Alexander Home . . . and to that end to take charge of, manage, rent and have general control of said tract of land and to turn over the net revenue derived therefrom to the proper officers of the said Alexander Home, annually, or more often if it be practicable to do so. . . . Provided further, that after the death of the party of the first part, said lands shall be held forever for the above set out trust, and that the party of the second part shall have no power to sell or convey the same either with or without the consent of the Alexander Home. . . ."

The habendum clause in this deed is as follows: "TO HAVE AND TO HOLD the remainder, at the expiration of the natural life of the said party of the first part, of the said tract unto the Charlotte National Bank, its successors and assigns forever, upon the uses and trusts above set out."

On 12 October 1967 Wachovia and defendant entered into a contract under the terms of which Wachovia, with the concurrence of the governing body of Alexander, agreed to sell to defendant and defendant agreed to buy 10.003 acres more or less of this land for the sum of $30,009. Thereafter, on 7 December 1967 defendant notified Wachovia by letter that defendant would refuse to accept the tender of the deed to the property in question or to pay the contract price, declining to go through with the contract and demanding the return of its binder check. The sole reason defendant refused to accept the deed to the 10.003 acres more or less or pay the purchase price was because it alleged that plaintiffs could not convey a valid fee simple title to the property.

For the first cause of action plaintiffs allege that the total restraint on alienation in the deed of Garsed is void as a matter of law.

For the second cause of action plaintiffs assert that if the restriction on total alienation in the Garsed deed is not void as a matter of law, then the court in the administration of a charitable trust ought, in the exercise of its equity jurisdiction, to allow a sale of a part of

the land so that the remainder may be properly utilized to carry out the intent of Garsed, the grantor.

The admissions in the pleadings and the unchallenged findings of fact show that the Garsed property consisted of some 450 acres of land; that the property was once a thriving dairy farm at the time of the death of Garsed and the acquisition of the property by the trustee; that due to the growth of Charlotte and other changes, the property is no longer productive; that the property has a value in excess of one million dollars, but that in its present state it does not produce enough income to pay ad valorem taxes; that the ad valorem taxes on this property for 1967 amounted to $2,367.79; that these taxes are unpaid and the trustee has no funds belonging to the trust to pay them.

An assistant trust officer of Wachovia testified:

"The development that has taken place adjacent to the property is all residential development of the single-family type. It is not feasible to build this sort of residence on leased land. The property is at present located so far from downtown Charlotte that there has been no interest in it as leased land for apartment-type dwellings. Virtually all of the apartment development that has taken place in Charlotte has taken place considerably closer to the center of town.

* * *

"Needless to say, if the land not now necessary to the purposes of The Alexander Children's Center could be sold and the proceeds held in trust and invested, this trust would produce a very substantial annual income for the use of the beneficiary. As matters stand, the trust is actually running an annual deficit because the value of the land and the ad valorem taxes have gone up while the income has gone down.

"When this trust was created the land in question was a thriving dairy with adjoining woodland and pasture land a number of miles from the city limits of Charlotte. It was producing income and there was no reason to think that it would not continue to do so. The unprecedented and then unforeseen growth of the City of Charlotte right up to the boundaries of this property, together with the drastic change in economic conditions and more particularly in the dairying industry have rendered the land unproductive for any purposes springing from the use of the land itself that would be compatible with the presence of the Center on part of the land. At the same time the land has be-

come highly desirable for residential purposes. The Alexander Children's Center has now moved its facilities to a part of the property. Single-family residential development of the quality that the prospective purchaser intends to place on the land will serve to insulate the Center against the kind of encroachment of undesirable adjoining land use that forced it to move from its former location, while at the same time giving the Center a substantial income from the remainder of the property, something which, along with the providing of a future site for the location of the Center, was one of the expressed intentions of the donors of the property."

W. Banks McClintock, Jr., a dealer in real estate, testified:

"Economic competition long ago forced the dairy farm out of business.

"Taking into consideration the needs of the Center itself as well as the economic factors involved, in my opinion single-family residential development of the type that has taken place on the adjoining property would be the most desirable use to which the land surrounding the Center could be put. It is economically unfeasible to construct single-family dwellings on leased land. In my opinion as a realtor the most productive use to which the land as a whole could be put would be to sell parcels of it from time to time as market conditions are favorable, investing the proceeds in some income-producing investments.

"Doing this would also insure that the land adjacent to the Center would be used for residential purposes, the most desirable use of it from the Center's point of view, by making it available to residential home builders at a time when interest in this particular portion of Mecklenburg County for residential development is at its peak. Holding the land longer might well result in the development of the surrounding area proceeding in some other direction, thereby impairing the value of the Garsed land for residential purposes, to the disadvantage of The Alexander Children's Center. Some of the land along the Monroe Road and the railroad which runs alongside it through the property may ultimately prove to be land that can best be utilized for selected business uses. This land is sufficiently distant from the location of the Center and sufficiently separated from it by the topography of the land that its use for such purposes at some future time would not be detrimental to the Center. Such use might also prove to be the most advantageous to the Center from an economic standpoint. I understand that this part of the prop-

erty is not involved in the pending suit and that any disposition of this land would be subject to Court approval at such time as the Trustee proposed to convey it."

In respect to the first cause of action, defendant admits all the material allegations of fact in the complaint except that it denies that the restraint on alienation in Garsed's deed is void as a matter of law. As to the second cause of action relating to the allegations as to the present condition of the property, its low income, and the desirability to sell certain land, defendant in its answer states that it does not have information sufficient to form a belief and therefore denies the same.

When the case was called for trial, the parties waived trial by jury.

The trial court among its findings of fact made these findings:

"5. That in accordance with the wishes of the donors of the land the plaintiffs have located The Alexander Children's Center on the land, but that the ability of The Alexander Children's Center to develop and expand its facilities and the services it offers to fully carry out the intentions of the donors is being materially impaired by a lack of assured operating income and funds for capital improvements, something that the donors of the land intended for the land to produce.

"6. That it is necessary and in the best interests of The Alexander Children's Center that the administrative provisions of the trust be amended so that a portion of the property in question may be sold and the proceeds of this sale held in trust by the trustee and invested so as to produce income to allow for the full development and utilization of that part of the property which the plaintiffs desire to retain for the use of The Alexander Children's Center.

"7. That it is only by so doing that the intention of the donors of the land can be fully realized."

The trial court made these findings of fact in respect to the second cause of action:

"1. That it is necessary and in the best interests of the Alexander Children's Center that those portions of the 450 acre tract held in trust for it which are not necessary to the purposes of The Alexander Children's Center be sold and the proceeds invested in order that that land retained may be developed and utilized to carry out the purposes of the trust.

"2. That, there having been a substantial, unforeseen change of conditions since the gift of land was made, which change of conditions materially impairs the realization of the donors' intent, the Court has the power to modify the administrative provisions of the trust to allow a portion of the property to be sold in order to develop the rest of the property, this without regard to whether or not the restrictions on alienation contained in the deed to the property are or are not valid as a matter of law or are or are not valid and binding on the trustee and The Alexander Children's Center."

The court further finds with respect to both causes of action "that the sale of the property which is the subject of this suit is in the best interests of The Alexander Children's Center and that so doing will help to achieve the purposes for which the trust was created, and that the Court in the exercise of its inherent equitable power to supervise the administration of charitable trusts ought to allow and require the conveyance of the land which is the subject of this suit."

The court adjudged that Wachovia and defendant carry out the terms of the contract of 12 October 1967. It further ordered "that this cause be retained on the docket of this Court so that the Court may from time to time consider upon motion the sale by the plaintiffs of land under the additional options heretofore granted to the defendant and of such additional parcels of land as they may from time to time desire to be allowed to convey. It is further ordered that the defendant be taxed with the costs of the Court."

Defendant excepted to the judge's conclusions of law in both causes of action and to the judgment and appealed to the Court of Appeals.

The Court of Appeals held that the trustee took title in fee simple absolute upon the death of the life tenant without restraint or restriction on the power of alienability, and that under the existing facts and circumstances the Court, in the exercise of its equitable jurisdiction, could permit the sale of the real property.

Defendant petitioned this Court for a writ of *certiorari* to the North Carolina Court of Appeals to review its decision. We allowed the petition on 31 January 1969.

James O. Cobb for defendant appellant.

Helms, Mulliss & Johnston by E. Osborne Ayscue, Jr., for plaintiff appellees.

PARKER, C.J.

This appeal presents two questions for decision: (1) Is the restriction on alienation in the deed creating the charitable trust valid? (2) May the court, in the exercise of its equitable jurisdiction, authorize a sale of the real property in said trust under the facts and circumstances shown by the record? We will consider these questions in their numerical order.

[1-3] It is well settled in this jurisdiction that the rule against perpetuity does not apply to charitable trusts, and such trusts may continue indefinitely. *Trust Co. v. Williamson,* 228 N.C. 458, 46 S.E. 2d 104; *Penick v. Bank,* 218 N.C. 686, 12 S.E. 2d 253; G.S. 36-21. Nevertheless, whether the restriction in the Garsed deed was void as being a restraint upon alienation presents a more serious question. The general rule in North Carolina as to private trusts is that a restraint on alienation is against public policy and void. *Douglass v. Stevens,* 214 N.C. 688, 200 S.E. 366; *Williams v. Sealy,* 201 N.C. 372, 160 S.E. 452; *Trust Co. v. Nicholson,* 162 N.C. 257, 78 S.E. 152. However, we find little authority in North Carolina on the question of whether an absolute restraint on alienation in a gift to a charitable trust is void.

The Court of Appeals in holding that the restraint in the Garsed deed was void relied solely on the case of *Hass v. Hass,* 195 N.C. 734, 143 S.E. 541. In that case the Court, in construing a devise by will, stated:

> "The second sentence in Item 2 of said will, to wit: 'It is my will that my real estate be not sold, but that the rents and profits for ninety-nine years be paid to the authorities aforesaid for the blind children as aforesaid,' if construed as an attempt to restrain the alienation of the real estate, devised in fee to the defendant, the State School for the Blind and Deaf, is of no legal effect and is void in law. *Latimer v. Waddell,* 119 N.C. 370. These words may be construed as merely expressing the wish of the testatrix, without any intention on her part to affect the title to or estate in the land devised in fee simple to defendant, the State School for the Blind and Deaf, for the use and benefit of the indigent children of the State, born blind, of the Caucasian race. *Springs v. Springs,* 182 N.C. 484; *Carter v. Strickland,* 165 N.C. 69. But however these words may be construed, there was no error in the judgment that said words have no legal effect with respect to the title to said real estate devised to defendant, the State School for the Blind and Deaf. The said defendant holds title to the land described in the com-

plaint in fee simple as trustee for the indigent children of the State, born blind, of the Caucasian race. This is a charitable trust and is valid. *Ladies Benevolent Society v. Orrel, ante,* 405; Public Laws 1925, ch. 264."

An analysis of the cases cited in *Hass v. Hass, supra,* reveals that the decision in both *Springs v. Springs,* 182 N.C. 484, 109 S.E. 839, and *Carter v. Strickland,* 165 N.C. 69, 80 S.E. 961, is based on the proposition that the words used are precatory words, merely expressing the wish of the donor rather than words of absolute restraint on alienation. Further, the case of *Latimer v. Waddell,* 119 N.C. 370, 26 S.E. 122, referred to a private trust and thus is not applicable to the question here posed. We therefore conclude that the result in the *Hass* case turned on the fact that the attempted restraint was precatory — a mere wish.

In *Brooks v. Duckworth,* 234 N.C. 549, 67 S.E. 2d 752, the Court seemingly recognizes that charitable trusts are exceptions to the rule that a restraint on alienation is void. There the Court, considering a charitable trust in which the trustees were prohibited from mortgaging or disposing of the trust property, said:

> ". . . *This provision clearly limited the right of the trustees in relation thereto,* but would not prevent a court of equity from using its power, in a proper case, to modify the terms of the trust to the extent necessary to prevent the failure of the trust and to effectuate the primary purpose of the trustor. *Henshaw v. Flenniken,* 183 Tenn. 232, 168 A.L.R. 1010, 1022 note." (Emphasis ours.)

Since the holdings of this Court on this question are meager and somewhat nebulous, we turn to other jurisdictions for enlightenment.

The general rule is that a condition against alienation in a gift for a charitable trust is not invalid or void. *Alexander v. House,* 133 Conn. 725, 54 A. 2d 510; *Dickenson v. City of Anna,* 310 Ill. 222, 141 N.E. 754; *Stubblefield v. Peoples Bank of Bloomington,* 406 Ill. 374 94 N.E. 2d 127; *Catholic Bishop of Chicago v. Murr,* 3 Ill. 2d 107, 120 N.E. 2d 4; *Sisters of Mercy of Cedar Rapids v. Lightner,* 223 Iowa 1049, 274 N.W. 86; *Smart v. Town of Durham,* 77 N.H. 56, 86 A. 821; *Mills v. Davison,* 54 N.J.E. 659, 35 A. 1072; *The Ohio Society for Crippled Children and Adults v. McElroy,* 175 Ohio St. 49, 191 N.E. 2d 543; *Henshaw v. Flenniken,* 183 Tenn. 232, 191 S.W. 2d 541; *Philadelphia v. Girard,* 45 Pa. 9; 15 Am. Jur. 2d, Charities, Sec. 22. See also Anno: 100 A.L.R. 2d 1208; *Quinn v. Peoples Trust and Savings Co.,* 223 Ind. 317, 60 N.E. 2d 281, 157 A.L.R. 885.

Since North Carolina recognizes that a donor may create a perpetual charitable trust, it would seem strange to deviate from the general rule so as to prevent the donor from restraining sale of the corpus of such trust. Furthermore, it appears that North Carolina has tacitly recognized the right of a donor to restrain alienation of property in charitable trusts when it recognizes the right of the court, in its equitable jurisdiction, to order the sale of trust property under certain conditions, even when the trust forbids the trustee to mortgage or sell.

[3] We conclude that the Court of Appeals erred in holding that the trustee took title in fee simple absolute upon the death of the life tenant without restraint or restriction on the power of alienability. We hold that the trustee took subject to the restrictions on alienation contained in the trust instrument. This, however, does not alter the end result which is controlled by the answer to the second question presented.

The Court of Appeals in considering the second question for decision stated:

> "'. . . (C)ourts of equity have jurisdiction to order, and in proper cases do order, the alienation of property devised for charitable uses. . . . The power is not infrequently exercised where conditions change and circumstances arise which make the alienation of the property, in whole or in part, necessary or beneficial to the administration of the charity. . . . (C)ourts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale.' *Holton v. Elliott,* 193 N.C. 708, 138 S.E. 3."

We agree with this statement.

[4, 5] There is plenary authority in this jurisdiction to the effect that courts in the exercise of their equitable jurisdiction may modify the terms of a charitable trust when it appears that some exigency, contingency, or emergency not anticipated by the trustor has arisen requiring a disregard of a specific provision of the trust in order to preserve the trust estate or protect the *cestuis.* In order to accomplish the ultimate purpose or intent of the trustor, the court may order real property sold and reinvested in other property when a change in circumstances makes such sale necessary to accomplish the purposes of the trust, even though the trust forbids the trustees to mortgage or sell the property. *Trust Co. v. Johnston,* 269 N.C.

701, 153 S.E. 2d 449; *Cocke v. Duke University*, 260 N.C. 1, 131 S.E. 2d 909; *Keesler v. Bank*, 256 N.C. 12, 122 S.E. 2d 807; *Rex Hospital v. Comrs. of Wake*, 239 N.C. 312, 79 S.E. 2d 892; *Brooks v. Duckworth, supra; Hospital v. Comrs. of Durham*, 231 N.C. 604, 58 S.E. 2d 696; *Hospital v. Cone*, 231 N.C. 292, 56 S.E. 2d 709; *Johnson v. Wagner*, 219 N.C. 235, 13 S.E. 2d 419; *Penick v. Bank, supra; Church v. Ange*, 161 N.C. 314, 77 S.E. 239; Bogert, Trusts and Trustees, 2d Ed. § 392, p. 214.

[6] In the instant case the undisputed evidence shows that because of changed conditions not anticipated by the trustor, the trust property has become unproductive and that because of such changes a sale of the property for reinvestment would preserve the trust and accomplish its ultimate purpose. Thus, the Court of Appeals correctly held under the facts of this case that the trial court, in the exercise of its equitable jurisdiction, could authorize and direct a sale of the trust property in order to accomplish the purposes of the trust even though the trust instrument forbids such sale.

Modified and affirmed.

BOBBITT, J., concurring in result:

Disposition of this appeal does not require that we decide whether the provision that "the party of the second part (the Trustee) shall have no power to sell or convey the same (trust property) either with or without the consent of the Alexander Home," is valid or void. Hence, I would treat the holding by Judge Hasty, and the affirmance thereof by the Court of Appeals, as unnecessary to decision and leave this question open for consideration and decision in a case where the answer thereto will be determinative.

Since the rule against perpetuities does not apply to charitable trusts, no question is presented as to the *duration* of the trust. The question here relates to the validity of the judgment authorizing a sale of the subject property free from the trust. The evidence fully supports Judge Hasty's findings to the effect that retention of the property by the trustee will defeat rather than effectuate the purposes of the trust. Under these circumstances, a court of equity may order a sale *even where* the trustor expressly provides that the trust property is to be used only for a specified purpose. *Brooks v. Duckworth*, 234 N.C. 549, 67 S.E. 2d 752. Hence, Judge Hasty's judgment should be affirmed.

As to whether the purported absolute restraint on alienation should be considered valid or void, I find no authoritative decision in this

jurisdiction. In my opinion, neither *Hass v. Hass,* 195 N.C. 734, 143 S.E. 541, nor *Brooks v. Duckworth, supra,* is controlling.

In *Hass,* the remainder in fee in 125 acres of land in Catawba County was devised to the State School for the Blind and Deaf at Raleigh, N. C. The opinion of Connor, J., contains the statement that this provision, "if construed as an attempt to restrain the alienation of the real estate, devised in fee to the defendant, the State School for the Blind and Deaf, is of no legal effect and is void in law." However, the action did not relate in any way to a sale of any part of the trust property by the State School for the Blind and Deaf. The judgment simply adjudged that the State School for the Blind and Deaf held title to the land as trustee for the indigent children of the State, born blind, of the Caucasian race, and that the plaintiffs, who were heirs of Mary E. Hass, had no right, interest or title in and to any of the property of which the testatrix died seized and possessed.

In *Brooks,* described real estate was devised to the Board of Trustees of Haywood Street Baptist Mission "to be used as a Baptist Mission, for the purpose of holding religious meetings on week-days and Sundays as the trustees may determine, and is to be established in memory of O. D. Revell and his wife, Caroline E. Revell." The will provided that "said Board of Trustees cannot mortgage or dispose of said property." Manifestly, this purported absolute restraint on alienation was made to effectuate testator's intention that this specific property be used solely for the stated purposes and not otherwise. Under these circumstances, it was held that the trust could be modified by a court of equity in a factual situation where such modification is necessary to prevent the failure of the trust and to effectuate the primary purpose of the trustor.

Decisions in other jurisdictions contain statements to the effect that the rule that a restraint on alienation is against public policy and void applies to private trusts but not to charitable trusts. Ordinarily, the statement is made without analysis of the sufficiency of underlying reasons. If and when the question is necessary to decision, my present view is that the following distinction should be drawn.

Unless the testator specifically restricts the use of the devised property as in *Brooks,* such devised property is simply a general asset of the trust estate and is available to provide income or gains to accomplish elsewhere the objects of the charity. In such case, it seems to me that all reasons for holding restraints on alienation void as against public policy in respect of private trusts apply with equal

force. No sale can be made unless authorized by the court in a duly constituted proceeding. However, the court's inquiry would be to determine simply whether the proposed sale is advantageous to the trust estate. On the other hand, if the testator specifically restricts the use of the devised property to a precise and limited purpose as in *Brooks*, the court, prerequisite to ordering a sale of the property, would have to determine that such sale was necessary to prevent the failure of the trust and to effectuate the general purpose of the testator.

In the present case, the Garsed deed was made in 1930. It contains no provisions whatever that the conveyed land was to be used as a site for the Alexander Home. Rather, the provisions indicate clearly that the trustee was to manage the property so as to produce an income for the Alexander Home. As investment property, it seems to me that a purported absolute restraint on alienation should be adjudged void as against public policy. In such a situation, there is no reason why the trustor should be permitted to impose an obstacle upon the sale and conveyance of the property if such sale and conveyance should be deemed appropriate and to the best interest of the trust estate.

SHARP, J., joins in this opinion.

STATE OF NORTH CAROLINA v. LEWIS THOMAS ROGERS, JR.

No. 20

(Filed 11 July 1969)

1. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of veniremen opposed to capital punishment

In this rape prosecution, statement in the record that the State inquired of each prospective juror as to whether he believed in capital punishment is insufficient to support an assignment of error to failure of the court to quash the indictment on the ground that prospective jurors opposed to capital punishment were challenged for cause.

2. Jury § 6— examination of veniremen as to views on capital punishment

It is not error to ask a prospective juror whether he believes in capital punishment.

3. Criminal Law § 161— necessity for exceptions

Only assignments of error based on exceptions duly taken are consid-

ered, and questions not embraced in an exception duly taken at the trial may not be presented on appeal.

4. Grand Jury § 3— motion to quash — systematic exclusion of Negroes — sufficiency of evidence

In this rape prosecution, the trial court did not err in the denial of defendant's motion to quash the indictment on the ground that Negroes were systematically excluded from the grand jury which indicted him, where the only evidence in support of the motion is a transcript of testimony presented upon the same motion in another case, there being no evidence that the grand juries in the two cases were the same, and the question of systematic exclusion having been decided adversely to defendant upon appeal of the other case to the Supreme Court.

5. Indictment and Warrant § 14— motion to quash — systematic exclusion of Negroes from administration of court system

Defendant's motion to quash the indictment on the ground that Negroes are systematically excluded from the administration of the court system is properly denied where defendant's evidence shows only that for 34 years no Negro has served as judge, solicitor or reporter in the superior court of the county, there being no evidence in the record that any Negro has sought such positions, or any other administrative position, in the court system of the county and been denied on account of race.

6. Judges § 1; Solicitors— election of judges and solicitors — appointment of court reporters

Superior court judges are elected by the people of the State and solicitors by the voters of the solicitorial districts, G.S. 7-41, G.S. 7-43, N. C. Const. Art. IV, §§ 7, 16; court reporters are appointed in each judicial district by the senior regular resident superior court judge. G.S. 7A-95(e).

7. Constitutional Law § 36— cruel and unusual punishment

Cruel or unusual punishments are prohibited by Article I, § 14 of the Constitution of North Carolina and by the Eighth Amendment to the Constitution of the United States which is now applicable to the several states.

8. Constitutional Law § 36— cruel and unusual punishment — expert opinion evidence

What constitutes cruel or unusual punishment is a question of law for the court and is not subject to proof by expert opinion evidence.

9. Constitutional Law § 36— cruel and unusual punishment

Punishment which does not exceed the limits fixed by statute cannot be classified as cruel and unusual in a constitutional sense unless the punishment provisions of the statute itself are unconstitutional.

10. Constitutional Law § 36; Criminal Law § 135; Rape § 7— death penalty for rape

Imposition of the death penalty upon conviction of the crime of rape is not unconstitutional *per se*.

11. Constitutional Law § 36; Criminal Law §§ 50, 135— death penalty — cruel and unusual punishment — expert opinion testimony

In this prosecution for rape, the trial court did not err in refusing to allow a witness to give his "expert opinion" that the death penalty constitutes cruel and unusual punishment and to support his opinion by quotations from leading authors in the field of criminology and penology, such testimony being irrelevant since the determination of what constitutes cruel and unusual punishment is a question of law for the court.

12. Indictment and Warrant § 14; Criminal Law § 135; Constitutional Law § 20— motion to quash — death penalty — discrimination against Negroes

In this prosecution for rape, the trial court did not err in the denial of defendant's motion to quash the bill of indictment on the ground the death penalty is used in a discriminatory manner against Negroes, thereby depriving defendant of equal protection of the law in violation of the Fourteenth Amendment, where defendant's evidence is merely a collection of statistics to the effect that since 1910 more Negroes than whites have been sentenced to death and executed in this State for the crime of rape and for all capital crimes, the motion as well as the evidence supporting it being irrelevant to the validity of the bill of indictment.

13. Jury § 5; Grand Jury § 1— jury list taken only from tax records

The fact that the county commissioners used only the names on the tax records in making up the jury list and jury box from which the grand and petit juries were chosen and did not also use "a list of names of persons who do not appear on the tax lists" as directed by G.S. 9-1 does not show racial discrimination in the selection of prospective jurors.

14. Jury § 3— qualifications for jurors

Absent discrimination by race or other identifiable group or class, a State is at liberty to prescribe such qualifications for jurors as it deems proper without offending the Fourteenth Amendment.

15. Indictment and Warrant § 2; Grand Jury §§ 1, 3— grand jurors chosen only from tax list — validity of indictment

Failure of county commissioners to include as source material for the jury list not only the tax records but also "a list of names of persons who do not appear upon the tax lists" as authorized by G.S. 9-1 does not void a bill of indictment returned by a grand jury drawn from a jury box so composed, the provisions of the statute being directory and not mandatory.

16. Jury § 5; Grand Jury § 1; Constitutional Law § 29— jury list containing only names of property owners

The use of a jury box containing only the names of property owners is not *per se* discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights.

17. Criminal Law § 32— capacity of infants to commit crime — common law presumptions

At common law, infants under seven years of age were conclusively

presumed incapable of crime, between ages seven and fourteen rebuttably presumed incapable, and those over fourteen were presumptively capable; in case of rape, the common law presumption of incapacity was conclusive to age fourteen.

18. Criminal Law § 32— infants 14 years old and over — capacity to commit crime — presumptions

Unless otherwise provided by statute, infants of the age of fourteen and over are not entitled to any presumption of incapacity.

19. Courts § 15— 14 year old minor charged with capital felony — jurisdiction of juvenile court and superior court

The juvenile department of the superior court is without jurisdiction where the charge is a capital felony and the offender is fourteen years of age and over, such offender being subject to indictment and trial in the superior court. G.S. 110-21 et seq.

20. Criminal Law § 5— low mentality — defense to crime

Low mentality in itself is no defense to a criminal charge, and the exclusion of evidence of low mentality is not error.

21. Criminal Law § 5— test of criminal responsibility

The test of accountability does not depend on intelligence, education or general mental capacity.

22. Criminal Law § 5— test of mental responsibility

The true test of mental responsibility in this State is whether defendant has the ability to distinguish right from wrong at the time and with respect to the matter under consideration.

23. Indictment and Warrant § 14; Criminal Law §§ 5, 13— motion to quash — 14 year old boy charged with rape — low mentality

In this prosecution for rape, the trial court did not err in the denial of defendant's motion to quash the indictment on the ground that he was only 14 years of age at the time of the alleged crime and had an I.Q. of only 63.

24. Constitutional Law § 32; Criminal Law § 66— lineup identification — right to counsel

United States Supreme Court decisions relating to the right of an accused to be represented by counsel at a lineup are inapplicable to a case in which the lineup occurred prior to June 12, 1967, the date of those decisions.

25. Constitutional Law § 30; Criminal Law § 66— lineup procedure — totality of circumstances test — due process

Judged by the totality of the circumstances, the conduct of identification procedures at a police lineup may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process, thus rendering inadmissible evidence that a witness identified the accused at the lineup or any in-court identification by witnesses who viewed the lineup unless the State shows on *voir dire* that the in-court

identification is of independent origin and not the result of the illegal out-of-court confrontation.

26. Constitutional Law § 30; Criminal Law § 66— lineup procedure — totality of circumstances — due process

In this rape prosecution wherein the victim had informed police that her assailant had a men's leather belt hanging around his neck during the assault, lineup confrontation at which defendant was the only participant who had a belt hanging around his neck was not unnecessarily suggestive so as to violate due process, where the belt was worn voluntarily by defendant at the time of his arrest and during the lineup and its presence cannot be attributed to the officers, and where prosecutrix gave police a detailed description of her assailant which fits the actual appearance of defendant, prosecutrix showed no hesitancy in her identification of defendant, the lineup occurred only some 24 hours after the crime and the other lineup participants physically resembled defendant.

27. Criminal Law § 42— clothing worn by rape victim — admissibility

In this prosecution for rape, articles of clothing identified as worn by the victim at the time the crime was committed are properly admitted into evidence.

28. Constitutional Law §§ 21, 33; Criminal Law §§ 42, 84— clothing taken from defendant for analysis

In this rape prosecution, no right of defendant, constitutional or otherwise, was violated when a police officer required him to surrender for examination and analysis the pants worn by him at the time of his arrest, and the pants are competent to be admitted into evidence.

29. Criminal Law § 169— objection to admission of evidence — like evidence thereafter admitted without objection

In this rape prosecution, objection to testimony as to identification of shoes allegedly worn by defendant on the night of the crime is waived where testimony of the same import was thereafter admitted without objection.

APPEAL by defendant from *Bailey, J.*, at the August 28, 1967, Criminal Session, DURHAM Superior Court.

Criminal prosecution upon a bill of indictment charging defendant with the crime of rape on Mrs. Edna Meachum. The jury returned a verdict of guilty as charged with a recommendation of life imprisonment. From judgment in accordance therewith defendant gave notice of appeal to the Supreme Court. M. C. Burt, Jr., his court-appointed counsel, neglected to perfect said appeal and, after reprimand, was removed as counsel and Attorney W. P. Whichard was appointed in his stead. Petition for certiorari to the Superior Court of Durham County as a substitute for appeal under Rule 34, Rules of Practice in the Supreme Court, was thereupon filed on be-

half of defendant and allowed by order of this Court in conference on 11 February 1969.

The State's evidence tends to show that Mrs. Edna Meachum, twenty-nine years old, lives with her mother at 826 N. Mangum Street in Durham. On January 14, 1967, she left home at 7:30 p.m., going uptown to meet a girl friend and then to the movies. She was wearing a skirt and blouse, low-heeled shoes, and an all-weather coat. As she walked up Mangum Street, she saw three colored boys walking toward her. Before reaching her they turned and began walking in the same direction she was going. Two walked very slowly and the third ran on ahead. Mrs. Meachum began walking faster so as to pass the two in front of the Curb Market where people were standing. She crossed Hunt Street walking fast. Just as she reached the other side of the S & H Green Stamp Store she heard something hit the sidewalk, turned to look and saw her assailant standing behind her. She had never seen him before and did not know his name. As she turned to look he put his left arm around her neck. She asked him what he wanted and he replied, "You know what I want." He started dragging her backwards across the parking lot. She began screaming and he struck her on the head two or three times with his fist and said, "I am going to kill you if you don't quit screaming." He had a belt around his neck and she was afraid he might use it to choke her. When he got to the rear of the store building he told her he had a gun and was going to kill her. He said, "I am going to get what I want and then I am going to kill you," and she kept crying and begging him to let her go. There was no one else in the vicinity. The Stamp Store was closed at that time. There was a street lamp at the front of the store but it was dark behind the building.

Mrs. Meachum lost her balance while being forced backwards. Her foot caught on a rock at the rear of the store and she fell over backwards on muddy ground with her assailant on top of her. He kept telling her to be quiet, to shut up, that he was going to kill her. He had sexual relations with her forcibly and against her will. While still on top of her he demanded her money. She removed $3.00 — all she had — from her pocketbook and gave it to him. He then got up, ran to the bottom of the bank and stood there looking back at her. Mrs. Meachum arose quickly, found her shoes which were lost in the scuffle, and ran around to the parking lot. She then ran up the street to the police department and reported the incident. Her coat was muddy, her hair and clothing wet. She told the police her assailant was a young colored male with smooth skin, hair cut short, dressed in a dark blue jacket and dark pants and had a men's leather belt looped loosely and hanging around his neck.

The following day, January 15, 1967, at about 7:00 p.m., Mrs. Meachum returned to the police station on request to view four young colored boys, including defendant. One boy was taller than the defendant. The other two were about his size. One had on a dark navy blue jacket and a pair of dark trousers. One was wearing a dark sweater. Defendant was dressed in a shirt and dungaree-type pants, which made him look a little different, and had a belt hanging around his neck. Mrs. Meachum viewed the four boys through a two-way glass window and identified defendant as the person who had raped her the previous evening.

After conducting a voir dire in the absence of the jury, during which evidence for both the State and the defendant was heard, including Dr. Bruce Kyles' report set out in the next paragraph, the trial judge found that the lineup was fairly and legally conducted and the evidence relating to defendant's identification admissible. Mrs. Meachum then identified defendant in court before the jury as noted in the opinion.

Pending trial, on motion of court-appointed counsel, defendant was committed to Cherry Hospital at Goldsboro for a 60-day observation period. The clinical summary describes defendant as an alert, pleasant lad oriented in all areas with an I.Q. of 59 — moderate mental deficiency. This summary further reveals that from October 1962 to April 1966 — or from age 11 to 14 — defendant had been arrested nine times for such things as store breaking, taking money, taking merchandise, and assault and battery. Defendant reluctantly admitted this history after initially stating that the present rape case was the only trouble he had ever had with the law. The diagnosis is "mental deficiency, moderate degree, with behavioral disturbance, code #6113." Dr. Kyles thereupon returned defendant to court as able to stand trial, stating, "It is the carefully considered opinion of the medical staff at Cherry Hospital that Lewis Thomas Rogers, Jr., 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 is charged, and in our opinion is able to consult with counsel in the preparation of his defense."

Dr. Norman Bowles did a pelvic examination on Mrs. Meachum on the evening of January 14, in the Emergency Department at Watts Hospital. A wet smear from the vagina showed the presence of live male sperm. Mrs. Meachum had mud in her hair and on her shoulder and an abrasion on the right shoulder. She was upset and was admitted to the hospital until the following day.

William S. Best, a chemist with the SBI for twelve years, re-

ceived Mrs. Meachum's coat and defendant's shoes from Officer Hicks, and took them to Dr. Buol at the Soil Science Department at North Carolina State University. He later received them back from Dr. Buol and returned them to Officer Hicks. They were offered and allowed in evidence over defendant's objection.

Dr. Stanley W. Buol, an expert in the field of soil analysis and soil science, testified without objection that three soil samples — one from the coat and one from each shoe — were carbon copies of each other and, in his opinion, certainly came from the same site.

Evidence for the defendant: Leo Kimball testified that between 7:00 and 7:30 p.m. on Saturday night, January 14, 1967, he picked defendant up at the corner of Canal and Roxboro Streets in Durham, drove to the corner of Roxboro and Dowd Streets where he picked up Sammy Melvin and James Green, and then drove to a clubhouse on Todd Street in Millgrove; that the four of them remained at said club until 11:00 p.m., when he drove back to North Durham and put defendant off on the corner of Canal and Roxboro. Evidence to the same effect was given by James Green and Samuel Melvin. These three witnesses each denied being a member of a gang known as the "Hunt Street Angels." Green and Melvin stated they had heard of the group but did not belong to it. Melvin stated that some of the "Hunt Street Angels" wore belts around their necks at times; that he had seen them walking two at a time with belts around their necks; and that he had seen defendant wear a belt around his neck although defendant did not have a belt there on the night they went to the club on Todd Street.

Defendant offered a certificate of his birth showing birthdate of February 2, 1952.

Mrs. Miriam Clifford, a school psychologist employed by the Education Improvement Program of Duke University, testified that she works primarily with the public schools; that she did a mental and intelligence examination on defendant at the request of his mother in June 1966; that defendant made a score indicating an I.Q. of 63, which places him in the lowest two percent of the population; that his I.Q. will not likely improve with age; that the tests she gave have nothing directly to do with whether defendant is sane or not sane; that she saw no evidence of mental illness and has no evidence at all on whether he knew right from wrong because she has no way of making a judgment.

Defendant did not testify in his own behalf.

Officer McCrea, in rebuttal, testified that the witness Sammy

Melvin told him that on Saturday night, the 14th of January, he, the defendant, and Melvin's brother had been to the West End and had walked back to Hunt Street; that the three of them then parted and Lewis Rogers went back in the direction of the City of Durham, going south on Mangum Street, and that he never saw defendant any more that night; that it was about 7:00 or 7:30 p.m. when he and defendant parted there on Mangum Street.

Other evidence pertinent to discussion of the various assignments of error is, to avoid repetition, omitted here and will be noted in the opinion.

Willis P. Whichard, Attorney for defendant appellant.

Robert Morgan, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

HUSKINS, J.

[1-3] Defendant moved to quash the bill of indictment on the ground that jurors opposed to capital punishment were challenged for cause, asserting that it was error to permit individual jurors to be questioned as to their belief in capital punishment. The record contains the following entry with respect to selection of the jury: "Immediately prior to the presentation of the State's evidence, the jury was duly selected as required by law. During the interrogation of the individual jurors the State inquired of each juror: 'Do you believe in capital punishment in certain cases as provided by law?' " No objection was made and no exception taken to the *manner* in which the jury was selected. The record fails to show how many prospective jurors, if any, were excused for cause — any cause. It is not error to ask a prospective juror whether he believes in capital punishment. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241. Even *Witherspoon v. Illinois,* 391 U.S. 510. 20 L. Ed. 2d 776, 88 S. Ct. 1770, does not prohibit the question. This assignment has nothing of record to support it. Only assignments of error based on exceptions duly taken are considered. *Langley v. Langley,* 268 N.C. 415, 150 S.E. 2d 764; *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666; *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335, cert. den., 384 U.S. 928, 16 L. Ed. 2d 531, 86 S. Ct. 1443. Questions not embraced in an exception duly taken at the trial may not be presented on appeal. *Wilson v. Wilson,* 263 N.C. 88, 138 S.E. 2d 827; *Freight Lines v. Burlington Mills and Brooks v. Burlington Mills,* 246 N.C. 143, 97 S.E. 2d 850; *Terrace, Inc. v. Indemnity Co.,* 241 N.C. 473, 85 S.E. 2d 677.

[4] Defendant moved to quash the bill of indictment on the ground

that Negroes were systematically excluded from the grand jury which indicted him. In support of the motion, the court reporter at defendant's request read into the record in this case the testimony of J. M. Mangum and Murray Upchurch taken April 10, 1967, before Judge Carr in another case entitled *"State v. Edward Theodore Ray,"* the same motion having been made in that case. There is no further evidence in this record to support this motion. At the conclusion of the reading of the evidence of these two witnesses, the motion was denied and defendant assigns this ruling of the court as error.

This assignment has no merit. There is no evidence to show that the grand jury in the *Ray* case and the grand jury which returned the bill of indictment in this case were one and the same. If we assume the same grand jury acted in both cases, the question of systematic exclusion of Negroes from said grand jury was fully considered in *State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457, and decided adversely to defendant. The assignment is therefore overruled.

[5, 6] Defendant moved to quash the bill of indictment on the ground that Negroes are systematically excluded from the administration of the court system. In support of the motion he examined Sheriff J. M. Mangum who testified that for thirty-four years no Negro superior court judge has presided over Durham County Superior Court; that no Negro solicitor has prosecuted the criminal docket; and that no Negro court reporter has served in said court. Defendant contends this deprived him of a fair trial but offers no specifics in that respect.

Superior court judges in North Carolina are elected by the people of the State and solicitors by the voters of the solicitorial district. G.S. 7-41; G.S. 7-43; N. C. Const. art. IV, secs. 7, 16. Court reporters are appointed in each judicial district by the senior regular resident superior court judge. G.S. 7A-95(e). Eligible persons of all races may be candidates or applicants for these positions. There is no evidence in the record that any Negro has sought these positions, or any other administrative position, in the court system of Durham County and been denied on account of race. This assignment is devoid of merit and therefore overruled.

[11] Defendant sought to elicit from V. L. Bounds, Director of Prisons for North Carolina, his "expert opinion" that the death penalty constitutes cruel and unusual punishment and to support his opinion by quotations from leading authors in the field of criminology and penology. The Court refused to allow it and held that the death penalty is not cruel and unusual punishment per se. Defendant asserts error.

[7] Cruel or unusual punishments are prohibited by Article I, Section 14, of the Constitution of North Carolina and by the Eighth Amendment to the Constitution of the United States which is now applicable to the several states. *Robinson v. California,* 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417, reh. den. 371 U.S. 905, 9 L. Ed. 2d 166, 83 S. Ct. 202.

[8, 9] What constitutes cruel and unusual punishment is a question of law for the court and not subject to proof by expert opinion evidence. When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense (*State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216; *State v. Greer,* 270 N.C. 143, 153 S.E. 2d 849), unless the punishment provisions of the statute itself are unconstitutional. *State v. Bruce, supra; State v. Robinson,* 271 N.C. 448, 156 S.E. 2d 854.

[10] G.S. 14-21 in pertinent part provides that "[e]very 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 . . . 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." Here, the jury so recommended and defendant was sentenced to life imprisonment. The sentence does not exceed the limit fixed by statute. The death penalty, or its alternative when the jury so recommends, is not prohibited as cruel and unusual in the constitutional sense, and its imposition upon conviction of the crime of rape is not unconstitutional per se. *State v. Yoes and Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386.

[11] In *Trop v. Dulles,* 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590, the Supreme Court of the United States said: "Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." It follows that an expert opinion and quotations from authors on criminology and penology are completely irrelevant. This assignment is overruled.

[12] Defendant moved to quash the bill on the ground the death penalty is used in a discriminatory manner against Negroes thereby depriving defendant of the equal protection of the law in violation of the Fourteenth Amendment. In support of this motion defendant

elicited from J. D. Wilson, Supervisor of Consolidated Records Section, State Prison Department, testimony to the effect that in North Carolina 110 Negroes and 17 whites have been sentenced to death for the crime of rape since 1910; that 66 Negroes and 5 whites have been executed; that the death sentence of 38 Negro and 9 white defendants were commuted to life imprisonment; that 66% of all Negroes and 33% of all whites sentenced to death for rape are executed; that since 1910 the total number of executions for all capital crimes in North Carolina is as follows: 73 white males, 282 Negro males, 2 Negro females and 5 Indian males, for a total of 362; that aside from the report which the witness read, he doesn't know how many Negroes and whites have been convicted for rape and life sentences imposed; that the report deals only with death sentences; that he has no figures revealing the number of rapes committed by Negroes as compared to the number committed by whites, but according to the report from which the figures are taken, many more rapes were committed by Negroes than by members of the white race.

The foregoing evidence is wholly ineffective on the question posed by this motion. It is merely a collection of statistics and nothing more. The motion itself is a *non sequitur*. Its fallacious rationale seems to be that since a certain percentage of white criminals commit rape and go unpunished it invalidates the law against rape and licenses a proportionate number of Negroes in that field. The motion as well as the evidence supporting it is totally irrelevant to the validity of the bill of indictment.

Defendant's motion to quash the bill of indictment on the ground that non-property owners were systematically excluded from the jury list in Durham County was denied, and defendant assigns same as error.

Artical I, Section 13, of the Constitution of North Carolina requires "a jury of good and lawful persons." The Sixth Amendment to the Constitution of the United States specifies a right to trial "by an impartial jury." And the Fourteenth Amendment provides that no State shall deprive any person of his life, liberty or property "without due process of law."

[13-15] The record shows that the County Commissioners of Durham County used only the names on the tax records in making up the jury list and the jury box from which was drawn the grand jury and petit jury in this case. The fact that the commissioners did not also use "a list of names of persons who do not appear on the tax lists" as directed by G.S. 9-1 does not show racial discrimination in the selection of prospective jurors. *State v. Brown,* 233 N.C. 202, 63

S.E. 2d 99. Absent discrimination by race or other identifiable group or class, a State is at liberty to prescribe such qualifications for jurors as it deems proper without offending the Fourteenth Amendment. *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513; *State v. Knight*, 269 N.C. 100, 152 S.E. 2d 179; *Eubanks v. Louisiana*, 356 U.S. 584, 2 L. Ed. 2d 991, 78 S. Ct. 970. Prior to 1947, G.S. 9-1 provided that the tax returns of the county for the preceding year should constitute the source from which the jury list should be taken. No other source was prescribed. When women became eligible to serve on juries by adoption of a constitutional amendment the previous year, the statute was amended to include as source material not only the tax returns but also "a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age. . . ." Chapter 1007, Session Laws of 1947; *State v. Brown, supra* (233 N.C. 202, 63 S.E. 2d 99). Failure to use this additional authorized list, however, does not affect the legality of the jury. The provisions of the statute in that respect are directory and not mandatory in the absence of bad faith or corruption, and neither is suggested here. *State v. Yoes and Hale v. State, supra* (271 N.C. 616, 157 S.E. 2d 386); *State v. Brown, supra; State v. Mallard*, 184 N.C. 667, 114 S.E. 17, and cases there cited. Hence, noncompliance with a procedure merely directory for the preparation of the jury list does not void a bill of indictment returned by a grand jury drawn from a jury box so composed. *State v. Yoes and Hale v. State, supra.*

[16] We adhere to precedent long established in this State and hold that use of a jury box containing only the names of property owners was not per se discriminatory as to race and did not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. *Brown v. Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397. This assignment of error is therefore overruled.

[23] Defendant moved to quash the bill of indictment on the ground that he was only fourteen years of age at the time of the alleged crime and had an I.Q. of 63. Denial of the motion is assigned as error.

In support of the motion defendant offered his birth certificate which showed he was born February 2, 1952, and thus was fourteen years, eleven months and twelve days of age on January 14, 1967 — the date Mrs. Meachum was allegedly raped. He also offered the testimony of Mrs. Miriam Clifford, a school psychologist, to the effect that he had an I.Q. of 63 which placed him in the lowest 2% of the population.

[17] At common law, infants under seven years of age were conclusively presumed incapable of crime, between ages seven and fourteen rebuttably presumed incapable, and those over fourteen were presumptively capable. 21 Am. Jur. 2d, Criminal Law, Sec. 27; *Allen v. United States,* 150 U.S. 551, 37 L. Ed. 1179, 14 S. Ct. 196; *State v. Yeargan,* 117 N.C. 706, 23 S.E. 153. In cases of rape, the common law presumption of incapacity was conclusive to age fourteen. "In England, it was accepted as a fact that a child under fourteen had not the physical capacity to commit the offense, and it was therefore held from an early day that the presumption of incapacity was conclusive, and this rule prevails in a few jurisdictions in the United States. In most of the states, however, on account of the great diversity of climate, race, habit, and the condition in life, which largely influence the physical condition and affect development, the rule adopted is that while there is a presumption of physical incapacity as to all boys under the age of fourteen, this is merely a prima facie presumption, subject to be rebutted by proof. It is well known that in some portions of this country instances of puberty among boys under fourteen years are not uncommon, and to adopt the rule which exists in countries where the climate, condition, and habits of the people are different, and the population mostly of one race, would be a departure from reason and good sense, and would afford immunity to a large number of persons capable of committing rape, or who have actually committed it, and thus in many instances defeat the ends of justice." 44 Am. Jur., Rape, Sec. 31; *Gordon v. State,* 93 Ga. 531, 21 S.E. 54.

[18] Unless otherwise provided by statute, infants of the age of fourteen and over are not entitled to any presumption of incapacity. *Allen v. United States, supra.* They are presumed capable of crime and are practically adults in the eyes of the law. *Colley v. State,* 179 Tenn. 651, 169 S.W. 2d 848, cert. den. 320 U.S. 766, 88 L. Ed. 457, 64 S. Ct. 71; *Cochran v. Peeler,* 209 Miss. 394, 47 So. 2d 806; *Clay v. State,* 143 Fla. 204, 196 So. 462 (holding that one could be convicted and executed for murder committed at age fourteen); *State v. Smith,* 213 N.C. 299, 195 S.E. 819.

[19] The juvenile court, as a separate part of the superior court, was established by Chapter 97, Session Laws of 1919, now codified as G.S. 110-21, et seq. Construing the provisions of those statutes in *State v. Burnett,* 179 N.C. 735, 102 S.E. 711, it was held that: (1) a child under fourteen years of age is no longer indictable as a criminal but must be dealt with as a ward of the State; (2) a child between fourteen and sixteen years of age, and as to felonies when the punishment cannot exceed ten years, may, if the case be of a nature

to require it, be bound over to the next term of the superior court to be prosecuted under the criminal law pertaining to the charge; and (3) a child fourteen years of age and over, in case of felonies in which the punishment may be more than ten years, is in all instances subject to prosecution as in case of adults. Thus where the charge is a capital felony, as here, the juvenile department of the superior court is without jurisdiction, and the offender, fourteen years of age and over is subject to indictment and trial in the superior court. See *State v. Smith,* 213 N.C. 299, 195 S.E. 819, where the defendant, slightly over fifteen years of age, was tried and convicted in the superior court for the crime of rape and his sentence of death upheld.

[20-23] It has been held that low mentality in itself is no defense to a criminal charge. *State v. Jackson,* 346 Mo. 474, 142 S.W. 2d 45. Evidence of low mentality is irrelevant and its exclusion is not error. *State v. Jenkins,* 208 N.C. 740, 182 S.E. 324; *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916. The test of accountability does not depend on intelligence, education, or general mental capacity. *Young v. State,* Fla., 140 So. 2d 97 (evidence that defendant had very low I.Q. was excluded as immaterial). The true test of mental responsibility in North Carolina and in a majority of American jurisdictions is whether defendant has the ability to distinguish right from wrong at the time and with respect to the matter under investigation. *State v. Willis,* 255 N.C. 473, 121 S.E. 2d 854; *State v. Scales, supra; State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *Leland v. Oregon,* 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002, reh. den. 344 U.S. 848, 97 L. Ed. 659, 73 S. Ct. 4. Measured by these principles, this assignment has no merit and is overruled.

Defendant assigns as error the admission of evidence regarding his in-custody lineup identification.

[24] The rules established for in-custody lineup identification by *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), include the constitutional right to the presence of counsel at the lineup and, when counsel is not present, (1) render inadmissible the testimony of witnesses that they had identified the accused at the lineup, and (2) render inadmissible the in-court identification of the accused by a lineup witness unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal lineup. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. *Wade* and *Gilbert* do not apply retroactively, however, and affect only cases

involving lineups for identification purposes conducted after June 12, 1967. *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967.

The lineup in this case was conducted on January 15, 1967. Hence the rules established by *Wade* and *Gilbert* do not apply. Even so, *Stovall* states that the totality of circumstances may show the use of lineup procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law under the Fourteenth Amendment. Defendant contends he was the victim of such a suggestive lineup procedure.

[25] The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ." Since *Mapp v. Ohio,* 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), "[e]vidence 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." *State v. Colson,* 274 N.C. 295, 306, 163 S.E. 2d 376, 384. With respect to lineups, the test of due process prior to *Stovall* was whether the procedures employed offended fundamental standards of decency, fairness, and justice. *Rochin v. California,* 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R. 2d 1396 (1952). This is still the test enlarged only by the right to presence of counsel at the lineup. If a consideration of the total circumstances reveals pretrial identification procedures unnecessarily suggestive and conducive to irreparable mistaken identification, such procedures would manifestly offend fundamental standards of decency, fairness and justice and amount to a denial of due process of law. Was the lineup in this case conducted in such fashion? If so, evidence that the witness identified the accused at the lineup is evidence illegally obtained and thus inadmissible as a matter of constitutional law. *Foster v. California,* 394 U.S. 440, 22 L. Ed. 2d 402, 89 S. Ct. 1127 (decided April 1, 1969). Furthermore, in-court identification by witnesses who view such a lineup must be excluded unless the State shows on voir dire that the in-court identification is of independent origin and not the result of the illegal out-of-court confrontation. *United States v. Wade, supra; State v. Wright, supra.*

[26] Let us look at the evidence. At the police station on the night of January 14 following the attack upon her, Mrs. Meachum told the officers her assailant was a young colored male with very smooth skin who did not need a shave, dark skinned, hair cut short, wearing a blue jacket and dark trousers and had a belt around his neck — looped, just hanging around his neck. She gave this description to

Detective Hicks in the presence of Detectives Leathers and McCrea. The following day these officers went out, talked to people in the neighborhood and brought in two young colored boys who resembled the description given police. Mrs. Meachum, who had returned to the police station, viewed them and exonerated them. The officers took these two boys home. Twenty minutes later defendant and three other colored boys, to wit, Otis Pipkins, age 16, Lonnie Williams, age 15, and Bobby Brown, age 16, were picked up at 115 Hunt Street and brought to the police station. Defendant was wearing a shirt and dungaree-type pants and had an ordinary men's belt looped around his neck. One of the other boys had on a dark navy blue jacket and a pair of dark trousers. One had on a dark sweater. Pipkins and Williams and defendant were the same size, although one was somewhat darker than defendant. Brown was a little taller. All four "kinda fit the description" given the officers by Mrs. Meachum.

These four suspects were placed in a room, and Mrs. Meachum viewed them on request of the officers. The clothing worn by the suspects remained unchanged. Nothing had been added and nothing had been removed when Mrs. Meachum first looked at them. Then one of the officers asked defendant to put on the blue jacket worn by one of the other boys, and Mrs. Meachum viewed the four of them again. She viewed the suspects through a two-way mirror. No one prompted her. She testified on voir dire and before the jury as follows: "I told Detective Hicks I was pretty sure that he [defendant] was the one. . . . I do not have any doubts about this individual being the one that assaulted me. He didn't have on the clothes that he had on the night before and that made him look a little different. *I won't ever forget his face.* He had the belt hanging around his neck. I did see him another time. He put — they put the clothes back on that he had on the night before. They told him to, I guess, and I went back and saw him. I did not have any trouble identifying him that time. I was positive. I have never been doubtful about my identification. . . . I pointed him out before they had put the clothes on him and then after they put the clothes on him there was no doubt about it."

Judged by the totality of these circumstances, was this lineup "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it offended fundamental standards of decency, fairness and justice and thus denied due process of law to this defendant? Let us examine the circumstances which have been the basis for judicial answer in other cases.

In *United States ex rel. Geralds v. Deegan,* 292 F. Supp. 968, the victims, who had previously described the robber as a Negro, were

summoned to the police station to view a suspect twenty days after the robbery and presented with one Negro man in custody of a white officer. They identified the suspect in each other's presence when he, still alone and without others for image or voice comparison, donned the robber's porkpie hat and spoke the words "Where's the money?" Held: Such pretrial confrontation was unnecessarily and unfairly suggestive and conducive to mistaken identification amounting to denial of due process.

In *Foster v. California, supra* (394 U.S. 440, 22 L. Ed. 2d 402, 89 S. Ct. 1127), Foster was charged with the armed robbery of a Western Union Office. The only witness to the crime was Joseph David, the manager. After Foster had been arrested, David was called to the police station to view a lineup consisting of Foster, six feet tall, and two short men, five feet, five or six inches tall. Foster wore a leather jacket similar to the one David had seen underneath the coveralls worn by the robber. After seeing this lineup David could not positively identify Foster. David asked to speak to Foster alone and did so. He was still uncertain. A week or ten days later the police arranged for David to view a second lineup with five men in it. Foster was the only person in the second lineup who had appeared in the first. This time David was "convinced" that Foster was the man. Held: "The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man'. In effect, the police repeatedly said to the witness, 'This is the man.' . . . This procedure so undermined the reliability of the eyewitness identification as to violate due process."

In *People v. Terry,* 77 Cal. Rptr. 460, 454 P. 2d 36, the only evidence regarding lineup was a bank teller's testimony that he described the robber to the police on the day of the robbery as a man in his early thirties. The persons in the lineup, other than Terry and a co-defendant, were in their teens or early twenties. Held: This alone is not so unnecessarily suggestive as to constitute a denial of due process.

In *People v. Caruso,* 68 Cal. 2d 183, 436 P. 2d 336, 65 Cal. Rptr. 336, defendant was a big man with a dark complexion and dark wavy hair. The eyewitness to the robbery remembered that the robber had these characteristics. Caruso was placed in a lineup with four companions none of which had dark wavy hair or a dark complexion or was his size. Held: The lineup was unnecessarily suggestive and conducive to mistaken identification and violative of due process.

In *People v. Hogan,* 70 Cal. Rptr. 448, defendant was charged

with burglary. A witness, Quincy Thomas, had seen a Negro commit the burglary and so informed the police. Defendant, a Negro, was placed in a lineup with a Mexican man and two white men. Obviously if Thomas chose anyone in the lineup, defendant was singularly marked for identification. Held: The contrasting composition of the lineup was so unfairly suggestive as to constitute denial of due process.

These cases illustrate the suggestive, unfair type of lineup referred to in *Wade, Gilbert,* and *Stovall* and condemned by the United States Supreme Court in *Foster v. California, supra.*

[26] By comparison, in the case before us Mrs. Meachum had observed defendant with sufficient particularity at the scene of the crime, even though visibility was poor, to inform the police that her attacker was colored, young, dark skinned, had a very smooth face, hair cut short, wore a blue jacket with dark trousers and had a belt looped around his neck. This is a detailed description. There is no discrepancy between it and the actual appearance of defendant. She has never identified any other person. She has shown no hesitancy whatsoever in her identification. Rather, she says "I do not have any doubts about this individual being the one that assaulted me. . . . I won't ever forget his face. . . . I was positive. . . . I have never been doubtful about my identification." The lapse of time between the act and her identification was barely twenty-four hours. Her memory was still fresh. Furthermore, three of the four boys in the lineup were the same size, and all were about the same age. One of the boys wore a dark blue jacket and dark trousers — the same sort of garments Mrs. Meachum told the police her assailant wore. Yet she exonerated him. Then defendant was asked to don this jacket. The belt around defendant's neck was the only mark of identification peculiar to him alone. It was placed there by defendant himself — not by law enforcement authorities. The officers were under no compulsion, constitutional or otherwise, to remove it. Nor were they required to place similar belts around the necks of the other boys in the lineup. Its presence cannot be attributed to the officers or regarded as the kind of rigged "suggestiveness" in identification procedures which *Wade* and *Gilbert* and *Foster* were designed to deter. Its presence was simply an existing fact — it was around defendant's neck when he was picked up, there when he was taken to the police station, and still there when viewed by the victim. No one put the belt on him and no one asked him to remove it. The victim was permitted to see him in raiment of his own choosing. Considering the totality of circumstances, as we are required to do, we hold that the lineup in this case did not offend constitutional requirements and

did not deny due process guaranteed by the Fourteenth Amendment. "The basic purpose of a trial is the determination of truth. . . ." *Tehan v. Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, 86 S. Ct. 459. This assignment of error is overruled.

[27] Defendant's assignment of error based on the admission of items of clothing worn by Mrs. Meachum (skirt, bra, blouse, slip, shoes and raincoat) is overruled. Articles of clothing identified as worn by the victim at the time the crime was committed are competent evidence, and their admission has been approved in many decisions of this Court. *State v. Vann,* 162 N.C. 534, 77 S.E. 295; *State v. Fleming,* 202 N.C. 512, 163 S.E. 453; State v. Wall, 205 N.C. 659, 172 S.E. 216; *State v. Petry,* 226 N.C. 78, 36 S.E. 2d 653; *State v. Speller,* 230 N.C. 345, 53 S.E. 2d 294; *State v. Bass,* 249 N.C. 209, 105 S.E. 2d 645; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241.

The State, over defendant's objection, offered in evidence the shoes and pants defendant allegedly wore on the night of the crime. Defendant argues in his brief that this was error because (1) the items of clothing were of no probative value and (2) their possession by the State was the result of an illegal search and seizure. No further argument or citation of authority on this point appears in the brief. Nevertheless, we examine the record with respect to defendant's shoes and pants.

[28] Detective Hicks testified over objection that he took a pair of pants from defendant, carried them personally to the S.B.I. laboratory in Raleigh, and that they were later returned to him. The pants were then identified and offered in evidence over defendant's objection. These pants were competent evidence. No right of defendant, constitutional or otherwise, was violated when the officer required him to surrender for examination and analysis the pants worn by him at the time of his arrest. *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873; *State v. Tippett,* 270 N.C. 588, 155 S.E. 2d 269; *State v. Colson, supra.* No search was involved. This exception has no merit.

[29] Detective McCrea then testified over objection that he got a pair of shoes (identified as S-14 and S-15) at 307 Canal Street where Mrs. Lula Poole gave them to him. This witness was then withdrawn temporarily and Mrs. Lula Poole was placed on the stand by the State. She testified that defendant, his mother, and several other grandchildren, lived with her in a house which she rented herself at 307 Canal Street; that defendant is her grandson; that S-14 and S-15 are defendant's shoes which Mr. McCrea took from under the bed. At this point, defendant moved to strike her testimony about

the shoes, the jury was excused and, on voir dire, Mrs. Poole said Detective McCrea and another officer came to her house and were admitted by some of the children; that McCrea said he wanted defendant's shoes — was hunting his shoes and his pants; that she didn't tell them to leave; that they didn't ask permission to look around the house and she didn't tell them they could; that he first mentioned the shoes when he got upstairs; that she didn't object to his going upstairs — that she went up behind him and told him where defendant's room was located; that she did not give the shoes to Officer McCrea, but he got them from under the bed where the boys slept.

The jury then returned to the courtroom, defendant's motion to strike was denied, and direct examination of Mrs. Poole was resumed by the solicitor in the presence of the jury. She again identified the shoes as belonging to defendant, stated they were under the bed where defendant slept but denied any knowledge as to whether he wore them on the previous Saturday. She said defendant's shoes were muddy because he had worn them while playing baseball and basketball at the East End School on the previous Friday. On reflection she said he did not wear those shoes the previous Saturday but had on his tennis shoes.

Officer McCrea then testified before the jury without objection that a teenaged girl let him in the house; that Mrs. Poole went upstairs with him and gave Rogers' shoes to him; that he didn't know Rogers' shoes from anyone else's — "she gave them to me."

Detective Upchurch testified before the jury without objection that he went with Officer McCrea to Mrs. Poole's house; that defendant's mother and several young girls were there; that they talked to defendant's mother and to Mrs. Poole and asked about some shoes and clothes defendant was wearing; that Mrs. Poole went upstairs into a bedroom "and Detective McCrea and myself went up there and she picked up these shoes here and gave them to us there in the room"; that the pair of shoes was all they got.

Officer Hicks was recalled and testified that he took the shoes to a chemist in the SBI office who later returned them to him. The shoes were then offered in evidence over defendant's objection.

Defendant assigns no reason, argument or authority in his brief to support the assignment except to say that the items of clothing worn by defendant were obtained by illegal search and seizure and were "devoid of probative value and should therefore have been excluded." The shoes themselves prove nothing and their admission

was harmless. Only the testimony gives them any significance. Mrs. Poole's testimony about them, seemingly favorable to defendant, was admitted over his objection. Other testimony concerning them by Detective McCrea, Detective Upchurch, Officer Hicks and Dr. Buol, the soil expert, was admitted *without objection.* "It is the well established rule with us that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. . . ." *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768. Exception to the admission of such testimony "is waived when testimony of the same import is thereafter admitted without objection." 1 Strong's N. C. Index 2d, Appeal and Error, Sec. 30; *Harvel's Inc. v. Eggleston,* 268 N.C. 388, 150 S.E. 2d 786. This assignment is overruled.

In the trial below, we find

No error.

STATE v. JOHNNY REUBEN JONES

No. 34

(Filed 11 July 1969)

1. Criminal Law § 146— Supreme Court — nature of appellate jurisdiction — supervisory powers

The Supreme Court, in the exercise of its power of "general supervision and control over the proceedings of the other courts," considers the trial court's instructions in a criminal prosecution where such consideration is necessary to determine the significance of the jury's verdict, even though no question as to error in the instructions was presented to the Court of Appeals. Constitution of North Carolina, Art. IV, § 10.

2. Larceny §§ 9, 10— larceny of property in excess of $200 — verdict of "guilty as charged" — judgment

In a prosecution upon indictment alleging the larceny of personal property of a value in excess of $200, a felony, verdict of "guilty as charged in the bill of indictment" must be considered as a verdict of guilty of larceny of personal property of a value of $200 or less, a misdemeanor, where trial court failed to charge that the burden was on the State to satisfy the jury beyond a reasonable doubt that the value of the stolen property was more than $200; hence, judgment of three years' imprisonment imposed upon the jury's verdict is in excess of the legal maximum and is vacated and the cause remanded for pronouncement of judgment as for misdemeanor-larceny.

3. Larceny § 4— felonious larceny — indictment — allegation of value of property

Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200.

4. Larceny § 5— felonious larceny — plea of not guilty — issues

A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than $200.

5. Larceny § 9— verdict — value of stolen property

G.S. 14-72 does not require that the jury fix the precise value of the stolen property, the only significant legal issue being whether the value thereof exceeds $200.

6. Larceny §§ 5, 8— felonious larceny — value of stolen property — burden of proof — instructions

Except in those instances where G.S. 14-72, as amended, does not apply, it is incumbent upon the State in order to convict of the felony of larceny to prove beyond a reasonable doubt that the value of the stolen property was more than $200; and, value in excess of $200 being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury, even in the absence of defendant's request therefor.

7. Larceny § 8— felonious larceny — value of stolen property — instructions

Where indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200, the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact; in such case, an instruction with reference to guilt of misdemeanor-larceny is inappropriate.

8. Larceny § 8— evidence of value of stolen property — instructions

When there is evidence tending to show the value of the stolen goods was more than $200 and other evidence tending to show the value thereof was $200 or less, the jury should be instructed that if they find that defendant is guilty of larceny and the value of the stolen property was more than $200 it would be their duty to return a verdict of guilty of felony-larceny, but that if they find defendant is guilty of larceny but fail to find that the value of the stolen property was more than $200 it would be their duty to return a verdict of guilty of misdemeanor-larceny.

9. Indictment and Warrant § 9— several counts — necessity for completeness of each count

In an indictment containing several counts, each count should be complete in itself.

ON writ of *certiorari* to the Court of Appeals.

The indictment on which defendant was tried contained three counts. The first charged that defendant on November 17, 1967, with

intent to steal, did wilfully and feloniously break and enter a certain building occupied by Wesley Lovett, trading and doing business as J & W Frame Works. The second charged defendant, "after having unlawfully, wilfully and feloniously broken into and entered" Lovett's building, with the larceny of certain personal property of Wesley Lovett "located therein." The third charged defendant with receiving the same personal property of Wesley Lovett with knowledge it had been stolen.

The personal property referred to in the second and third counts is described in each as follows: "One Craftman electric drill, valued at $60.00; a Black-Decker electric screwdriver, valued at $50.00; one air nailing machine, valued at $200.00."

The evidence bearing upon the fair market value of the tools described in the indictment and referred to in the evidence is summarized as follows: Lovett testified he paid $54.00 for the electric drill, had used it for a year, and that it was worth $30.00 or $40.00. He testified the electric screwdriver was worth $30.00. He testified he had *leased* the "nailing machine" and was charged $185.00 for the right to use it. He testified he did not know the fair market value of the "nailing machine"; that it had been used for less than a year; and that he himself had made necessary repairs.

At the trial before Crissman, J., at June 3, 1968 Criminal Session of Guilford Superior Court, High Point Division, only the first and second counts were submitted to the jury. The jury returned this verdict: "1. Not guilty of breaking and entering. 2. Guilty as charged in bill of indictment."

The judgment pronounced by Judge Crissman, which imposed a prison sentence of three years, contains the recital that defendant had been "found guilty on the second count of larceny in excess of $200.00."

Upon defendant's appeal, the Court of Appeals affirmed. 3 N.C. App. 455, 165 S.E. 2d 36. On defendant's application, this Court granted *certiorari.*

Defendant, an indigent, was represented at trial and in subsequent appellate proceedings by court-appointed counsel.

Attorney General Morgan and Staff Attorney Vanore for the State.

Sammie Chess, Jr., for defendant appellant.

BOBBITT, J.

Defendant based his petition for *certiorari* on two grounds: First, he asserted the trial court erred in denying his motion for nonsuit;

and second, he asserted the trial court erred in treating the verdict on the second count as a conviction of larceny of personal property of a value in excess of two hundred dollars, a felony, and in imposing a prison sentence of three years.

The denial of defendant's motion for nonsuit was proper. Evidence offered by the State and by defendant, respectively, is summarized by Judge Morris in her opinion for the Court of Appeals. Suffice to say, the evidence, when considered in the light most favorable to the State, was sufficient to require that the first and second counts in the indictment be submitted for jury determination.

Criminal prosecutions on bills of indictment containing similar charges are of such frequent occurrence throughout the State that this Court deemed it appropriate to grant *certiorari* in order to reconsider, clarify and restate certain of the rules applicable in trials involving factual situations similar to that here under consideration.

The first count charged the felony defined in G.S. 14-54. The jury having returned a verdict of "Not guilty" with reference thereto, further discussion of the first count is unnecessary.

The second count charged the larceny of personal property of the value of more than two hundred dollars, a felony. Nothing else appearing, the verdict, "Guilty as charged in bill of indictment," indicates the jury found from the evidence beyond a reasonable doubt all essential elements necessary to constitute the felony charged in the second count. However, examination of the court's instructions discloses that, in charging the jury with reference to the second count, no instruction was given to the effect that, prerequisite to finding defendant guilty of felony-larceny, the State had to satisfy the jury from the evidence beyond a reasonable doubt *either* that the alleged larceny was committed by defendant after "unlawfully, wilfully and feloniously" breaking into and entering Lovett's building, *or* that the value of the personal property stolen by defendant was more than two hundred dollars.

[1] Defendant did not except to and assign as error any portion of the court's instructions to the jury. Hence, no question as to error in the charge was presented to the Court of Appeals. Even so, we have elected, in the exercise of the "general supervision and control over the proceedings of the other courts" vested in this Court by Article IV, Section 10, of the Constitution of North Carolina, to consider the charge, this being necessary to determine the significance of the jury's verdict on the second count.

It seems clear that Judge Crissman held, and rightly so, that, in view of the verdict of "Not guilty" on the first count, the verdict

on the second count cannot be considered as including a finding that defendant committed the alleged larceny "after having unlawfully, wilfully and feloniously broken into and entered" Lovett's building. Under these circumstances, the court's failure to instruct the jury with reference to this element of the crime charged in the second count is not germane to decision on this appeal.

[2] Under the circumstances and for the reasons stated below, we hold it was error for the court to treat the verdict on the second count, "Guilty as charged in bill of indictment," as a verdict of guilty of larceny of personal property of the value of more than two hundred dollars, a felony, and to pronounce judgment imposing a prison sentence of three years.

In *State v. Cooper,* 256 N.C. 372, 124 S.E. 91, after full consideration of the statutes and decisions prior and subsequent to the Act of 1913 (Public Laws of 1913, Chapter 118) which, as amended, was codified as G.S. 14-72, this Court, undertaking to resolve any inconsistencies in prior decisions, decided these propositions:

[3] 1. Where neither larceny from the person nor by breaking and entering is involved, an indictment for the *felony* of larceny must charge, *as an essential element of the crime,* that the value of the stolen goods was more than two hundred dollars. Accord: *State v. Slade,* 264 N.C. 70, 140 S.E. 2d 723; *State v. Fowler,* 266 N.C. 667, 147 S.E. 2d 36; *State v. Ford,* 266 N.C. 743, 147 S.E. 2d 198; *State v. Davis,* 267 N.C. 126, 147 S.E. 2d 570; *State v. Bowers,* 273 N.C. 652, 654, 161 S.E. 2d 11, 13.

[4, 5] 2. A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than two hundred dollars. G.S. 14-72 does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds two hundred dollars.

[6] 3. Except in those instances where G.S. 14-72, as amended, does not apply, to convict of the *felony* of larceny, it is incumbent *upon the State* to prove beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars; and, value in excess of two hundred dollars being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. Accord: *State v. Holloway,* 265 N.C. 581, 583, 144 S.E. 2d 634, 635; *State v. Herring,* 265 N.C. 713, 144 S.E. 2d 846; *State v. Matthews,* 267 N.C. 244, 148 S.E. 2d 38. The basis for this requirement is the

elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury.

[2, 6] Here, as in *State v. Cooper, supra,* the court failed to charge that, before the jury could return a verdict of "Guilty as charged in bill of indictment," the State was required to satisfy the jury from the evidence beyond a reasonable doubt that the value of the stolen property was more than two hundred dollars. This was an essential feature of the case, embraced within the issue raised by defendant's plea of not guilty and arising on the evidence; and the court, although defendant made no request therefor, was required to give such instruction. *State v. Ardrey,* 232 N.C. 721, 62 S.E. 2d 53, and cases cited. Absent such instruction, the jury did not fix the value of the stolen property as in excess of two hundred dollars. Hence, the verdict on the second count did not establish defendant was guilty of larceny of personal property of a value in excess of two hundred dollars, a felony.

The legal propositions declared in *State v. Cooper, supra,* set forth above and applied herein, are reaffirmed. Decisions in conflict therewith, including *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297; *State v. Stubbs,* 266 N.C. 274, 145 S.E. 2d 896; *State v. Brown,* 267 N.C. 189, 147 S.E. 2d 916, may not, to the extent of such conflict, be considered authoritative. For a discussion of relevant decisions subsequent to *State v. Cooper, supra,* see 3 Wake Forest Intramural Law Review 1-11.

[7, 8] Although an indictment charges, and *all* the evidence tends to show, that the value of the stolen property was more than two hundred dollars, *the jury,* under appropriate instructions, *must find* from the evidence beyond a reasonable doubt that this is the fact. In such case, there is no basis, and it is inappropriate, for the court to instruct the jury with reference to a verdict of guilty of misdemeanor-larceny, a less degree of felony-larceny within the meaning of G.S. 15-170. *State v. Summers,* 263 N.C. 517, 139 S.E. 2d 627; *State v. Hemphill,* 273 N.C. 388, 160 S.E. 2d 53. However, when there is evidence tending to show the value of the stolen goods was more than two hundred dollars and other evidence tending to show the value thereof was two hundred dollars or less, the jury should be instructed in substance as follows: If you find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny and that the value of the stolen property was more than two hundred dollars, it would be your duty to return a verdict of guilty of felony-larceny; however, if you find from the evidence beyond a reasonable

doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen goods was more than two hundred dollars, it would be your duty to return a verdict of guilty of misdemeanor-larceny. Too, it would be appropriate to give such instructions where the evidence, although sufficient to support a finding that the value of the property involved was more than two hundred dollars, is equivocal and susceptible of diverse inferences.

The propositions reaffirmed herein are analogous to the decisions of this Court with reference to what is necessary to allege and establish in order to convict of felony-larceny when the value of the stolen goods is two hundred dollars or less and the basis of the State's contention is that the larceny was by breaking and entering a building.

In *State v. Fowler, supra,* defendant was tried on the first and second counts of a three-count bill of indictment. The jury returned a verdict of guilty (1) of feloniously breaking and entering a certain building occupied by one J. M. McLamb, as charged in the first count, and (2) of larceny of personal property of J. M. McLamb, to wit, $128.30 in cash, as charged in the second count. The portion of the judgment of the court below imposing a prison sentence of ten years on the second count was vacated and the cause was remanded for the entry of a new judgment based upon defendant's conviction of the larceny of property of the value of two hundred dollars or less, to wit, a misdemeanor. Decision was based on the fact that the second count contained no allegation that the larceny was from a building by breaking and entering or by other means of such nature as to make the larceny a felony. Accord: *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165; *State v. Morgan,* 268 N.C. 214, 222, 150 S.E. 2d 377, 383; *State v. Bowers, supra; State v. Massey,* 273 N.C. 721, 725-726, 161 S.E. 2d 103, 106-107.

[9] It is noted that "(i)n an indictment containing several counts, each count should be complete in itself. *S. v. McCollum,* 181 N.C. 584, 107 S.E. 309." *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46.

In *State v. Bowers, supra,* the opinion states: "Where an indictment charges larceny of property of the value of two hundred dollars or less, but contains no allegation the larceny was from a building by breaking and entering, this Court has held the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering."

Seemingly, in *State v. Stevens,* 252 N.C. 331, 113 S.E. 2d 577, and in *State v. Morgan,* 265 N.C. 597, 144 S.E. 2d 633, the necessity that the indictment allege all facts essential to constitute felony-larceny was overlooked. Suffice to say, these two decisions, to the extent they conflict with the decisions cited in the preceding two paragraphs, may not be considered authoritative.

Reference is made to: (1) Chapter 522, Session Laws of 1969, which rewrites G.S. 14-70 and G.S. 14-72; and (2) Chapter 543, Session Laws of 1969, which amends G.S. 14-51 and rewrites G.S. 14-53, 14-54, 14-55, 14-56 and 14-57. Although attention is called to these statutory modifications, for present purposes it is sufficient to say that nothing in these 1969 Acts impairs or modifies the legal propositions declared in *State v. Cooper, supra,* set forth above and reaffirmed and applied herein.

[2] Our conclusion on this appeal is as follows: The jury having failed to find that the larceny of which defendant was convicted related to property of a value of more than two hundred dollars, the verdict must be considered a verdict of guilty of larceny of personal property of a value of two hundred dollars or less. This being a misdemeanor, the judgment imposed a sentence in excess of the legal maximum. Hence, although the verdict will not be disturbed, the judgment is vacated; and this decision will be certified to the Court of Appeals with direction to remand the case to the Superior Court of Guilford County for the pronouncement of a judgment herein as upon a verdict of guilty of misdemeanor-larceny.

Error and remanded.

H. GILLIAM NICHOLSON v. STATE EDUCATION ASSISTANCE AUTHORITY, AND THE MEMBERS OF ITS BOARD OF DIRECTORS: GEORGE WATTS HILL, JR., ROGER GANT, JR., VICTOR E. BELL, JR., MRS. CARRIE W. HARPER, J. RUSSELL KIRBY, ARTHUR D. WENGER AND H. EDMUNDS WHITE AND COLLEGE FOUNDATION, INC. AND WACHOVIA BANK & TRUST COMPANY, N.A.

No. 34

(Filed 11 July 1969)

1. Constitutional Law §§ 6, 10— branches of government — Supreme Court — General Assembly

The Supreme Court and the General Assembly are coordinate branches of the State government, and neither is the superior of the other.

2. Constitutional Law § 10— power of Supreme Court to declare statute unconstitutional

The authority of the Supreme Court to declare an act of the Legislature unconstitutional arises from, and is an incident of, its duty to determine the respective rights and liabilities or duties of litigants in a controversy brought before it by the proper procedure.

3. Appeal and Error § 2— nature of appellate jurisdiction — conflict between rules of law

In the event of a conflict between two rules of law, the Supreme Court must determine which is the superior rule and, therefore, the rule governing the rights and liabilities or duties of the parties to the controversy before the Court.

4. Constitutional Law § 10— nature of judicial power — conflict between statute and Constitution

If there is a conflict between a statute and the Constitution, the Supreme Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation.

5. Appeal and Error § 3— review of constitutional questions — Supreme Court — other questions

When it becomes necessary for the Supreme Court to pass upon the constitutional validity of a legislative provision, it will not anticipate other questions of constitutional law not necessary to the decision of the precise controversy presented in the litigation before it.

6. Appeal and Error § 3; Constitutional Law § 4— review of constitutional questions — parties

The Supreme Court will not determine the constitutionality of a legislative provision in a proceeding in which there is no actual antagonistic interest in the parties.

7. Constitutional Law § 4— person who may assert constitutional questions

Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action, and it is not sufficient that he has merely a general interest common to all members of the public.

8. Constitutional Law § 4— persons entitled to assert constitutional questions — taxpayer

A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation, but he may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose.

9. Constitutional Law § 4— constitutionality of statute — suit for injunction — direct and irreparable injury

Constitutionality of a statutory provision may not be tested by a suit for injunction unless the plaintiff alleges, and shows, that the carrying out of the provision he challenges will cause him to sustain, personally, a

direct and irreparable injury, apart from his general interest as a citizen in good government in accordance with the provisions of the Constitution.

10. Appeal and Error § 3; Constitutional Law § 10— review of constitutional questions — effect of stipulated questions

The fact that both parties to an action desire the determination of the constitutionality of an entire act of the Legislature and stipulate that certain questions, leading to such determination, are presented by the action for the determination of the Court is not binding upon the Court, and such stipulation does not require or authorize the Court to pass upon the constitutional questions not necessary to the determination of the right of the party who denies the validity of the legislation.

11. Constitutional Law § 4— person entitled to assert constitutional questions — stockholder

Plaintiff's allegation that he is a stockholder, or otherwise beneficially interested, in one or more corporations which pay taxes within the State, and his allegations that these corporations have issued non-tax-exempt notes and bonds bearing rates of interest which are higher than they would be if such securities were tax exempt, do not give plaintiff standing to attack the constitutionality of the legislation of which he complains, unless such legislation directly injures the plaintiff as taxpayer.

12. Colleges and Universities; Injunctions § 11— injunction to restrain activities of Education Assistance Authority — issuance of bonds — injury to plaintiff

Since issuance of tax exempt revenue bonds by the State Education Assistance Authority for purpose of financing loans to college students does not pledge the credit of the State or of any political subdivision thereof, G.S. 116-209.12, plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds and has no interest therein except his general interest as a member of the public in good government pursuant to the Constitution, and, consequently, plaintiff has no standing to seek an injunction restraining actions of the Authority and its fiscal agent relating to the issuance of the bonds and the expenditure of the proceeds thereof in accordance with Chapter 1177 of the Session Laws of 1967 (G.S. 116-209.1 to G.S. 116-209.15).

13. Colleges and Universities— injunction to restrain activities of Education Assistance Authority — attack on appropriations

Plaintiff is not entitled to attack appropriation of funds from the general tax revenues of the State to the Education Assistance Authority where he alleges that such appropriation was for use by the Authority "in the performance of its lawful functions" and he does not attack the statutes establishing the Authority.

14. Colleges and Universities; Injunctions § 11— injunction against state agency — completed expenditure of funds

Expenditure of tax funds for travel expenses of the Secretary of the Education Assistance Authority, even if unlawful, was an accomplished fact prior to institution of plaintiff's action to restrain the activities of

the Authority and cannot be prevented or redressed by issuance of injunction.

15. Colleges and Universities— injunction to restrain activities of Education Assistance Authority — funds for lawful functions

Allegation that Education Assistance Authority, by expressing its intent to issue a further series of bonds, has indicated that "additional tax funds will be expended" unless enjoined by the Supreme Court, *is held* not to afford a basis for injunctive relief where the allegation is consistent with a contemplated use of funds for the lawful functions of the Authority, such as the payment of salaries and expenses of employees as authorized by G.S. 116-201 to G.S. 116-209.

16. Colleges and Universities; Constitutional Law § 4— review of constitutional questions — injury to plaintiff

Where plaintiff has not alleged facts showing, and the stipulated facts do not show, that any contemplated or threatened use of funds or other activity of the State Education Assistance Authority will, if accomplished, result in any injury to plaintiff as a taxpayer or as a stockholder of any corporation, the constitutional questions raised by plaintiff are not before the Supreme Court.

17. Injunctions § 1— nature of the remedy

An injunction will not issue to prevent that which has already been done.

18. Colleges and Universities; Injunctions § 11— injunction to restrain expenditure of public funds

Injunction will not issue to restrain expenditure by State Education Assistance Authority of funds appropriated by the General Assembly where the Supreme Court has no assurance that the appropriation was not expended prior to the hearing and decision of the case on appeal.

APPEAL by plaintiff from *Bone, J.*, at the 31 March 1969 Civil Session of WAKE, the plaintiff's motion to docket the appeal in this Court prior to a determination by the Court of Appeals having been allowed.

This is an action for a mandatory injunction directing the defendants to cease certain activities, which the plaintiff alleges to be unconstitutional and otherwise unlawful, and nullifying all past transactions between the defendants and all others "to the end that the defendants and all who may have dealt with them may be restored to their original positions." The plaintiff also prayed for a temporary restraining order, which was not granted. He appeals from a judgment of nonsuit and dismissal of the action.

The plaintiff alleges that he is a taxpayer of the City of Raleigh, Wake County, the State and the United States. He also alleges that he is a stockholder in one or more corporations, which pay franchise taxes to the State, taxes upon property located within the State and

income taxes to the United States and which have issued interest bearing notes and bonds, that these securities are not exempt from taxation in North Carolina and that the rates of interest paid by such corporations thereon are higher than they would be if such interest were exempt from taxation.

The plaintiff alleges that he will sustain irreparable injury from the acts of which he complains unless the injunctive relief for which he prays is granted, but does not allege how he will be injured unless such injury be inherent in his status as taxpayer or as shareholder. The answer of each defendant denies that the plaintiff will sustain such injury and denies that the State Education Assistance Authority has been or is carrying on any activity which is unconstitutional or otherwise unlawful. Except for these denials the several answers admit the allegations of the complaint.

The complaint alleges in substance (numbering revised):

(1) The Authority is a corporate body, created by Chapter 1180 of the Session Laws of 1965. By Chapter 1177 of the Session Laws of 1967, the General Assembly undertook "to vest in the Authority power to issue tax exempt revenue bonds *not pledging the credit of the State* (emphasis added) and to make available the proceeds of these bonds for financing loans to North Carolina students to enable them to obtain an education in an 'eligible institution'" as defined in Title 20 of the United States Code. The College Foundation, Inc., is a North Carolina non-profit corporation engaged in the business of making loans to North Carolina students for use in educational pursuits.

(2) The Authority adopted a Resolution authorizing the issuance of bonds in the total amount of $3,000,000, a copy of which Resolution is attached to the complaint. (The said Resolution covers 74 printed pages in the record and sets forth in great detail the form of the bonds to be issued under it, the use to be made of the proceeds, and the bookkeeping and accounting procedure to be followed.) The Authority has issued and sold such bonds at a privately negotiated sale.

(3) The Authority, the Foundation and the Wachovia Bank & Trust Company, which is the "fiscal agent" of the Authority, entered into a tripartite contract, a copy of which is attached to the complaint. (The contract likewise sets forth in detail the undertakings of the several parties concerning the use by the Authority of the proceeds of the said bonds to purchase from the Foundation notes, representing loans previously made by the Foundation to students, and concerning the collection of such notes and the handling

of funds, accounting and bookkeeping procedures, etc.). The proceeds of the bonds so issued have been used, pursuant to the said contract, for such purchase by the Authority from the Foundation of such student notes.

(4) Thereafter, the Authority adopted a further Resolution, a copy of which is attached to the complaint, authorizing its officers and employees to issue another series of bonds, also in the total amount of $3,000,000, the proceeds of which will be used "in making or buying student loans during the academic year 1969-1970."

(5) The General Assembly of 1967 appropriated from the general tax revenues of the State funds for use by the Authority in the performance "of its lawful functions" during the two years ending 30 June 1969. From the funds so appropriated the Authority has made expenditures for salaries and expenses of its employees and other "necessary office cost," including the expense of the Secretary of the Authority in traveling to New York for the purpose of executing the first series of bonds.

(6) "In expressing its intent to issue a further series of these bonds * * * the Authority has indicated that additional tax funds will be expended."

(7) Chapter 1177 of the Session Laws of 1967, pursuant to which the Authority has so acted, is unconstitutional in that it conflicts with Article V, § 3, Article I, § 7, Article I, § 8, and Article V, § 5, of the Constitution of North Carolina, and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. If the said Act of the General Assembly be deemed constitutional, the actions of the defendants are nevertheless unlawful because the tripartite contract and provisions of the bond resolution are in conflict with the said Act of the Legislature.

When the matter came on for a hearing in the superior court, a jury trial was waived and the matter was submitted to the court under an agreed statement of facts, setting forth, in substance, the facts alleged in the complaint and admitted in the answers.

The parties further stipulated in the superior court that eleven detailed questions are "the questions of law which arise upon the facts and which are to be determined."

The superior court found the facts to be as so stipulated and that these were "all of the facts that are competent for a determination of this controversy." Thereupon, the court set forth its conclusions of law as follows:

"(1) That the agreed facts show that the General Assembly of North Carolina in the enactment of Chapter 1177, Session Laws of 1967, has acknowledged its and the State's responsibility to its citizens under the Constitution of North Carolina to further education of North Carolina students beyond the level of secondary education by making available funds through student loans to enable these students to pursue their education and by this pursuit to better prepare themselves for their lives as responsible North Carolina taxpaying Citizens and that Chapter 1177, Session Laws of 1967, is a permissible method of promoting such public purposes and constitutes a valid use of public funds for public purposes required by Section 3 of Article V and Section 17 of Article I of the North Carolina Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution, and said Chapter 1177 does not authorize the use of public funds for other than a public purpose in violation of Section 3 of Article V or Section 17 of Article I of the North Carolina Constitution or Section 1 of the Fourteenth Amendment to the United States Constitution.

"(2) Chapter 1177, Session Laws of 1967, does not authorize the lending of the credit of the State in violation of Section 4 of Article V of the North Carolina Constitution and does not authorize any entitlement to exclusive or separate emoluments or privileges in violation of Section 7 of Article I of the North Carolina Constitution.

"(3) Chapter 1177, Session Laws of 1967, does not provide a delegation of legislative authority in violation of Section 8 of Article I of the North Carolina Constitution.

"(4) Chapter 1177, Session Laws of 1967, does not authorize the creation of a debt in violation of Section 4 of Article V of the North Carolina Constitution.

"(5) Chapter 1177, Session Laws of 1967, does not exempt property from taxation in violation of Section 5 of Article V of the North Carolina Constitution.

"(6) Chapter 1177, Session Laws of 1967, is in every respect valid and constitutional in accordance with the Constitution of the United States and the Constitution of North Carolina.

"(7) That State Education Assistance Authority and the members of its Board of Directors and Wachovia Bank & Trust Company, N.A., and College Foundation, Inc. have proceeded

in a lawful manner to carry out their duties and functions in execution of the powers of Chapter 1177, Session Laws of 1967, and their resolutions, contracts and actions taken in furtherance of their duties and as set forth in the Agreed Statement of Facts are in each and every respect lawful, and specifically that:

"(a) The powers vested in the 'Fiscal Agent,' Wachovia Bank & Trust Company, N.A., under the bond resolution, are consistent with the legislative enactment.

"(b) The powers vested in the fiscal agent under the bond resolution are not inconsistent with the powers of the State Treasurer vested under the Constitution of the State of North Carolina, and under the appropriate legislative enactments.

"(c) The provisions of the bond resolution respecting the creation and administration of the 'loan fund' and the 'sinking fund' and the 'current expense account' and the flow of funds thereunder are not in conflict with the provisions of the enabling legislation.

"(d) The tripartite contract is not in violation of Chapter 1177 and the Constitution of the State of North Carolina.

"(e) The powers vested in College Foundation under the tripartite contract are not in conflict with Chapter 1177.

"(f) The provisions of the bond resolution and tripartite contract by which bond funds were used to purchase existing student loans held by College Foundation, Inc. are legal and do provide for a lawful expenditure of said funds."

The superior court thereupon adjudged that the Authority is authorized and empowered to perform all of the acts set forth in Chapter 1177 of the Session Laws of 1967 in the manner in which it has proceeded to do so, and adjudged that the plaintiff be nonsuited and the action dismissed.

Attorney General Morgan by Deputy Attorney General McGalliard for State Education Assistance Authority and the members of its Board of Directors.

Jordan, Morris & Hoke for Wachovia Bank & Trust Company, N.A., and College Foundation, Inc.

Bailey, Dixon & Wooten for plaintiff.

LAKE, J.

[1] The authority of this Court, in a proper case, to declare an act of the Legislature unconstitutional was clearly established in

Bayard v. Singleton, 1 N.C. 5, sixteen years prior to the comparable decision of the Supreme Court of the United States in *Marbury v. Madison,* 5 U.S. 137, 2 L. ed. 60. That authority does not arise from any inherent power of this Court to review acts of the General Assembly and to declare invalid those which this Court disapproves or, upon its own initiative, finds to be in conflict with the Constitution. This Court and the General Assembly are coordinate branches of the State government. Neither is the superior of the other.

[2-4] The authority of this Court to declare an act of the Legislature unconstitutional arises from, and is an incident of, its duty to determine the respective rights and liabilities or duties of litigants in a controversy brought before it by the proper procedure. To do so, this Court, in the event of a conflict between two rules of law, must determine which is the superior rule and, therefore, the rule governing the rights and liabilities or duties of the parties to the controversy before the Court. If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation. *State v. Lueders,* 214 N.C. 558, 200 S.E. 22.

[5] When, in order to determine a controversy, properly before it, in accordance with the controlling rule of law, it becomes necessary for this Court to pass upon the constitutional validity of a legislative provision, it will not anticipate other questions of constitutional law not necessary to the decision of the precise controversy presented in the litigation before it. *Person v. Doughton,* 186 N.C. 723, 120 S.E. 481; *Commissioners v. State Treasurer,* 174 N.C. 141, 149, 93 S.E. 482, 2 A.L.R. 726.

[6, 7] Again, this Court will not determine the constitutionality of a legislative provision in a proceeding in which there is no "actual antagonistic interest in the parties." *Bizzell v. Insurance Co.,* 248 N.C. 294, 103 S.E. 2d 348. "Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370. Accord: *Surplus Co. v. Pleasants,* 263 N.C. 587, 139 S.E. 2d 892; *Watkins v. Wilson,* 255 N.C. 510, 121 S.E. 2d 861, cert. den. and app. dism., 370 U.S. 46; *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *Turner v. Reidsville,* 224 N.C. 42, 29 S.E. 2d 211.

[8, 9] A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation. *Wynn v. Trustees,* 255

N.C. 594, 122 S.E. 2d 404; *Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408; *Fox v. Commissioners of Durham, supra; Turner v. Reidsville, supra.* A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose. See: *Wynn v. Trustees, supra; Barbee v. Comrs. of Wake,* 210 N.C. 717, 188 S.E. 314. The constitutionality of a provision of a statute may not, however, be tested by a suit for injunction unless the plaintiff alleges, and shows, that the carrying out of the provision he challenges will cause him to sustain, personally, a direct and irreparable injury, apart from his general interest as a citizen in good government in accordance with the provisions of the Constitution. *D & W, Inc., v. Charlotte,* 268 N.C. 577, 151 S.E. 2d 241; *Watkins v. Wilson, supra; Fox v. Commissioners of Durham, supra; Sprunt v. Comrs. of New Hanover,* 208 N.C. 695, 182 S.E. 655; *Newman v. Comrs. of Vance,* 208 N.C. 675, 182 S.E. 453.

[10] The fact that both parties to an action, as in the present case, desire the determination of the constitutionality of an entire act of the Legislature and stipulate that certain questions, leading to such determination, are presented by the action for the determination of the Court is not binding upon the Court. Such stipulation does not require, or authorize, the Court to pass upon the constitutional questions not necessary to the determination of the right of the party who denies the validity of the legislation. *Carringer v. Alverson, supra.*

[11] The plaintiff's allegation that he is a stockholder, or otherwise beneficially interested, in one or more corporations which pay taxes within the State, does not give him any greater right to attack the validity of any provision of the legislation in question than his own status as taxpayer would do. His allegations that these corporations have issued notes and bonds bearing interest, which are not exempt from taxation, and that the rates of interest on such notes and bonds are higher than they would be if such securities were so exempt do not add to his standing to attack the constitutionality of the legislation of which he complains. He does not allege, and there is nothing in the record to indicate, that if the legislation which he attacks were declared unconstitutional in its entirety the interest rates upon the notes and bonds of such corporations would be lower than they now are. Thus, in the present proceeding, we may not properly determine the constitutionality of any provision of the statutes attacked by the plaintiff, G.S. 116-209.1 to 116-209.15, inclusive, unless such provision directly injures the plaintiff as taxpayer.

The plaintiff does not attack the validity of any portion of the Act of 1965 (G.S. 116-201 to G.S. 116-209), to which only minor amendments, not of consequence in this litigation, were made by the General Assembly of 1967. By the Act of 1965, the Authority was created, declared to be a political subdivision of the State and given certain powers, including the power to accept from any federal or private agency or from any person grants of money, and to use such funds for the purchase of obligations representing loans made to students in institutions of higher education for the purpose of enabling them to obtain an education. The validity of any act of the Authority, pursuant to G.S. 116-201 to G.S. 116-209, is not before us in this action.

The plaintiff attacks the validity of Chapter 1177 of the Session Laws of 1967 (G.S. 116-209.1 to G.S. 116-209.15). As the basis for such attack, he complains of the following actions and proposed actions:

1. In the 1967 Act, the General Assembly undertook to confer upon the Authority power to issue "tax exempt revenue bonds *not pledging the credit of the State.*" (Emphasis added.)

2. The General Assembly undertook to make available (or to confer upon the Authority the power to make available) the proceeds of "these bonds" for financing loans to North Carolina students to enable them to obtain an education in an "eligible institution," as that term is defined in Title 20 of the United States Code.

3. The Authority adopted a resolution authorizing the issuance of $3,000,000 in five percent revenue bonds "pursuant to the aforesaid Act," a copy of which resolution is made a part of the complaint.

4. The Authority entered into "certain contractual relationships" for the sale of the said bonds.

5. The Authority accepted an offer made on behalf of "certain North Carolina banks" for the purchase of the said bonds and, by resolution, authorized their sale to such banks.

6. The Authority, by resolution, authorized the execution in its behalf of a tripartite contract between it, Wachovia Bank & Trust Company and College Foundation, Inc., which contract was executed, and a copy of which is made a part of the complaint.

7. The Authority issued the said bonds and sold them in accordance with the said contracts.

8. The proceeds from the sale of the said bonds "have been

used and expended" as prescribed in these contracts "except for certain funds which are still on hand."

9. The Wachovia Bank & Trust Company, as fiscal agent for the Authority, "has expended bond proceeds for the purchase of student loans."

10. The Wachovia Bank & Trust Company, as fiscal agent for the Authority, "has expended bond proceeds * * * for various items of expense."

11. The Wachovia Bank & Trust Company, as fiscal agent for the Authority, "is collecting student loan payments" from College Foundation, Inc., pursuant to the above mentioned bond resolution and contracts.

12. The Wachovia Bank & Trust Company, as fiscal agent for the Authority, "has paid" interest to bondholders as provided in the said bond resolution.

13. The Wachovia Bank & Trust Company, as fiscal agent for the Authority, "has allocated and separated bond funds and proceeds in accordance with said bond resolution, contract and agreement."

14. The Authority has, by resolution, authorized its officers and employees to proceed with steps for the issuance of "an additional series of bonds in the amount of $3,000,000 pursuant to the aforesaid bond resolution" and is "threatening" to issue such bonds "under said resolution for use and expenditure in making or buying student loans during the academic year of 1969-1970."

15. "[I]n so doing [the Authority] will cause to be expended tax revenues of the State of North Carolina in the manner set forth in Paragraph XIV of this complaint [Items 16 through 19, below]."

16. The General Assembly of 1967 appropriated funds from the general tax revenues, paid by the plaintiff and other taxpayers, for use by the Authority "in the performance of its *lawful functions* during the period from July 1, 1967, through June 30, 1969." (Emphasis added.)

17. From these appropriated funds there "have been, within the provisions of the applicable budget laws and regulations of the State of North Carolina, made available to the Authority" funds for salaries, per diem allowances and expenses of directors and employees of the Authority and "for other necessary office costs."

18. "[T]he Authority has used monies so appropriated in furtherance of the issuance by the Authority" of the first $3,000,000 in

bonds, including payment of expenses of its Secretary incurred in traveling to New York on October 3, 1968 for the purpose of executing such bonds.

19. "[I]n expressing its intent to issue a further series of these bonds as was expressed in its resolution of February 28, 1969, the Authority has indicated that additional tax funds will be expended unless the Court prevents this from taking place by granting the relief herein sought," which expenditures of tax funds will result in irreparable loss to the State and to its taxpayers, including the plaintiff.

[12] The plaintiff alleges that the statute vests in the Authority power to issue only bonds which do not pledge the credit of the State. G.S. 116-209.12 expressly provides: "Bonds issued under the provisions of this act shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the revenues and other funds provided therefor. Each bond issued under this act shall contain on the face thereof a statement to the effect that * * * neither the faith and credit nor the taxing power of the State or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds." The form of the bonds is set forth in the resolution attached to the complaint and provides that the bond is payable "solely from the special fund provided therefor as hereinafter set forth." It further provides that the bond shall not be deemed to constitute a debt or obligation of the State or of any political subdivision thereof and "neither the faith and credit nor the taxing power of the State of North Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on this bond."

It is necessarily true that the plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds of which he complains and has no interest therein, except his general interest as a member of the public in good government pursuant to the Constitution. It is equally apparent that this is his only interest in the care and use of the proceeds of the bonds by the Authority and its fiscal agent and in the use and handling of funds received by the Authority, or for its benefit, from the Federal government or from private sources.

Consequently, provisions of the bond resolution and of the contracts of which the plaintiff complains, with reference to the care, allocation, handling and use of the proceeds of the bonds threaten no injury to the plaintiff in his status as taxpayer. The same is true

with reference to the provisions of the tripartite contract concerning the services to be rendered by College Foundation, Inc., in the collection from students of payments upon their notes or other obligations. The same is true of each of the acts of the fiscal agent for the Authority of which the plaintiff complains. In these respects there is no distinction between the series of bonds which the Authority is alleged to have issued prior to the institution of this action and the series of bonds which it is alleged to be "threatening to issue."

[13] It being alleged that the appropriation of funds from the "general tax revenues" of the State was for use by the Authority "in the performance of its lawful functions" and the Authority having been established by statutes, not attacked by the plaintiff, which statutes purport to confer upon it authority to perform certain functions, the appropriation, as such, is not subject to attack by the plaintiff in this action.

[14] The only specific use of funds, so appropriated from tax revenues, of which the plaintiff complains is the expenditure for the travel expenses of the Secretary of the Authority on October 3, 1968. Assuming, without deciding, that such expenditure was an unlawful use of appropriated funds, it was an accomplished fact prior to the institution of this action and cannot be prevented or redressed by the issuance of the injunction prayed for. *Jackson v. Jernigan,* 216 N.C. 401, 5 S.E. 2d 143.

[15] The general allegation that, by expressing its intent to issue a further series of bonds, the Authority has indicated that "additional tax funds will be expended" unless enjoined by this Court is not sufficient basis for such relief. This allegation is consistent with a contemplated use of funds appropriated from tax revenues for "lawful functions" of the Authority, such as the payment of salaries and expenses of employees engaged in the performance of functions authorized by G.S. 116-201 to G.S. 116-209.

[16] Thus, the plaintiff has not alleged facts showing, and the stipulated facts do not show, that any contemplated or threatened use of funds or other activity of the defendants will, if accomplished, result in any injury to the plaintiff, as a taxpayer or as a shareholder of any corporation. Consequently, the constitutional questions which he has sought to raise in this action are not before us and we express no opinion with reference thereto.

The plaintiff further alleges that the actions and proposed actions of the defendants, of which he complains as above set forth, are in conflict with the provisions of the Act of 1967 (G.S. 116-209.1

to G.S. 116-209.15), assuming the constitutionality of that Act, in the following respects:

1. The powers conferred upon the fiscal agent by the bond resolution are not consistent with these statutes in that the function of the fiscal agent under the resolution is that of a trustee.

2. The powers vested in the fiscal agent by the bond resolution are inconsistent with the constitutional and statutory powers of the State Treasurer, the complaint not specifying the nature of the alleged conflict.

3. The provisions of the bond resolution with reference to the handling of funds and their allocation to specified accounts are in conflict with the provisions of these statutes, the complaint not specifying the nature of the conflict.

4. The tripartite contract is in conflict with the statutes, the complaint not specifying the nature of the alleged conflict.

5. The powers vested in College Foundation, Inc., by the tripartite contract are in conflict with the statutes, the complaint not specifying the nature of the alleged conflict.

6. The use of proceeds of the bonds to purchase existing student loans already held by College Foundation, Inc., is an unlawful expenditure of such funds for the reason that such purchase did not provide additional loan funds for students and thus such use or proposed use of proceeds of the bonds is not consistent with the purposes of the statutes.

If each of these allegations be true, as to which we express no opinion, the plaintiff, in his capacity as taxpayer or in his capacity as the holder of corporate stock, has suffered no injury and will suffer no injury by the actions or proposed actions of which he complains. He is, therefore, not entitled to injunctive relief on the basis of these allegations.

[17, 18] With reference to the alleged uses and proposed use of funds appropriated by the General Assembly from the general funds of the State for use by the Authority, we note that the only appropriation mentioned in the complaint was for the two-year period ending 30 June 1969. Appropriated funds not used prior to that date would revert automatically to the general fund. Furthermore, since the superior court denied the prayer for injunctive relief and dismissed the action on 31 March 1969, we have no assurance in the record that the entire amount of such appropriation was not expended prior to the hearing and decision of the appeal by this Court. Ob-

viously, an injunction will not issue to prevent that which has already been done. *Jackson v. Jernigan, supra.* The mandatory injunction prayed for obviously could not be issued in this action so as to require employees of the Authority and others, to whom the Authority has paid salaries and other items, to refund such amounts, such persons not being parties hereto.

There was no error in the denial by the superior court of the relief sought by the plaintiff or in its decree that the plaintiff be nonsuited and that this action be dismissed. There was, however, error in that portion of the judgment of the superior court adjudging that the Authority "is lawfully authorized and empowered to perform all of the acts set forth in Chapter 1177, Session Laws of 1967, and in the manner in which the findings of fact disclosed that it has proceeded to do this." These questions were not properly before the superior court. For the same reason, there was error in the inclusion in the judgment of the several conclusions of law stated therein and quoted above in the statement of the facts. The erroneous portion of the decree and these conclusions of law are, therefore, stricken from the judgment. As so modified, the judgment of the superior court is affirmed.

Modified and affirmed.

CITY OF RALEIGH v. NORFOLK SOUTHERN RAILWAY COMPANY

No. 31

(Filed 11 July 1969)

1. Municipal Corporations § 35; Railroads § 2— municipal ordinance requiring reconstruction of railroad trestle — allocation of cost

Where a municipality, pursuant to its police power, seeks to compel a railroad to reconstruct a trestle at its full or partial expense, the allocation of the cost is a part of its legislative function.

2. Constitutional Law § 11; Municipal Corporations § 29— municipal police power — judicial review

When an ordinance exercising the municipal police power is properly before the court so as to present a justiciable controversy, it is the province of the court to determine whether the police power has been exercised within constitutional limits.

3. Constitutional Law § 13; Municipal Corporations § 35; Railroads § 2— ordinance requiring railroad to rebuild overpass — validity — allocation of cost

The allocation of the cost is a special factor to be considered by the

court in determining the validity of an exercise of the municipal police power in requiring a railroad to reconstruct an overpass.

4. Constitutional Law § 11— police power of the states

The police power rests in the individual states, and in the exercise thereof the legislature may enact laws, within constitutional limitations, to protect or promote the health, morals, order, safety and general welfare of society.

5. Constitutional Law §§ 8, 11; Municipal Corporations § 29— delegation of police power to municipality

The General Assembly may delegate to a municipality, as an agency of the State, authority to enact ordinances in the exercise of the police power, such ordinances being subject to the same constitutional limitations as are the police powers exercised directly by the State.

6. Constitutional Law § 11— exercise of police power — appellate review

In reviewing an exercise of the police power, it is the sole duty of the court to ascertain whether the act violates any constitutional limitation, the question of public policy being solely within the province of the legislature.

7. Constitutional Law § 11— police power

Generally, the police power can only be exercised by a body possessing legislative power.

8. Municipal Corporations § 29— exercise of municipal police power

Police powers of a municipality are to be carried into effect and discharged through provisions of ordinances or resolutions enacted by the governing authority at a meeting legally called.

9. Declaratory Judgment Act § 1— validity and construction of a statute

The Uniform Declaratory Judgment Act, G.S. 1-253, *et seq.*, furnishes a proper method for determining all controversies relative to the construction and validity of a statute.

10. Declaratory Judgment Act § 1— jurisdiction of court — consent of parties

Parties cannot confer jurisdiction upon a court in declaratory judgment proceedings by consent, stipulation or agreement.

11. Declaratory Judgment Act § 1— justiciable controversy — validity of proposed ordinance

No justiciable controversy determinable under the Declaratory Judgment Act is presented where, pursuant to agreement between plaintiff municipality and defendant railroad, defendant has reconstructed a railway overpass and the parties have submitted to the court for determination the validity of a proposed ordinance which would require the defendant railroad to bear the entire expense of such reconstruction, no wrong having resulted to either party by reason of a proposed ordinance not yet enacted.

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

APPEAL by plaintiff from decision of the North Carolina Court of Appeals filed 26 February 1969 and reported in 4 N.C. App. 1.

This is an action for declaratory judgment brought pursuant to Article 26 of Chapter 1 of the North Carolina General Statutes. The parties are seeking to determine if the City can require defendant railway company to bear the entire cost of constructing a new overpass bridge to replace the original bridge carrying defendant's tracks over Peace Street in the City.

On 18 January 1907 plaintiff City adopted an ordinance granting defendant's predecessor a franchise to construct, maintain, and operate a railroad in Raleigh. Among other things, the franchise gave the railroad the authority to build a bridge for its tracks across Peace Street in accord with certain specifications. Pursuant to and in conformity with these specifications the railroad built the bridge across Peace Street so that the bridge abutments were constructed on the street right of way.

On 2 March 1959 the Raleigh City Council approved a "thoroughfare plan" for the City designating certain streets, including Peace Street, which would be widened to accommodate increased amounts of automotive traffic within the City. The proposed widening of Peace Street required the reconstruction of defendant's bridge and in 1962 the City and defendant railroad jointly prepared plans for a new bridge with the understanding that the City would bear the entire cost. The City Attorney, after learning that the abutments of defendant's bridge were in the City's Peace Street right of way, proposed that the City adopt an ordinance requiring the railway at its own expense to remove the bridge abutments from the right of way and assessing a penalty for the failure to do so within a certain time. The railway appeared before the City Council in opposition to the proposed ordinance, and after extended consideration the parties entered into an agreement, dated 8 January 1963, under which the railroad was to reconstruct the bridge and the parties were to submit to the Superior Court of Wake County the question of which party should ultimately bear the cost of reconstructing the bridge. The City never adopted the proposed ordinance requiring the railroad to remove the bridge abutments from the City's right of way.

At the November 1967 Non-Jury Civil Session of Wake Superior Court Canady, J., made detailed findings of fact relating to the changed conditions which had occurred in the years after the granting of the 1907 franchise to defendant's predecessor. Reference is made to the opinion by Parker, J., of the North Carolina Court of Appeals, reported in 4 N.C. App. 1, for a full statement of the facts

including the findings of fact and conclusions of law of Canady, J., in Wake Superior Court. Here, it is sufficient to note that the change in conditions had been adverse to the railroad economically and that increased motor vehicle traffic, instead of any need for change by the railroad, motivated the reconstruction of the bridge. Judge Canady concluded that it would be an unreasonable exercise of the police power for the City to impose on the railroad the *entire* cost of rebuilding the bridge and entered judgment requiring the City to bear the *entire* cost of the new bridge. From this judgment the City appealed to the Court of Appeals. The Court of Appeals affirmed the judgment of the Wake Superior Court. Pursuant to the provisions of N. C. Gen. Stat. Sec. 7A-30(1), the City appealed to this Court.

Donald L. Smith for plaintiff City of Raleigh.

R. N. Simms, Jr., for defendant Railway Company.

Joyner, Moore & Howison for Southern Railway Co., and Maupin, Taylor & Ellis for Seaboard Coast Line Railroad Company — Amici Curiæ.

BRANCH, J.

The decision of the Court of Appeals is based on the principles set forth in *Winston-Salem v. Southern Ry.*, 248 N.C. 637, 105 S.E. 2d 37.

The majority view in this country recognizes that an ordinance in the interest of public safety, convenience or welfare which requires a railroad to construct or reconstruct, at its expense, passageways over or under streets and highways, without regard to which was first in existence, is a reasonable exercise of the police power. *Atchison, T. & S. F. Ry. v. Public Utilities Commission,* 346 U.S. 346, 98 L. Ed. 51, 74 S. Ct. 92; *Erie R. R. v. Board of Public Utilities Commissioners,* 254 U.S. 394, 65 L. Ed. 322, 41 S. Ct. 169; *Chicago, Mil. & St. P. Ry., v. Minneapolis,* 232 U.S. 430, 58 L. Ed. 671, 34 S. Ct. 400. See also *Atlantic Coast Line R. R. v. Goldsboro,* 155 N.C. 356, 71 S.E. 514, *aff'd,* 232 U.S. 548, 58 L. Ed. 721, 34 S. Ct. 364.

The rationale of these cases is that the public has a superior right to the safe and unimpeded use of streets and highways and since the railroad has obstructed such use, the cost to the railroad is *damnum absque injuria. Missouri Pac. Ry. v. Omaha,* 235 U.S. 121, 59 L. Ed. 157, 35 S. Ct. 82.

In the case of *Winston-Salem v. Southern Ry., supra,* the city's charter provided that the city could require any railroad company,

at its own expense, to construct, maintain and repair crossings at grade, over or under its streets. The governing body of the city enacted an ordinance requiring the defendant railroad to rebuild at its *entire* expense an existing trestle over a city street in order to accommodate increased traffic which would be caused by a proposed city thoroughfare. The city sought a writ of mandamus to enforce the ordinance. The defendant railroad challenged both the ordinance and the charter provision under which it was enacted as being arbitrary, unreasonable and unconstitutional. The defendant railroad introduced evidence of special facts which tended to show that railroads were in a losing competitive fight with other modes of transportation and could no longer effectively pass on costs of improvement and building to the public by rate increases; that benefit from overpass or underpass construction or improvement accrued to their strongest competitors, motor transports; that the municipality received large amounts for street improvement from gasoline taxes and ad valorem taxes on motor vehicles; that there was a strong legislative trend towards relieving railroads from payment of costs for overpass and underpass construction.

The trial court granted mandamus. The Supreme Court reversed the trial court, holding that the ordinance and the charter provisions were unconstitutional as applied to the facts of the case, in that it was an unreasonable exercise of the police power, depriving the defendant of its constitutional right of due process. The Court in so deciding said:

> (T)he police power is subject to all the constitutional limitations which protect basic property rights, and therefore must be exercised at all times in subordination to Federal and State constitutional limitations and guarantees. *Clinard v. Winston-Salem,* 217 N.C. 119, 6 S.E. 2d 867; *Brewer v. Valk, supra* (204 N.C. 186); *Clinton v. Oil Co.,* 193 N.C. 432, 137 S.E. 183; *S. v. Whitlock,* 149 N.C. 542, 63 S.E. 123; *S. v. Williams,* 146 N.C. 618, 61 S.E. 61.
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> . . . (W)hat was at one time regarded as an improper exercise of the police power may now, because of changed conditions, be recognized as a legitimate exercise of that power. *Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78; *Miller v. Board of Public Works, supra;* 11 Am. Jur., Constitutional Law, Sec. 253. Similarly, a police regulation or measure, although valid when promulgated, may become unreasonable and confiscatory

in operation as a result of later events or changed conditions. *Nashville C. & St. L. R. Co. v. Walters, supra.*

. . .

Upon consideration of these special facts and all the surrounding circumstances of the case, we conclude that the ordinance of the City of Winston-Salem requiring the defendant railway company to pay the *entire* expense of rebuilding the trestle amounts to an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by the "law of the land" or "due process" section of the Constitution of North Carolina. Article I, Section 17. (emphasis ours)

See *Nashville, C. & St. L. Ry. v. Walters,* 294 U.S. 405, 79 L. Ed. 949, 55 S. Ct. 486.

The case of *Winston-Salem v. Southern Ry., supra,* applies well-recognized constitutional principles and, without overruling the majority view, reaches its conclusions by factual distinctions based principally on absence of the elements of public safety and danger to the public. It is important to note that in that case the Court concluded that the ordinance requiring the defendant to pay "the *entire* expense of rebuilding the trestle amounts to an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by the 'law of the land' or 'due process' section of the Constitution of North Carolina, Article I, Section 17." (Emphasis ours)

Our courts are thus confronted with the enigma of what portion of the costs may be allocated to the railroad by the city without constituting the exercise of its police power unreasonable and arbitrary. Clearly, the proper forum for relief is the legislative. The Legislature has enacted statutes authorizing the Highway Commission to allocate the costs in eliminating or safeguarding grade crossings, underpasses, or overpasses, where any road or street forming a part of the State Highway System is concerned (N. C. Gen. Stat. #136.20(b)) and has further authorized the Utilities Commission to require the raising or lowering of any tracks or roadways at any grade crossing in a road or street not forming a link in or part of the State Highway System (N. C. Gen. Stat. #62-223) and to allocate the costs thereof. The statutory formula for allocation of the costs provides "that the cost of construction of such underpass or overpass or the installation of such safety device shall be allocated between the railroad company and the Commission in the same ratio as the net benefits received by such railroad company from the

project bear to the net benefits accruing to the public using the highway, and in no case shall the net benefits to any railroad company or companies be deemed to be more than ten per cent (10%) of the total benefits resulting from the project." N. C. Gen. Stat. § 136-20(b).

This legislative trend is further indicated by the Federal Highways Act of 1958, 23 U.S.C. § 130 (1964), under which railroads are required to pay for overpasses or underpasses where federal money goes into the projects only in proportion to the benefits received, and in no case are the railroads required to pay in excess of ten per cent of the cost incurred.

At least one jurisdiction has recognized legislative enactments as creating state policy limiting the municipality's general police power. *Memphis v. Southern Ry.*, 167 Tenn. 181, 67 S.W. 2d 552.

[1-3] Whether the same formula and limitations should apply where municipal streets are concerned is a matter for the Legislature. We do not consider it to be the province of the courts to allocate the cost between the municipality and the railroad. Where the municipality, pursuant to its police power, seeks to compel a railroad to reconstruct a trestle at its full or partial expense, the allocation of the cost is a part of its legislative function. When an ordinance exercising the municipal police power is properly before the court so as to present a justiciable controversy, it is the province of the court to determine whether the police power has been exercised within constitutional limits. *State v. Whitaker,* 228 N.C. 352, 45 S.E. 2d 860. In making this decision the allocation of the cost is a special factor to be considered by the court in determining the validity of the exercise of the police power.

The lack of guidelines or standards for the allocation of costs in cases of this nature creates an uncertain and uncharted area in the exercise of municipal police power. This unsatisfactory condition does not, however, warrant the court's intrusion into the legislative area in violation of Article I, Section 8, of the North Carolina Constitution.

We turn to the determinative question of whether a justiciable controversy is here presented.

[5-8] The police power rests in the individual states, and in the exercise thereof the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731; *State v. Whitaker, supra.* The General Assembly may delegate to a municipality, as an agency of the State, authority to enact

ordinances in the exercise of the police power. *State v. Scoggins,* 236 N.C. 1, 72 S.E. 2d 97. However, the municipality has only such powers as are delegated to it, and such powers are, of course, subject to the same constitutional limitations as are police powers exercised directly by the State. *Winston-Salem v. Southern Ry., supra.* In reviewing the exercise of the police power, it is the sole duty of the court to ascertain whether the act violates any constitutional limitation, the question of public policy being solely within the province of the legislature. *State v. Whitaker, supra.* Generally, the police power can only be exercised by a body possessing legislative power, 16 C.J.S., Constitutional Law § 177 (1956), and it is generally accepted that the police powers of a municipality are to be carried into effect and discharged through provisions of ordinances or resolutions enacted by the Council or other governing authority at a meeting legally called. 37 Am. Jur. Municipal Corporations § 52 (1941; 2 McQuillin, Municipal Corporations § 10.30, at 816 (3d ed. 1966 rev. vol.)

[9] The Uniform Declaratory Judgment Act, codified as N. C. Gen. Stat. § 1-253 *et seq.,* furnishes a proper method for determining all controversies relative to the construction and validity of a statute. *Woodard v. Carteret County,* 270 N.C. 55, 153 S.E. 2d 809.

N. C. Gen. Stat. § 1-254 states:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

In the case of *Angell v. Raleigh,* 267 N.C. 387, 148 S.E. 2d 233, citizens and taxpayers of the City of Raleigh instituted a proceeding under the Declaratory Judgment Act to determine the validity of an ordinance authorizing the City to grant licenses for installation and operation of a community antenna television system. No licenses had been issued by the City. The trial court held the ordinance valid. This Court held that no justiciable controversy existed, and in part stated:

> In the case of *Lide v. Mears,* 231 N.C. 111, 56 S.E. 2d 404, Ervin, J., speaking for the Court, said:

"There is much misunderstanding as to the object and scope of this legislation (the Uniform Declaratory Judgment Act). Despite some notions to the contrary, it does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450; *Allison v. Sharp*, 209 N.C. 477, 184 S.E. 27; *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532; Anderson on Declaratory Judgments, Section 13. This observation may be stated in the vernacular in this wise: The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice."

. . .

In the case of *Development Co. v. Braxton*, 239 N.C. 427, 79 S.E. 2d 918, in 1950 the Federal Government by contract leased to plaintiff, a domestic corporation, a certain tract of land lying entirely within Cumberland County. The lease was for a period of 75 years. The lessee obligated itself to construct and maintain on said leased land a housing project of 500 units for Army personnel.

In 1952 Cumberland County notified plaintiff that said property of plaintiff would be assessed for *ad valorem* taxes. The plaintiff, protesting, asserted that said property was not subject to taxation by the county and requested that the question be submitted to the court for decision under the Declaratory Judgment Act. The county agreed, and thereupon the proceeding was instituted.

The question presented for decision was: "Does Cumberland County have the right to levy and collect *ad valorem* taxes on the aforesaid property or any part thereof?

Barnhill, J., (later C.J.) said:

"Here the facts agreed do not set forth a 'question in difference which might be the subject of a civil action.' The defendant County has made no assessment. Neither has it levied upon this or any other property of plaintiff in an attempt to collect a tax on the property involved. No right of plaintiff has been denied or violated. It has suffered no wrong. It has sustained no loss either real or imaginary. On the facts agreed no justiciable question on which the court, in a civil action, could render a judgment is disclosed.

> "Does the County have the right to tax the property of plaintiff which is located on the Fort Bragg Military Reservation? The County asserts this right. Plaintiff denies that it exists. The controversy thus created presents a purely abstract question. Any judgment putting it to rest would be wholly advisory in nature."
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> The appeal was dismissed.
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> In the instant case the City of Raleigh has issued no license pursuant to the provisions of the ordinance alleged to be unconstitutional. Moreover, nothing has been done in connection with said ordinance that has violated any rights of the plaintiffs.

See also *Little v. Wachovia Bank and Trust Co.*, 252 N.C. 229, 113 S.E. 2d 689; *NASCAR, Inc. v. Blevins*, 242 N.C. 282, 87 S.E. 2d 490.

Borchard, Declaratory Judgments, 62 63 (2d ed. 1941) states:

> So, a plaintiff contesting the applicability or validity of restrictive regulations under the police power need do no more than show that they in some way affect him deleteriously. But until the statute or ordinance is passed, the claim of privilege or immunity would be premature.

We find in 2 Anderson, Actions for Declaratory Judgments § 621, at 1415 (2d ed. 1951) the following:

> Indeed it is unnecessary for the assailed statute to have taken effect in order to entitle one whose rights it affects to contest the same by declaratory action. *However, it is well settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment.* (emphasis ours)

In instant case there are five instruments which might appear to support a declaration of rights under N. C. Gen. Stat. § 1-254: the franchise of 1907, the thoroughfare plan adopted on 2 March 1959, the resolution adopted 7 January 1963 relative to the thoroughfare plan, the agreement dated 8 January 1963, and the proposed ordinance to require the railroad to remove the bridge abutments on West Peace Street.

The franchise of 1907 granted to the railroad the right to construct the trestle. The trestle was constructed according to the terms of the franchise, which resulted in the placing of abutments in the right of way on Peace Street. The only way that the city could compel the railroad to remove the abutments is by the passage of an

ordinance in the exercise of its police power. There is no controversy as to the rights of either party under the franchise, since the parties readily concede that the city under the facts here presented has the power to have the bridge reconstructed. The real question presented is which party shall bear the cost. A declaration of the rights of the parties under the franchise will not provide the answer.

The thoroughfare plan which designated certain streets to be widened and the resolution relative to the thoroughfare plan dated 7 January 1963 in no way imposed any obligation on the railroad to remove its bridge abutments so as to create an actual controversy between the city and the railroad.

[10] The agreement of 8 January 1963 amounts merely to a recital of facts and an agreement by the parties to seek a declaration of rights under the Declaratory Judgment Act. Parties cannot confer jurisdiction upon a court in declaratory judgment proceedings by consent, stipulation or agreement. 22 Am. Jur. 2d Declaratory Judgments § 75 (1965).

[11] The very crux of this appeal lies in the construction of a *proposed* ordinance which the city has not enacted. The city has not exercised its granted police power by enacting the proposed ordinance. Proposal of the ordinance offers no assurance of its passage. No wrong has resulted to either party by reason of the proposed ordinance. The facts here alleged and found by the trial judge present a wholly abstract question and our decision on such facts would be purely advisory.

Construing the Declaratory Judgment Act liberally, as required by N. C. Gen. Stat. § 1-264, we hold that the trial court and the Court of Appeals erred in attempting to declare the rights of the parties since no justiciable controversy now exists between them.

The cause is remanded to the Court of Appeals with direction that it enter an order directing the Superior Court of Wake County to vacate the judgment entered and dismiss the action in this cause.

Cause remanded and judgment vacated.

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

SOUTHERN RAILWAY COMPANY v. CITY OF WINSTON-SALEM

No. 32

(Filed 11 July 1969)

1. Constitutional Law § 11— police power of the State

The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people, and has conferred such legislative authority upon the Board of Aldermen of Winston-Salem. G.S. 160-52; G.S. 160-200(6), (7) and (10); Ch. 232, Private Laws of 1927.

2. Railroads § 2— grade crossing — danger to the public — warning devices

Where trains cross a highway or street at grade, the crossing is hazardous and a danger to persons and property, such danger being lessened, but not eliminated, by the installation and maintenance of automatic signal devices.

3. Railroads § 2— grade crossing warning devices — benefits to railway company

Automatic signalling devices at grade crossings benefit the railway company (1) by reducing the risk of liability for personal injury and property damage claims growing out of collisions at the crossings, and (2) by reducing the risk of damage to its own equipment.

4. Municipal Corporations § 35; Railroads § 2— ordinance requiring grade crossing warning device — validity

Board of Aldermen of Winston-Salem had authority to provide that automatic signal devices be constructed and maintained at grade crossings of railway's tracks with city streets.

5. Highways and Cartways § 4; Municipal Corporations §§ 33, 35— city streets — State highway system — sufficiency of evidence

In this action to determine the validity of a municipal ordinance requiring a railway to install automatic signal devices at two grade crossings and allocating the costs of the signals between the municipality and the railway, findings by the trial court that the streets in question are not links in or parts of the State-maintained system of roads, that no State Highway funds have been used in the construction or maintenance thereof, and that the State Highway Department has never exerted or attempted to exert any control over such streets or either of the grade crossings *are held* supported by competent evidence.

6. Constitutional Law §§ 13, 23; Municipal Corporations § 35; Railroads § 2— allocation of costs of grade crossing warning devices

A municipality has authority, in the exercise of its police power to promote public safety and convenience, to allocate to the railway company some portion of the costs of the installation and maintenance of automatic signal devices at grade crossings of its tracks with city streets, such allocation constituting a denial of the railway company's constitutional right to substantive due process only if the proportion of the costs allocated to

it is so unreasonable as to constitute an arbitrary taking of the railway company's property.

7. Constitutional Law §§ 13, 23; Municipal Corporations § 35; Railroads § 2— municipal ordinance allocating costs of grade crossing warning device — constitutionality

Railway company's constitutional right to substantive due process was not violated by a municipal ordinance requiring the railway company to pay 63% of the cost of installing automatic signal devices at two grade crossings of its tracks with city streets and all of the annual cost of maintenance thereof, such allocation of costs being reasonable under the existing facts and circumstances.

8. Highways and Cartways § 4; Railroads § 2— cost allocation for grade crossing improvements — G.S. 136-20 and G.S. 62-237

The cost allocation formula for grade crossing safety devices and the limitation on the percentage of such costs to be borne by the railway company prescribed in G.S. 136-20 does not apply where the streets involved, at the location of the crossings, are not links in or parts of the State Highway System, and the cost allocation formula and limitation prescribed in G.S. 62-237 do not apply where the raising or lowering of tracks or roadway at a grade crossing in a road or street not forming a link in or part of the State Highway System is not involved.

9. Municipal Corporations §§ 33, 35; Railroads § 2— allocation of costs of grade crossing improvements — State policy — municipalities

G.S. 136-20 and G.S. 62-237 do not establish a State policy with respect to the allocation of costs of grade crossing safety devices and other grade crossing improvements which is binding upon the governing body of a municipality in administering city streets.

Appeal by plaintiff under G.S. 7A-30(1) from the Court of Appeals.

Civil action in which plaintiff (Railway Company) seeks a judgment declaring unconstitutional and void, as applied to the factual situations here involved, two ordinances of defendant (City), and an injunction against the enforcement thereof.

The ordinances, adopted March 20, 1967, relate to widely separated grade crossings, *viz.:* (1) The crossing in the northern sector of City where Railway Company's single track crosses 27th Street; and (2) the crossing in the western sector of City where Railway Company's single track crosses Bethesda Road. They require that Railway Company *shall maintain* automatic signal devices at the street approaches to these crossings. Each provides for the payment by City of *one-half of the cost of constructing* the required automatic signal devices "up to a maximum of $5,000.00."

Plaintiff alleged the provisions of these ordinances are unreasonable and arbitrary; that enforcement thereof would constitute an

unlawful taking of plaintiff's property without due process of law; that Section 54 of the Charter of Winston-Salem (Chapter 232, Private Laws of 1927), as applied to the factual situations here involved, is unconstitutional and void; and that, apart from constitutional considerations, the proportion of costs allocated to Railway Company exceeds the maximum permissible under designated General Statutes declaratory of State policy, including G.S. 136-20.

In its answer, in addition to a general denial of plaintiff's crucial allegations, City alleged that each of the crossings, under existing conditions, constitutes "a hazard to persons and property" on account of "the lack of any signaling devices warning of approaching trains"; that the safety of the public required "that proper signaling devices be installed at both crossings"; and that the challenged ordinances were enacted by its Board of Aldermen in the exercise of City's authority "to enact such ordinances as are necessary to protect and safeguard the health, safety and general welfare of the public." City's answer contains no reference to Section 54 or any other portion of City's Charter.

It was stipulated "that the Court might hear the evidence without a jury, make determinations of fact if any issues of fact arose during the trial, reach conclusions of law and enter a judgment. . . ." The judgment recites that, "upon the evidence presented," the court found the facts set forth in paragraphs numbered 1 through 42. The court, as a basis for Findings of Fact Nos. 1 through 37, adopted, with immaterial variations, the facts which were stipulated (for the purposes of this case) by the parties. The paragraphs designated Findings of Fact Nos. 38 through 42 include legal conclusions as well as factual findings based on evidence.

Reference is made to the statement of facts by Parker, J., in his opinion for the Court of Appeals, for a full and accurate summary of the stipulated (admitted) facts and of the findings to which Railway Company excepted. Restatement at length is deemed unnecessary.

Based upon the findings of fact set forth therein, and in accordance with his stated conclusions of law, Judge Olive adjudged the ordinances valid. He ordered that Railway Company construct the required automatic signal devices and place them in operation within four months from the date of judgment; that City reimburse Railway Company "for one-half (½) of the cost of installation of such automatic signal devices at each crossing, up to a maximum of $5,000.00 for each crossing"; and that Railway Company "shall thereafter maintain said signals. . . ."

In appealing to the Court of Appeals, Railway Company assigned errors based on its exceptions (1) to certain of the findings of fact set forth in the paragraphs designated Findings of Fact Nos. 39 through 42, (2) to each and all of the conclusions of law set forth in the judgment, and (3) to the judgment itself. Upon appeal, the judgment was affirmed. 4 N.C. App. 11, 165 S.E. 2d 751.

Joyner, Moore & Howison; Deal, Hutchins & Minor; and William K. Davis for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson and Thomas E. Capps for defendant appellee.

Maupin, Taylor & Ellis for Seaboard Coast Line Railroad Company, amicus curiæ.

Bobbitt, J.

[1] The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. It has conferred this legislative authority upon the Board of Aldermen of City by the General Statutes codified as G.S. 160-52 and G.S. 160-200(6), (7) and (10) and by Chapter 232, Private Laws of 1927, City's Charter.

City, in its brief, quotes the following portions of Section 54 of City's Charter, *viz.*: "The city of Winston-Salem shall have the control and supervision of all street crossings where railroads and street car tracks intersect or cross its streets, whether such crossings be at grade, over or under its streets. . . . The said city shall have the power to require such railroad company or street railway company, *at its own expense,* to construct, maintain and repair all such crossings at grade, over or under its streets as aforesaid. . . ." (Our italics.)

In *Winston-Salem v. R. R.*, 248 N.C. 637, 105 S.E. 2d 37, City relied upon the quoted portions of Section 54 of City's Charter as authority for the ordinance then under consideration. The ordinance required Railway Company, *at its entire expense,* to rebuild its overpass trestle at entended length so that the width of the space under the trestle available for vehicular traffic would be sufficient to accommodate, in addition to existing traffic on Northwest Boulevard, the traffic on a street *to be opened* (Broad Street Extension) and to cross Northwest Boulevard under the trestle. This Court held the portion of Section 54 of City's Charter purporting to authorize the requirement that Railway Company rebuild the overpass trestle "at

its own expense" was unconstitutional and void, as applied to the facts of that case, in that it constituted "an unreasonable exercise of the police power, amounting to an invasion of the company's property rights in violation of the constitutional guarantee provided by the 'law of the land' or 'due process' section of the Constitution of North Carolina. Article I, Section 17." *Id.* at 655.

The quoted portions of Section 54 *purport* to authorize City to require a railroad company to construct, maintain and repair the crossings "at its own expense." They do not refer to the construction, maintenance or repair of automatic or other signaling devices.

The ordinances now under consideration contain no reference to the quoted portions of Section 54 or any other provision of City's Charter. City, in its answer, asserted that its authority for the ordinances now under consideration derives from the police power conferred upon it by the General Assembly. Judge Olive and the Court of Appeals so held. If otherwise applicable, the quoted portions of Section 54 establish no rule or formula *for apportionment* of the improvement costs as between the municipality and the railroad company.

The stipulated (agreed) facts support Judge Olive's Finding of Fact No. 41 that the grade crossing at 27th Street and the grade crossing at Bethesda Road "constitute hazardous crossings and a danger to persons and property." Plaintiff's exception to this finding of fact is without merit.

[2, 3] The present factual situations are well and accurately distinguished from that involved in *Winston-Salem v. R. R., supra,* by Parker, J., in his opinion for the Court of Appeals. Where trains cross a highway or street at grade, the crossing is hazardous and a danger to persons and property. The danger is lessened, but not eliminated, by the installation and maintenance of automatic signal devices. Without doubt, these benefit Railway Company (1) by reducing the risk of liability for personal injury and property damage claims growing out of collisions at the crossings, and (2) by reducing the risk of damage to its own equipment.

Finding of Fact No. 38 establishes that "(t)he cost of installing a standard railroad crossing flashing light signal is approximately $13,250.00 for each installation, with annual maintenance costs for each installation of approximately $750.00; and, the standard light fixtures to be angled to the west and east at an approximate additional cost of $300." Assuming $13,550.00 would be the cost of construction at each crossing, the ordinances require that Railway Com-

pany pay approximately 63% ($8,536.50 plus) thereof and all (approximately $750.00) of the annual cost of maintenance.

[4] The Board of Aldermen had authority to provide that automatic signal devices be constructed and maintained at each of the crossings here involved. The crucial question is whether the Board of Aldermen had authority to allocate the costs of construction and maintenance in this manner.

[5] Railway Company excepted to Judge Olive's findings that the portion of 27th Street between Farmall Street and Liberty Street and that Bethesda Road (formerly Maplewood Avenue) between Hawthorne Road and Stratford Road are not links in or parts of the State-maintained system of roads; that no State Highway funds have ever been used in the construction or maintenance thereof; and that the State Highway Department has never exerted or attempted to exert any control or supervision over these portions of 27th Street and of Bethesda Road or over either of the grade crossings. The Court of Appeals held, and we agree, that these findings are supported by competent evidence.

[6] Apart from the quoted portions of Section 54 of its Charter, City had authority, in the exercise of its police power to promote public safety and convenience, to allocate to Railway Company some portion of the costs of the installation and maintenance of automatic signal devices at the two crossings. Allocations so made would constitute a denial of Railway Company's *constitutional right* to substantive due process only if the proportion of the costs allocated to it was so unreasonable as to constitute an arbitrary taking of Railway Company's property.

Having reached the conclusion the Board of Aldermen of City had authority to allocate to Railway Company *some* portion of the costs of the installation and maintenance of automatic signal devices at the two crossings, we must next consider and determine the City's authority to determine *what* portion of the costs is to be allocated to Railway Company.

[7] City contends the authority of its Board of Aldermen to make this determination is subject only to the *constitutional* limitation that the allocation must not be so unreasonable as to constitute an arbitrary taking of Railway Company's property. Accepting this contention, Judge Olive held the allocation made by City's Board of Aldermen did not constitute a denial of Railway Company's *constitutional* right to substantive due process. In accord with these bases of decision, the Court of Appeals affirmed Judge Olive's judg-

ment. For the reasons set forth clearly and cogently by Parker, J., in his opinion for the Court of Appeals, we agree. Further elaboration is deemed unnecessary.

Plaintiff contends the General Assembly, by the enactment of G.S. 136-20 and G.S. 62-237, has adopted a State policy with reference to the allocation of costs in connection with crossing improvements. In support thereof, plaintiff cites *City of Memphis v. Southern Ry. Co.*, 67 S.W. 2d 552 (Tenn. 1934).

G.S. 136-20 applies "(w)henever any road or street *forming a link in or a part of the State highway system* . . . shall cross or intersect any railroad at the same level or grade. . . ." (Our italics.) Subsection (b) provides that, when the State Highway Commission orders a railroad company "to install and maintain gates, alarm signals or other approved safety devices," such order "shall specify that the cost of . . . the installation of such safety device shall be allocated between the railroad company and the Commission in the same ratio as the net benefits received by such railroad company from the project bear to the net benefits accruing to the public using the highway, and in no case shall the net benefit to any railroad company or companies be deemed to be more than ten percent (10%) of the total benefits resulting from the project." Subsection (h) provides: "The cost of maintenance of safety devices at all intersections of any railroad company and any street or road *forming a link in or a part of the State Highway System* which have been constructed prior to July 1, 1959 or which shall be constructed thereafter shall be borne fifty per cent (50%) by the railroad company and fifty per cent (50%) by the Highway Commission." (Our italics.)

G.S. 62-237 provides that the North Carolina Utilities Commission "may require the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System and designate who shall pay for the same by partitioning the cost of said work and the maintenance of such crossing among the railroads and municipalities interested in accordance with the formula provided for grade crossing alterations or eliminations on the State Highway System in G.S. 136-20(b)."

[8] G.S. 136-20 does not apply because the streets here involved, at the location of the crossings, are not links in or parts of the State Highway System. G.S. 62-237 does not apply because here "the raising or lowering of any tracks or roadway at any grade crossing in a road or street not forming a link in or part of the State Highway System" is not involved.

It is noted that the Federal statute now codified as 23 U.S.C. § 130(b), which relates to the allocation of costs where Federal funds are involved, provides: "The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project."

The formula and *statutory* limitation prescribed in G.S. 136-20 and in G.S. 62-237 apply only to the specific factual situations set forth therein. They do not apply to the factual situations here involved. The General Assembly, if it sees fit to do so, may enact legislation providing that a similar formula and limitation shall apply to the allocation by the governing body of a municipality of the costs of installation and maintenance of "gates, alarm signals or other approved safety devices," or of other crossing improvements. Whether this should be done is a policy question to be answered by the Legislature and not by the courts.

[9] Admittedly, the primary thrust of the decision in City of Memphis v. Southern Ry. Co., supra, is in accord with plaintiff's contention. Suffice to say, that decision is not authoritative in this jurisdiction. Our view is that, although G.S. 136-20 and G.S. 62-237 may indicate a legislative trend in the field of allocating costs of grade crossing improvements, these statutes fall short of establishing a State policy applicable to factual situations other than those to which they relate in express and specific terms.

The decision of the Court of Appeals and opinion of Parker, J., for that court, are in all respects approved and affirmed.

Affirmed.

BERNADINE WILES, d/b/a CENTERVIEW TAXI v. RALPH P. MULLINAX, JR., AND MULLINAX INSURANCE AGENCY, INC.

No. 36

(Filed 11 July 1969)

1. Insurance §§ 4, 6; Appeal and Error § 68— construction of insurance binder — former appeal

Construction of alleged insurance binders and their legal effect are questions for the court, not the jury, and determinations of these questions by the Supreme Court upon a prior appeal are conclusive.

2. Contracts § 12; Insurance § 6— construction of two attached documents

Two sheets attached together as parts of a single communication must be construed as one document.

3. Insurance § 4— sufficiency of purported binder

Document setting forth terms of former workmen's compensation insurance policy issued to plaintiff by one company and document attached thereto purportedly binding a second company to provide like coverage for plaintiff upon expiration of the old policy *are held* sufficient, when construed together, to constitute a binder for the second company to provide such coverage effective upon expiration of the old policy.

4. Insurance § 4; Principal and Agent § 5— issuance of binders—authority of insurance agent—credibility of evidence

The credibility of testimony by insurance agent that he issued alleged insurance binders and of the evidence of his authority from the insurance company to issue such documents is for the jury to determine.

5. Insurance §§ 2, 4, 11— failure of agent to procure insurance coverage — binders — authority of agent

Defendant insurance agents would not be liable in this action for damages allegedly sustained as a result of their negligent failure to procure for plaintiff a renewal or rewriting of workmen's compensation insurance if they issued a binder for such coverage on behalf of either of two insurance companies, and if they had authority from either company to issue such a binder for it, there being no contention and no evidence that any binder issued by defendants for either insurance company was cancelled by such company in the manner prescribed by G.S. 97-99(a).

6. Insurance §§ 2, 4; Principal and Agent § 5— extent of insurance agent's authority — competency of testimony by agent

Testimony by an insurance agent as to the extent of his authority to bind an insurance company for a particular risk is competent upon that question, though not conclusive.

7. Insurance §§ 2, 4; Principal and Agent § 5— authority of insurance agent to issue binder — competency of company's application form

An application form issued by an insurance company for use by its agents and acknowledged by defendant insurance agent to have been in

his office at the time an alleged insurance binder was issued by the agent on behalf of the insurance company, which form states that under certain conditions the agent may not bind the risk, is competent upon the question of the authority of the agent to issue such a binder.

8. Insurance § 4; Principal and Agent §§ 5, 7— insurance binders — limitations on agent's authority

Where all the evidence is to the effect that plaintiff, at the time in question, knew nothing of an alleged agency of defendant for a particular insurer and did not know that an alleged binder for plaintiff's coverage had been issued by defendant on behalf of such insurer, rules applicable to apparent authority do not apply, and a limitation upon the authority of defendant agent to issue such binder, imposed by the insurer and communicated to the agent, is effective though the limitation was not known to plaintiff and though it was forgotten or overlooked by the agent at the time the supposed binder was issued; such limitation may, however, be rescinded by habitual disregard of it acquiesced in by the insurer.

9. Insurance §§ 2, 4; Principal and Agent § 5— agency agreement — authority to issue insurance binders — evidence of issuance of such binders by agent

Where defendants' agency agreement with an insurance company does not state clearly their authority to issue binders for workmen's compensation insurance but is susceptible to such construction, testimony by the individual defendant that from time to time, prior to and since the date in question, defendants have issued such binders on behalf of the insurance company would be sufficient, if found to be true, to establish the construction of the agency agreement by the parties thereto, and would be sufficient evidence to support a finding that they had such authority generally.

10. Insurance §§ 2, 4; Principal and Agent § 5— limitation on authority of agent to issue binder

Limitation placed by insurance company on authority of insurance agents to bind a risk which had been rejected by another insurer, if found by the jury to have been in effect at the time the alleged binder in question was issued, would deprive the agents of the authority to issue such binder on behalf of the insurer, where the evidence shows that the alleged binder was issued by the agents after they were notified that another insurer refused to issue the proposed policy.

11. Insurance §§ 2, 4; Trial § 35— agent's failure to procure insurance — binders — instructions — burden of proof

In this action for damages allegedly sustained as the result of the negligent failure of defendant insurance agents to procure for plaintiff a renewal or a rewriting of workmen's compensation insurance and their negligent failure to notify plaintiff that they had not obtained such coverage, defendants contending that plaintiff had such coverage on the date in question through binders issued by them on behalf of two separate insurance companies, the court erred in giving the jury instructions which left the

jury free, in its unguided discretion, to find that defendants negligently failed to procure such coverage for plaintiff even though it believed defendants' evidence that they issued one or both of the alleged binders and had authority from the company or companies to do so, such instructions erroneously placing upon defendants the burden of proving their performance of their undertaking.

12. Evidence § 5— burden of proof

Plaintiff must allege and prove all the essential elements of his cause of action, even though stated in the negative form.

13. Evidence § 9— definition of affirmative defense

Affirmative defenses are those which, in their nature, admit the matters so alleged by the plaintiff but assert other matters which, if true, will defeat plaintiff's right to recover.

14. Insurance §§ 2, 11— agent's failure to procure insurance — burden of proof

In an action for damages allegedly sustained as a result of the negligent failure of defendant insurance agents to procure for plaintiff a renewal or rewriting of workmen's compensation insurance, failure of defendants to procure the insurance coverage for plaintiff in accordance with their undertaking is an essential element of plaintiff's cause of action and she has the burden of proof upon that phase of the case.

15. Trial § 35— burden of proof — conflicting instructions

Instruction erroneously placing the burden of proof of an issue upon defendant is not cured by an earlier instruction which correctly placed the burden of proof of that issue upon plaintiff, since the jury cannot be deemed to have acted upon the correct instruction.

16. Insurance §§ 2, 11; Evidence § 22; Judgments § 36— competency of opinion and award of Industrial Commission — res judicata

In this action for damages allegedly sustained as a result of the negligent failure of defendant insurance agents to procure for plaintiff a renewal or rewriting of workmen's compensation insurance, the trial court erred in the admission of an opinion and award of the Industrial Commission in which it was found that plaintiff had no compensation insurance on the date in question where defendants were not parties to the proceeding before the Industrial Commission, the Commission's findings therefore not being res judicata as to defendants and not competent in this action.

17. Insurance §§ 2, 11; Damages § 13; Trial § 6— amount of damages stipulated — competency of evidence of damages

Where the parties stipulated the amount of damages recoverable, if any, in this action based upon the alleged negligent failure of defendant insurance agents to procure for plaintiff a renewal or rewriting of workmen's compensation insurance, neither a workmen's compensation award by the Industrial Commission to the widow of plaintiff's deceased employee nor portions of defendants' further answer with reference thereto are admissible in evidence, the issue of damages no longer remaining in the case, and the trial court should allow defendants' pretrial motion that plaintiff be

instructed not to refer, in the presence of the jury, to the Industrial Commission award or to allegations in the pleadings relating thereto.

18. Insurance §§ 2, 4, 11; Trial §§ 6, 40— negligent failure of insurance agent to procure insurance — stipulations — binders — authority of agent — issues for jury

In this action for damages allegedly sustained as the result of the negligent failure of defendant insurance agents to procure for plaintiff a renewal or rewriting of workmen's compensation insurance and their negligent failure to notify plaintiff that they had not obtained such coverage, wherein the parties stipulated that defendants undertook to procure such insurance for plaintiff and the amount of damages recoverable, if any, and defendants conceded that they did not notify plaintiff of any failure to procure such coverage, defendants contending that they had in fact obtained for plaintiff workmen's compensation insurance through binders issued by them on behalf of two named insurance companies, the only issue for jury determination is whether defendants failed to procure for plaintiff workmen's compensation insurance as they undertook to do, and the answer to this issue will turn upon the jury's findings as to whether the defendants issued the alleged binder on behalf of either company and whether, if they did, they had authority from such company to bind it upon such risk.

SHARP, J., concurring in part, dissenting in part.

BOBBITT, J., joins in concurring and dissenting opinion.

On certiorari to the Court of Appeals to review its decision reported in 4 N.C. App. 73.

This is an action to recover damages for a loss alleged to have been sustained by the plaintiff as the result of the negligent failure of the defendants to procure a renewal or rewriting of workmen's compensation insurance coverage for the operation of her taxicab business and their negligent failure to notify her that they had not obtained such coverage.

Upon the first of two former appeals in this matter, reported in 267 N.C. 392, 148 S.E. 2d 229, a judgment of nonsuit was reversed. Upon retrial in the superior court, judgment was entered for the plaintiff upon a verdict in her favor. On appeal therefrom, reported in 270 N.C. 661, 155 S.E. 2d 246, a new trial was ordered. Upon the third trial in the superior court, the verdict of the jury was again in favor of the plaintiff and from judgment thereon the defendants appealed to the Court of Appeals. That court ordered another new trial, this being the decision now under review.

The Court of Appeals ordered a new trial on two grounds: (1) The superior court erred in permitting the plaintiff to introduce into evidence, over objection, the opinion and award of the North Carolina Industrial Commission in a proceeding instituted before it against the

present plaintiff and others by the widow of her deceased employee, to which proceeding the present defendants were not parties; (2) the superior court erred in that the effect of its charge to the jury was to place upon the defendants the burden of proving that they had procured the desired insurance coverage.

In the most recent trial in the superior court, the following issues were submitted to the jury without objection by either party:

"1. Did the defendants undertake to procure workmen's compensation insurance coverage for the plaintiff, as alleged in the Complaint?

"2. Did the defendants negligently fail to procure such workmen's compensation insurance coverage, as alleged in the Complaint?

"3. Did the defendants fail to timely notify the plaintiff of their failure to procure workmen's compensation insurance coverage, as alleged in the Complaint?

"4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants?"

The jury answered the first three issues "Yes" and the fourth issue "9,300.00," having been instructed, by consent of the parties, so to answer the first issue.

The complaint alleges that the damages sustained by the plaintiff consisted of $8,400 paid by her, pursuant to the award of the Industrial Commission, as compensation to the widow of her deceased employee, $400 paid by her, pursuant to that award, for funeral expenses, and $500 paid by her as a fee to her attorney for representing her before the Industrial Commission. In the course of the most recent trial in the superior court, counsel for the defendants stipulated that the plaintiff had paid out these amounts. Prior to the commencement of the trial, counsel for the defendants filed a written motion that the plaintiff and her counsel be instructed not to mention in the presence of the jury the decision of the Industrial Commission, stipulating therein that the plaintiff would be entitled to recover these sums, totaling $9,300, if it should be determined that the defendants had negligently failed to procure for the plaintiff the insurance coverage.

The defendants have never contended that, prior to the death of the plaintiff's employee, they notified her that her former policy of insurance, procured for her by them, had expired or that they informed her of their efforts to obtain coverage for her with other insurance companies or of the results of those efforts. Their contention throughout the litigation has been that, at the time of the accident in which the plaintiff's employee was killed, the plaintiff had workmen's compensa-

tion insurance coverage as the result of binders issued by the defendants for her benefit, binding both the Royal Indemnity Company and the Dixie Fire and Casualty Company. The individual defendant testified that he did not notify the plaintiff of any of these matters because she was insured by reason of the binders. It is stipulated that he was at all times an agent of the corporate defendant and acted within the course and scope of his employment.

Williams, Willeford & Boger for plaintiff appellant.

Hartsell, Hartsell & Mills, by William L. Mills, Jr., K. Michael Koontz and Boyd C. Campbell, Jr., for defendant appellees.

LAKE, J.

Upon the first appeal in this matter, reported in 267 N.C. 392, 148 S.E. 2d 229, we held that, when an insurance agent or broker undertakes to procure a policy of insurance for another and is unable to do so, it is his duty to give timely notice of such failure to his customer and, if he fails to do so, he is liable for the damage which his customer suffers as the result of such lack of insurance. Upon the second appeal, reported in 270 N.C. 661, 155 S.E. 2d 246, we held that the defendants, having introduced evidence from which the jury could have found that there was in effect, at the time of the accident, a valid contract of workmen's compensation insurance procured for the plaintiff by the defendants, the defendants were entitled to argue this contention to the jury and were entitled to have the jury instructed upon the principles of law applicable thereto. Obviously, if the defendants procured for the plaintiff the insurance coverage they undertook to procure and that coverage was in effect at the time of the event against which the plaintiff was to be insured, the defendants are not liable to the plaintiff in this action.

At the trial now under review, the parties stipulated that the defendants undertook to procure workmen's compensation insurance coverage for the plaintiff as alleged in the complaint. The amount of damages recoverable, if any, was also stipulated. The defendants have never contended that they notified the plaintiff of any failure by them to procure the insurance coverage they undertook to procure. Their contention throughout has been that they did procure such coverage and hence there was no occasion to give any such notice to the plaintiff. Both the plaintiff and the individual defendant testified that no such notice was given to the plaintiff.

[18] Thus, the sole question for the jury at the trial now under review was whether, at the time of the accident, there was in effect

workmen's compensation insurance coverage procured by the defendants for the plaintiff.

The defendants contend that there was then in effect such coverage by reason of an alleged binder issued by them as agent for Royal Indemnity Company and also by reason of an alleged binder issued by them as agent for Dixie Fire and Casualty Company. The alleged binders are the same documents which were before us upon the second appeal, except that in the present record there is an additional document (defendants' Exhibit E) which the defendants now contend was a part of the alleged binder issued by them as agent for Royal Indemnity Company.

[1] Upon the second appeal we held that the alleged Royal Indemnity Company binder, in the form then before us (defendants' present Exhibit D) was not a binder affording insurance coverage to the plaintiff at the time of the accident for the reason that, by its terms, it covered a different period of time. We also held upon the second appeal that the alleged binder for Dixie Fire and Casualty Company (defendants' present Exhibit G) was sufficient in form and content to constitute a valid binder. As we there said, the construction of these documents and their legal effect were questions for the court, not for the jury. *Strigas v. Insurance Co.*, 236 N.C. 734, 73 S.E. 2d 788; *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E. 2d 666. Our determinations of these questions upon the second appeal are conclusive. *Horton v. Redevelopment Commission*, 266 N.C. 725, 147 S.E. 2d 241; *Glenn v. Raleigh*, 248 N.C. 378, 103 S.E. 2d 482.

Upon the retrial following our decision on the second appeal, the defendants introduced in evidence a new document, their present Exhibit E. The individual defendant testified at the retrial that Exhibit E is a copy of a sheet originally attached to and part of Exhibit D (the document before us on the second appeal) but which had become detached therefrom and lost. Exhibit E. of itself, is not sufficient to constitute a binder though the word "Binder" is written upon it. It cannot be determined from this paper alone what insurance coverage was contemplated. It is addressed to Royal Indemnity Company from the corporate defendant. It states that it is with reference to the plaintiff and further states, "The above mentioned policy expires 11/8/58. Please renew this policy for us." The policy to be "renewed" is not identified on Exhibit E. No other material information appears upon it.

[3] The individual defendant testified on retrial that Exhibit D is "a copy of the front page of the last insurance policy that was issued" (i.e., a policy issued by another company for which the defendants

were then agents) and, with the original of Exhibit E attached thereto, was sent by him to Royal Indemnity Company prior to the accident in which the plaintiff's employee was killed. That is, the individual defendant testified on retrial that Exhibit D set forth the terms of the former policy, which was to expire 8 November 1958, and Exhibit E showed a binder had been issued by the defendants for a replacement policy, with like terms, to be issued by Royal, effective upon the expiration of the old policy.

[2, 3] Two sheets, attached together as parts of a single communication, must, of course, be construed as one document. See: *Stein v. Outdoor Advertising,* 273 N.C. 77, 159 S.E. 2d 351; *Robbins v. Trading Post,* 253 N.C. 474, 117 S.E. 2d 438. So construing Exhibits D and E, we hold that these documents were, in form and content, sufficient to constitute a binder for Royal Indemnity Company covering the period of time in which the accident occurred. The difficulty with reference to the period to be covered by the policy to be issued by Royal, noted in our opinion on the second appeal, is removed by Exhibit E if the testimony of the individual defendant with reference to that document is accepted as true.

[4, 18] The credibility of the testimony of the individual defendant to the effect that he did issue Exhibits D and E, or either of them and that he did issue Exhibit G on the account of Dixie Fire and Casualty Company and of the evidence of his authority from the insurance company in question to issue any such document is for the jury to determine. In view of the above mentioned stipulations and the testimony of the individual defendant that no notice of failure to obtain the desired insurance was given the plaintiff, there was no other question for the jury to determine at the third trial. *Heating Co. v. Construction Co.,* 268 N.C. 23, 149 S.E. 2d 625.

[5] Here, as in the trial reviewed by us upon the second appeal, there was no contention, and no evidence to show, that any binder issued by the defendants, as agent either for Royal Indemnity Company or for Dixie Fire and Casualty Company, was cancelled by such company in the manner prescribed for such cancellation by G.S. 97-99 (a) and *Moore v. Electric Co.,* 264 N.C. 667, 142 S.E. 2d 659. Thus, if the defendants had authority from either insurance company to issue a binder for it in this instance and if the defendants did issue the alleged documents for such company (Exhibit D plus Exhibit E as to Royal Indemnity Company; Exhibit G as to Dixie Fire and Casualty Company), the defendants would not be liable to the plaintiff in this action for the reason that, in such event, the defendants procured for the plaintiff the insurance they undertook to procure. If neither insurance company was so bound, the defendants would be liable in

the amount stipulated, for the evidence of both parties is that no notice of any failure to procure such insurance was given to the plaintiff.

[6] We observe with interest that at none of the three trials of this action has the jury been favored by either litigant with testimony of any official of either insurance company concerning the authority of the defendants to bind it in this instance. The testimony of the individual defendant as to the extent of his authority, and that of the corporate defendant, so to bind either or both of the two insurance companies was, of course, competent upon that question though not conclusive. *Sealy v. Insurance Co.*, 253 N.C. 774, 117 S.E. 2d 744.

[7] Plaintiff's Exhibit 13 was also competent upon that question with reference to Dixie Fire and Casualty Company. This is an application form issued by that company for use by its agents and acknowledged by the individual defendant to have been in the office of the defendants at the time the alleged binder was issued. This form contained the following:

> "6a. Has any policy been cancelled or has any other Insurance Company refused to write a new policy or as a renewal in the past two years? If so, give date, reason and name of such Insurance Company. *(NOTE: If so, do not bind the risk.)*" (Emphasis added.)

[8] The binder alleged to have been issued on behalf of Dixie Fire and Casualty Company could not constitute a defense in this action unless, at the time of the accident resulting in the death of the plaintiff's employee, it constituted a valid contract of insurance between Dixie Fire and Casualty Company and the plaintiff. It did not constitute such contract unless the defendants had actual authority from Dixie Fire and Casualty Company to issue the binder on its behalf. We are not here concerned with apparent authority of the defendants to bind the Dixie Fire and Casualty Company since all of the evidence is to the effect that the plaintiff, at the time in question, knew nothing whatever of the alleged agency of the defendants for that company and did not even know the alleged binder had been issued. Under such circumstances, a limitation upon the authority of an agent, imposed by the principal and communicated to the agent, is effective though the limitation was not known to the third party (the plaintiff) and though it was forgotten or overlooked by the alleged agent at the time the supposed contract was made. See: *R. R. v. Smitherman*, 178 N.C. 595, 101 S.E. 208; 3 Am. Jur. 2d, Agency, § 314. Such limitation may, of course, be rescinded by habitual disregard of it acquiesced in by the principal. See 3 Am. Jur. 2d, Agency, § 352.

[9] Testimony of the individual defendant, at the most recent trial in the superior court, was to the effect that the defendants, from time to time, prior to and since their alleged issuance of the document in question, issued binders for workmen's compensation insurance coverage as agent for Dixie Fire and Casualty Company. Their agency agreement with that company (defendants' Exhibit K) does not state clearly their authority to issue binders for workmen's compensation insurance, but it is susceptible to the construction that they had such authority generally. The testimony of the individual defendant that such binders had been issued on behalf of Dixie Fire and Casualty Company by the defendants, if found by the jury to be true, would be sufficient to establish the construction of the agency agreement by the parties thereto and would be sufficient evidence to support a finding that the defendants had such authority generally. See: *Trust Co. v. Processing Co.*, 242 N.C. 370, 379, 88 S.E. 2d 233; 3 Am. Jur. 2d, Agency, § 352.

[10] There is, however, in the record before us no evidence that the defendants had ever issued on behalf of Dixie Fire and Casualty Company a binder for a risk which had been rejected by another insurance company. The testimony of the individual defendant is that the alleged binder on behalf of Dixie Fire and Casualty Company was issued by the defendants following their receipt of a communication from Royal Indemnity Company that it would not issue the proposed policy for the plaintiff. The insufficiency of that communication to constitute a cancellation of the alleged binder issued on behalf of Royal Indemnity Company does not alter the fact that the company had "refused to write a new policy" covering the plaintiff's risk. Nothing else appearing, the limitation above quoted from plaintiff's Exhibit 13, if found by the jury to have been in effect at the time the alleged binder was issued, would deprive the defendants of such authority as they might otherwise have had to issue a binder on behalf of Dixie Fire and Casualty Company for the plaintiff's risk.

[11] The trial judge first instructed the jury that the burden of proof upon the second issue was on the plaintiff, but thereafter charged: "Now, members of the jury, the document which the defendants contend bound the Dixie Insurance Company on this risk is, in form and content, sufficient to constitute such memorandum of a contract for temporary coverage. And, if you find from the evidence and by its greater weight the supporting evidence concerning the binder, the date which it was mailed to the Dixie Insurance Company, the receipt thereby, the contract between the Dixie Insurance Company and the defendants, if you find the supporting evidence to be true, the same

is *sufficient for you to find* that there was a valid binder issued by the Dixie Insurance Company." (Emphasis added.)

The court's final instruction upon this point was: "The Court charges you that if you believe the evidence of the defendant, you *could* find that there was a valid binder, as the contents of the instrument to Dixie Insurance Company are, in form and content, sufficient to constitute such a memorandum. If you believe the evidence offered by the defendants and if you find the same to be true, *it would support* a finding that a valid binder was issued by the Dixie Insurance Company and the defendant so argues and contends." (Emphasis added.)

These portions of the charge were error prejudicial to the defendants in that by them the jury was left free, in its unguided discretion, to answer the second issue in favor of the plaintiff even though it believed the defendants' evidence that they did issue one or both of the alleged binders and had authority from the company or companies so to do.

The Court of Appeals held that the instruction, first above quoted, was error in that it placed upon the defendants the burden of proving their performance of their undertaking, notwithstanding the court's earlier instruction that the burden of proof upon the second issue was upon the plaintiff. We agree.

[12-14] We are not here concerned with the burden of going forward with evidence to overcome a prima facie case, or to rebut a presumption or inference arising from a failure of a party to offer evidence of facts peculiarly within his own knowledge. See: *Anthony v. Express Co.*, 188 N.C. 407, 124 S.E. 753, 36 A.L.R. 460; 29 Am. Jur. 2d, Evidence, § 131. We are here concerned with burden of proof in its proper sense; i.e., the burden of persuading the jury, all the evidence being in. The test is not whether the specific issue is affirmative or negative in form. *Williams v. Insurance Co.*, 212 N.C. 516, 193 S.E. 728; Stansbury, North Carolina Evidence 2d, § 208; 29 Am. Jur. 2d, Evidence, § 130. The plaintiff must allege and prove all the essential elements of her cause of action, even though stated in negative form. Affirmative defenses, with a few exceptions not here material, are those, which in their nature, admit the matters so alleged by the plaintiff but assert other matters which, if true, will defeat the plaintiff's right to recover. In the present matter, failure of the defendants to procure insurance coverage for the plaintiff, in accordance with their undertaking, is an essential element of the plaintiff's cause of action and she has the burden of proof upon that phase of the case.

[15] The instruction above quoted being error, it would not be cured by the earlier, correct instruction that the burden of proof upon the second issue was on the plainitff. Where the jury is left with both a

correct and an incorrect instruction upon the same point, the jury cannot be deemed to have acted pursuant to the correct instruction. *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163; *Hartley v. Smith,* 239 N.C. 170, 79 S.E. 2d 767.

[16] The Court of Appeals correctly held that it was prejudicial error to admit into evidence, over the defendants' objection, the copy of the award and opinion of the North Carolina Industrial Commission. The opinion stated that the Commission found the plaintiff "had no workmen's compensation insurance with the defendant insurance carriers" (Royal Indemnity Company and Dixie Fire and Casualty Company), and concluded that these insurance companies "had no workmen's compensation insurance policy in force for the protection of defendant employer (the present plaintiff) at the time of the injury by accident" giving rise to the proceeding before the Commission.

As we stated upon the second appeal, the present defendants were not parties to the proceeding before the Industrial Commission and, consequently, the existence or nonexistence of insurance coverage for the plaintiff, at the time of the accident to her employee, is not res judicata as to these defendants by virtue of the findings, conclusions and award of the Commission. That being true, the finding of the Industrial Commission upon that question was not competent evidence in the trial of this action. *Warren v. Insurance Co.,* 215 N.C. 402, 2 S.E. 2d 17; Stansbury, North Carolina Evidence 2d, § 143; Strong, N. C. Index 2d, Evidence, § 22.

The competency of the opinion and award of the Industrial Commission as evidence in the present action was not before us upon either of the former appeals. The first, being an appeal by the plaintiff from a judgment of nonsuit, did not present the question of the competency offered by her and admitted. The record upon the second appeal shows that the plaintiff introduced the opinion and award of the Commission into evidence, over objection, at the trial then under review and that the defendants originally assigned this as error. However, this assignment was not brought forward by the defendants in their brief filed in this Court upon the second appeal and, therefore, was not before us upon that appeal, having been abandoned. Rule 28 of the Rules of Practice in the Supreme Court; Strong, N.C. Index 2d, Appeal and Error, § 45, and cases there cited. The statement in our opinion upon the second appeal that we found no error in the rulings of the trial court with reference to the admission of evidence related, of course, to the rulings which were before us on that appeal. Those were rulings of the trial court excluding evidence offered by the defendants. They had no relation to the admission in evidence of the findings, award and opinion of the Industrial Commission.

[17] Upon the trial now under review, the stipulation as to the amount of damages recoverable, if any, removed from the case the only issue as to which the award and opinion of the Industrial Commission was competent evidence. *Heating Co. v. Construction Co., supra.* As the Court of Appeals observed, the above quoted findings of the Industrial Commission went far beyond the allegations by the defendants in their fourth further answer and their admission into evidence was highly prejudicial to the defendants upon the second issue.

For the same reason, it was error to permit the plaintiff to introduce in evidence portions of the defendants' fourth further answer. Ordinarily, as the Court of Appeals said, admissions by a party in his pleadings may be introduced into evidence by his adversary, though, being judicial admissions, it is not necessary to do so in order to obtain the benefit of them. However, all of the allegations in the fourth further answer related properly to the question of whether the plaintiff paid compensation to the widow of her employee under the compulsion of a valid award by the Industrial Commission; that is, to the issue of the amount of damages recoverable by her, if any. The defendants having stipulated the amount recoverable, if any, after the filing of this answer, this issue no longer remained in the case. *Heating Co. v. Construction Co., supra.* These allegations, which would have been competent upon the issue of damages had it remained for determination, were highly prejudicial to the defendants upon the second issue even though not so devastating in effect as the statements in the opinion of the Industrial Commission.

In view of the stipulation as to damages recoverable, if any, the superior court should have allowed the pretrial motion of the defendants that the plaintiff be instructed not to refer, in the presence of the jury, to the award and opinion of the Industrial Commission or to allegations in the pleadings with reference thereto.

[18] There must be still another trial of this action. At that trial, by reason of the stipulations, above referred to, and the concession by the defendants as to the absence of any notice by them to the plaintiff concerning the presence or absence of insurance coverage, the only issue to be determined by the jury is, Did the defendants fail to procure for the plaintiff workmen's compensation insurance coverage as they undertook to do? The answer to this issue will turn upon the jury's findings as to whether the defendants issued on the account of Royal Indemnity Company the documents designated in the present record as defendants' Exhibits D and E, or issued on the account of Dixie Fire and Casualty Company the document designated in this record as defendants' Exhibit G, and whether, if they did, they had authority from such company to

bind it upon such risk. Only evidence relating to these matters and otherwise competent should be introduced at the new trial. If the jury answers the issue "Yes," judgment should be entered for the plaintiff for $9,300. If the jury answers the issue "No," judgment should be entered in favor of the defendants.

Modified and Affirmed.

PARKER, C. J., did not participate in the decision of this case.

SHARP, J., concurring in part, dissenting in part:

The following facts — which constitute plaintiff's case — are either stipulated or are not controverted:

Defendant is a duly licensed fire and casualty agent as defined by G. S. 58-39.4(1). (In this opinion no distinction will be made between the individual and the corporate defendant.) On 8 November 1952 defendant undertook to procure workmen's compensation insurance for plaintiff, a customer entitled to "automatic renewals." For six years thereafter defendant forwarded to plaintiff — without request from her — policies of workmen's compensation insurance. From 8 November 1956 through 8 November 1958, defendant furnished plaintiff policies issued by Pennsylvania Threshermen and Farmers' Mutual Casualty Insurance Company (P. T. & F.). Defendant's agency contract with P. T. & F. terminated in July 1958, and he was unable to renew plaintiff's coverage with this company. He failed to notify plaintiff of this development or of his subsequent unsuccessful efforts to procure a policy of insurance for her. Defendant never furnished plaintiff any policy, binder, or certificate of insurance covering her workmen's compensation liability after 8 November 1958. On 29 November 1958 one of plaintiff's employees was killed in an accident arising out of and in the course of his employment. Thereafter, plaintiff paid out $8,800 under an order of the North Carolina Industrial Commission for his death and incurred attorneys' fees in the sum of $500.00.

Defendant's evidence tends to show that he undertook to procure coverage for plaintiff from Royal Indemnity Company (Royal) in early October 1958 by sending it a duplicate of his office copy of the front page of the expiring P. T. & F. policy, across the top of which was written "Please issue this policy for us." A copy of this front page was introduced in evidence as defendant's Exhibit D. At the second trial of this case defendant contended that Exhibit D was a binder which provided plaintiff with coverage on 29 November 1958. However, as Lake, J., pointed out in the Court's opinion on the second appeal (270 N.C. 661, 667, 155 S.E. 2d 246, 251), this document "ex-

pressly provided for coverage from 8 November 1957 to 8 November 1958. Thus, by its terms, it would not constitute a binder in force at the time of the injury to the plaintiff's employee."

At the third trial (which we now review), defendant testified that "over the weekend" preceding that trial, he had made out in his own handwriting another document, which was introduced in evidence (over plaintiff's objection) as defendant's Exhibit E. He then asserted that when he mailed Exhibit D to Royal in October 1958 the original of Exhibit E was attached to it; that he had kept a copy of the material which was sent to Royal, but Exhibit E became detached from Exhibit D; that he knows, however, that Exhibit E is an exact copy of the paper which went to Royal.

Exhibit E, as prepared by defendant in 1968—almost ten years after the original was purportedly made—is a form for memoranda. It is undated. At the top defendant's letterhead is imprinted. Thereunder appears the following, the underlined words being handwritten:

Binder

Re: Mrs. Bernadine Wiles T/A Centerview Taxi

Policy No.....

To: Royal Indemnity Co.

Richmond, Va.

From: Mullinax Insurance Agency

The above mentioned policy expires 11/8/58

Please renew this policy for us. See .....below.

☐ 1. Please record Dividend on Renewal.

☐ 2. Dividend Subject to Audit.

☐ 3. This is an Assigned Risk. Please Notify Assured and this Agency the Conditions You will Renew this Policy.

☒ 4. Please send Extra Daily.

Defendant now contends that Exhibit D, together with Exhibit E (which was not in evidence at the second trial), is "in form and content" sufficient to constitute a binder which provided plaintiff with coverage on 29 November 1958 because no notice of cancellation was ever given plaintiff. *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659. The Court accepts this contention and holds that (1) if defendant did

write and send Exhibit E attached to Exhibit D to Royal in October 1958 (as he testified he did), and (2) if defendant was then authorized to issue such a binder, he had provided plaintiff with coverage, and she cannot recover in this action. It also holds that defendant's Exhibit G, if issued and authorized, provided plaintiff with coverage by the Dixie Fire & Casualty Company (Dixie) and precludes her recovery. On this present appeal these conclusions must be considered as established by our decision in the second appeal. However, the majority opinion—upon the premise that the burden is upon plaintiff to show that defendant breached his contract by failing to provide her with insurance—puts the burden upon plaintiff to disprove defendant's assertion that he issued the "binders" or, if he did, to show that he lacked authority to bind the particular company. From this holding I dissent.

The issues submitted in the third trial do not isolate the determinative facts. Other issues will be required to bring into focus the defenses upon which defendant relies and to determine upon whom rests the burden of proof. I suggest the following:

1. Did defendant undertake to procure a policy of workmen's compensation insurance for plaintiff and to renew it annually as alleged in the complaint? (It is now stipulated that he did.)

2. For the period 8 November 1958-8 November 1959 did defendant fail to procure a renewal policy providing the coverage contained in the policies he had previously procured for her? (Defendant does not contend that he secured a policy of insurance for plaintiff or furnished her any document whatever.)

3. Did defendant secure for plaintiff a binder by which Royal Indemnity Company insured her workmen's compensation on 29 November 1958, as alleged in the answer?

4. Did defendant secure for plaintiff a binder by which Dixie insured her workmen's compensation liability on 29 November 1958, as alleged in the answer?

5. What amount of damages, if any, is plaintiff entitled to recover of defendants? (If liable, defendants offer to stipulate that plaintiff's damages are $9,300.00.)

Certainly, the burden of the first, second, and fifth issues is upon plaintiff. However, as this case has now developed, when it is shown that defendant never delivered to her any policy or certificate which provided her with insurance after 8 November 1958, plaintiff becomes entitled to a peremptory instruction on the second issue. In such case, unless defendant produces evidence that he had procured for her insur-

ance which was in effect on 29 November 1958, plaintiff is entitled to recover. In the trial below defendant introduced documents, Exhibits D, E, and G, which—he testified and contends—"bound" both Royal and Dixie on 29 November 1958 and constituted performance of his contract with plaintiff. If this contention be correct, suggested issues 3 and 4 must be answered YES. Before either can be so answered however, it must be shown (1) that defendant issued the respective "binder" and (2) that he had authority to do so.

In a situation such as this it seems that common sense, as embodied in two guides usually employed to fix the burden of proof, places the burden of issues 3 and 4 upon defendant. The first rule puts the burden of proof upon the party who asserts the affirmative of the issue. "Thus, the person alleging the agency must prove not only the fact of its existence, but also its nature and extent." 3 Am. Jur. 2d *Agency* § 348 (1962); *accord, Harvel's, Inc. v. Eggleston*, 268 N.C. 388, 150 S.E. 2d 786; 44 C.J.S. *Insurance* § 146 (1945). The second rule puts the burden upon the party having peculiar knowledge of the fact in issue and therefore the better means of proving it. Stansbury, N.C. Evidence (2d Ed.) § 208 (1963). Here other than what defendant has said, plaintiff knows nothing of defendant's transactions with either Royal or Dixie. Until after 29 November 1958, she never heard that defendant had purported to bind either in her behalf. He says that by sending Exhibits D and E to Royal and Exhibit G to Dixie, he bound each to cover her liability on that date. To this plaintiff can only answer: "I can't know what he did or didn't do, what Royal or Dixie had specifically authorized him to do, or what he was accustomed to do for either. However, what he says doesn't sound right to me!" To put the burden upon plaintiff to *disprove* defendant's asserted acts or his authority with respect to the binders in question is both unrealistic and violative of established rules of procedures.

Defendant admits that he failed to furnish plaintiffs a policy of insurance as he had agreed to do and as he was accustomed to do. If, as he contends, he provided her with coverage, it was not in the manner specified by his contract but by *temporary* insurance, a binder, which was an informal paper writing, meaningful to the trade but not to the uninitiated. Defendant concedes that he did not fulfill his contract according to its terms, but asserts that his breach was harmless to plaintiff because he had substituted a different form of coverage. He thereby interposes an affirmative defense which he must prove. The only facts in this case which are in dispute relate to defendant's defense. Plaintiff's right to recover, therefore, cannot be adjudicated upon the one issue, "Did the defendants fail to procure for the plaintiff workmen's compensation insurance coverage as they undertook to do?" As

thus phrased, the issue places upon plaintiff the burden of proving defendant's breach of contract—a breach which he is obliged to concede, but which he seeks to avoid by an alleged substitute performance.

I also dissent from the statement in the majority opinion that "The testimony of the individual defendant as to the extent of his authority, and that of the corporate defendant, so as to bind either or both of the two insurance companies was, of course, competent upon that question. . . ."

Over plaintiff's objection (or motion to strike), defendant was permitted to testify that (1) in order to keep plaintiff continuously insured, he "bound the Royal Indemnity Co."; (2) it was his intention to bind Royal when he filled out Exhibit D; (3) it was his "intention as agent of Dixie Fire & Casualty Co. to bind the risk of Workmen's Compensation coverage" for plaintiff when he filled out defendant's Exhibit G; (4) he had "bound" both Royal and Dixie; and (5) on 29 November 1958, her workmen's compensation liability was covered by both companies. These conclusions or opinions of the witness were clearly incompetent. Stansbury, Evidence (2d Ed.) § 130 (1963). What transactions defendant had with Royal and Dixie were questions of fact for the jury; the legal effect of those transactions was for the court—not defendant. This is just another application of the rule which prevents a witness from labeling another's conduct negligent or certain utterances a contract.

In *Cole v. City of Britton,* 63 S.D. 428, 260 N.W. 266 (1935), a witness was permitted to answer (over objection) the following question: "Did you receive authority from him (the mayor) to employ men to work in and about the city?" In granting a new trial, the court said: "It was competent for the witness to state the facts and circumstances concerning the transactions between him and the mayor, leaving to the court and jury under the facts disclosed whether or not he had the alleged authority; but it was error to permit the witness to state his conclusions." *Id.* at 430, 260 N.W. at 267.

The same rule which prevents a nonexpert witness from stating the legal effect of a transaction about which he has testfied also prevents him from testifying that he was the agent of a certain principal. "The facts being shown, then, whether the relation of principal and agent is created becomes a question of law for the court to declare, and not for the witness." *Parker v. Brown,* 131 N.C. 264, 265, 42 S.E. 605, 606; *accord, Young v. Newark Fire Ins. Co.,* 59 Conn. 41, 22 Atl. 32 (1890). The rule is well stated in *Chaplin v. Mutual Cash Guaranty Fire Ins. Co.,* 26 S.D. 632, 639-40, 129 N.W. 238, 240-41 (1910): "Where agency is the question directly involved in a case, the reputed agent as a wit-

ness may not give his opinion or state his conclusion as to such agency, but may state the facts and circumstances concerning the various transactions between him and the alleged principals, leaving the court and jury to determine under the facts disclosed, whether or not he was such agent. . . . Testimony that a party is or is not an agent is a mere conclusion of law. Likewise, testimony that an agent had authority to do a certain act is a conclusion of law." See Annot., 90 A.L.R. 749.

The problem posed here is lucidly amplified by Stansbury, Evidence (2d Ed.) § 130 (1963), wherein it is said that in attempting to relate facts a witness will often use words which, "though familiar to the layman's vocabulary, also have a legal meaning. Whether this usage will constitute a violation of the opinion rule depends upon the sense in which the words are used and the nature of the issues in the case." Thus a witness may state he was in "possession" of property, that he had "bought" an article, or that he did not "owe" a debt "if the words are employed in a popular sense to describe the facts rather than the legal consequences. But where the legal relations growing out of the physical facts are a disputed issue in the case, and the witness's language appears to describe the relations themselves, the same words may be objectionable. Under these circumstances it is improper for a witness to testify . . . whether he was an 'agent'. . . . He may not testify to the legal effect of a contract or to its meaning when that is a question for the court to decide from the writing itself. . . ."

The statement is often made that, as against the principal, agency cannot be proved by the out-of-court declarations of the alleged agent, but the agent may testify under oath as to the agency. *Sealey v. Insurance Co.*, 253 N.C. 774, 117 S.E. 2d 744. This does not mean, however, that a witness may, over objection, state bluntly, "I was an agent authorized to contract in behalf of my principal." It merely means that he is a competent witness to testify as to the facts and circumstances upon which he contends the court should rule that he was an agent clothed with certain authority. The rule which renders an agent a competent witness to prove his agency does not abrogate the rule that the legal effect of a transaction is for the court.

"The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal. . . ." 3 Am. Jur. 2d *Agency* § 78 (1962). In this connection we note that defendant's Exhibit G, the document which defendant asserts "bound" Dixie, was dated 14 November 1958—approximately ten days after Royal had declined to provide plaintiff with coverage. Exhibit G is a form of the American Casualty Company upon which the name "Dixie Fire and Casualty Company" was written at the top. Dixie's own form for an "application for workmen's compensation in-

surance," Exhibit 13, specifically instructs the agent not to bind risk if any other insurance company has refused to write a new policy in the past two years. Defendant's written "agency agreement" with Dixie, defendant's Exhibit K, discloses no authority for him to issue binders for workmen's compensation insurance.

To minimize the risk of a fifth trial of this case, I call attention to another error in the admission of evidence in the third trial. Exhibits D and E, which were admitted over plaintiff's objection, are neither original nor duplicate original documents. Indeed, Exhibit E is not a *copy* of any document. Instead, it is a product of defendant's recollection, a professed *reproduction* of a *lost copy* reconstructed approximately ten years after the original document was purportedly written. "A party who seeks to prove the contents of a writing by a copy or oral testimony must first account satisfactorily for his failure to produce the *original.*" *Randle v. Grady,* 228 N.C. 159, 163, 45 S.E. 2d 35, 39. (Italics mine.) If the original writing is in existence but unobtainable, secondary evidence of the contents may be admitted upon proof, satisfactory to the trial judge (1) that the offering party had made diligent effort to obtain the original and (2) that its production is impossible or impracticable. Stansbury, Evidence (2d Ed.) §§ 192, 194 (1963).

The originals of Exhibits D and E and Exhibit G would presumably be in the files of Royal and Dixie. On 3 November 1958, in a letter written on stationery from its Richmond office (defendant's Exhibit F) with reference to "Workmen's Compensation coverage Mrs. Bernadine Wiles d/b/a Centerview Taxi, Front St., Kannapolis, N. C.," Royal thanked defendant "for the captioned *submission*" and declined to provide coverage. (Italics mine.) On 18 November 1958, from Greer, South Carolina, Dixie advised defendant that plaintiff's risk "will not be acceptable to the company." It is noted that both of these letters speak in terms of an application for prospective coverage. Whether defendant's "submission" to Royal was a binder or an application for insurance is one of the two crucial questions in this case. *See* 43 Am. Jur. 2d *Insurance* § 216 (1969).

So far as the evidence discloses defendant made no attempt to secure the originals of Exhibits D, E, and G. He, therefore, laid no foundation for the introduction of secondary evidence of their contents. In *Greene v. Grocery Co.,* 159 N.C. 119, 74 S.E. 813, defendant offered secondary evidence of a telegram, "a material part of the contract, directly involved in the issue." In sustaining the trial judge's rejection of this evidence, Hoke, J., pointed out that the operation of the "best evidence" rule "is not necessarily affected by the fact that the proper custody of the written paper is no longer within the jurisdiction of the court." It is still necessary to show its unavailability. *Id.* at 120-21, 74 S.E. at 813.

See Avery v. Stewart, 134 N.C. 287, 46 S.E. 519, for a discussion by Walker, J., of when the production of the original writing is excused. *See* Stansbury, Evidence (2d Ed.) § 194 (1963); McCormick on Evidence § 207 (1954); 4 Wigmore (3d Ed.) §§ 1264-1268 (1940), for a discussion of ways of evidencing a document not produced.

Except as indicated I concur in the majority opinion.

BOBBITT, J., joins in this opinion.

GENERAL ELECTRIC COMPANY v. DR. WILLIAM L. TURNER; ESTON Y. BRICKHOUSE; ED O'HERRON; SAMUEL H. JOHNSON; RALPH H. SCOTT; THORNE GREGORY; AND LINDSAY C. WARREN, JR.

No. 38

(Filed 11 July 1969)

1. Administrative Law § 3; Injunctions § 11— injunction to restrain new bids for State contract — sufficiency of evidence

In this action to restrain defendants, officials of the State, from accepting new bids for television transmitting equipment after plaintiff had previously submitted the lowest bid for such equipment, plaintiff's evidence that a competitive bidder objected to an award of the contract to plaintiff on the ground that a small item in plaintiff's specifications failed to meet the bid requirements, that an agent of the competitive bidder was present at a hearing upon the bids held before the State Purchasing Officer but that plaintiff was neither notified nor present at the hearing, and that when a representative of plaintiff requested a hearing, he was told that an irrevocable decision had been made to call for new bids, *is held* insufficient to warrant the court in restraining the call for new bids, defendants having been given the right to make the administrative decision whether to call for new bids by G.S. 143-52.1 and by the bid proposal, and there being no evidence that defendants acted corruptly, in violation of the law or in excess of authority.

2. Injunctions § 3; Mandamus § 2— exercise of discretionary duty

Neither mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary duty.

3. Injunctions §§ 3, 11; Mandamus § 4; State § 4— action against individual State officials — action against State — consent to suit

Action to restrain individual defendants, officials of the State, from accepting new bids for television transmitting equipment and for a mandatory injunction requiring defendants to award the contract to plaintiff as lowest original bidder, *is held* to constitute an action against the State where every act charged against any defendant was performed in his capacity as representative of the State and related to a contract to be

performed by the State, and the State not having consented to the suit, defendants' demurrer should be sustained and the action dismissed.

On certiorari to review orders entered in the Superior Court of WAKE COUNTY (1) restraining, pendente lite, the defendants "from opening, accepting, awarding or in any way acting upon any bid submitted pursuant to Bid No. 690866 'Request for Bids on Television Transmitting Equipment' . . ." and (2) overruling the defendants' demurrer to the complaint. This Court entered an order, on defendants' petition, certifying this cause to the Supreme Court for review prior to determination by the North Carolina Court of Appeals. The cause was heard on briefs and oral arguments in the Supremee Court at a special session held June 23, 1969.

Robert Morgan, Attorney General, Henry T. Rosser, Assistant Attorney General, Eugene A. Smith, Trial Attorney for the Defendants.

Joyner, Moore & Howison by Dan K. Moore and James M. Kimzey for the plaintiff.

HIGGINS, J.

The plaintiff instituted this action in which it filed a verified complaint alleging (1) the defendant William L. Turner is Director of the North Carolina Department of Administration, "which Department is empowered . . . to supervise the letting of all contracts for the purchase of supplies, materials and equipment needed and required by all state departments, institutions and agencies"; (2) the defendant Brickhouse is "State Purchasing Officer in charge of the purchase and contract division of the Department of Administration, which division has been delegated the authority to supervise the letting of all contracts for the purchase of supplies, materials and equipment needed and required by all State Departments, institutions and agencies"; and (3) the other named defendants constitute the Advisory Budget Commission which is empowered to act with the Director of Administration in canvassing bids and awarding contracts.

The complaint further alleges the plaintiff, in response to the defendants' request, filed a responsible offer to comply with Bid No. 690462 by delivering special television transmitting equipment at the total price of $655,000 for Units I, II and III. Thee opening of the bids disclosed the plaintiff's was the lowest bid submitted on Units I, II and III. We here quote five paragraphs from the complaint:

"10. Plaintiff is informed and believes, and therefore alleges that after said bids were opened, the Radio Corporation of America, an unsuccessful bidder, objected by letter dated April 14, 1969, to

the Department of Administration to the awarding of the contract to the low bidder, the plaintiff, General Electric Company.

11. Plaintiff is informed and believes and therefore alleges that the defendants after receipt of the April 14 letter, permitted representatives of the Radio Corporation of America to be present at a hearing and to state their contentions concerning the letting of the contract pursuant to the request for bids without giving notice to the plaintiff and without giving the plaintiff an opportunity to be heard.

12. After some period of time, the contract had not been awarded to plaintiff and on or about the 26th day of April, 1969, Mr. Paul H. Fletcher, District Sales Representative of the plaintiff, telephoned the defendant Brickhouse to ascertain the status of the bid. During said telephone call, the defendant Brickhouse informed Mr. Fletcher that a decision had been made to reject all bids and to open the contract for rebidding. Mr. Brickhouse informed Mr. Fletcher that this decision has been 'irrevocably made' even though plaintiff had been given no notice and had no knowledge of the defendant's decision to consider rejecting the bids, and even though plaintiff had not been given opportunity to be heard concerning said decision.

13. Plaintiff requested a hearing in order to have an opportunity to be heard on the matter and when representatives of the plaintiff met with the defendants they were once again told that the decision to reopen the bidding had been 'irrevocably made' and that any hearing would be of no avail.

14. Although plaintiff has received no formal rejection of its bid and reason therefor, plaintiff is informed and believes and therefore alleges, that the sole reason for the 'irrevocable decision' made by defendants to reject plaintiff's low bid and rebid the contract was that the defendants contend that the specifications for a 3⅛ inch patch panel called for in Item 36 of the specifications, attached hereto as Exhibit A, was in conflict with the specification contained in Item 1.7 of the instructions to bidders, which generally required that all components meet EIA standards."

The plaintiff alleged the patch panel, in all respects, complied with EIA standards and requested permission to submit documentary proof showing compliance. Mr. Brickhouse refused to hear the proof. The plaintiff further alleged the defendants' new call for bids repeated the same specifications with respect to the patch panel; that this item accounted for only $600 in a transaction involving $655,000.

The plaintiff prayed (a) that the defendants be restrained from accepting any new bids and (b) that a mandatory injunction be issued

requiring the defendants to award to the plaintiffs the contract according to its offer in response to Bid No. 690462 at the price of $655,000.

The defendants filed answer to the complaint denying the allegations upon the basis of which the plaintiff prayed for the restraining order. In addition, the defendants filed a demurrer to the cause of action alleged, upon these grounds:

1. The defendants, in their official positions as officers of the State, were carrying out the duties which the law required them to perform. This is, therefore, an action against the State of North Carolina which has not waived its sovereign immunity and has not consented to be sued.

2. The court is without authority to exercise the discretionary powers assigned to the defendants, or to require the defendants to execute a contract on behalf of the State.

3. The plaintiff does not allege facts sufficient to show any abuse of discretion on the part of the defendants in rejecting all bids and in readvertising for new submissions.

The defendants, in their official capacities and acting for the State under authority of G.S. 143-52.1, advertised for bids for the television transmitting equipment specified in No. 690462. The authorizing statute contains this provision: "Any and all bids received may be rejected." Form R-1, attached to the bid proposal, contains the following: "The State reserves the right to reject any and all bids . . ." The plaintiff concedes the right of the defendants to reject all bids, but contends the right may not be exercised arbitrarily or capriciously, but honestly and for good cause. The reason for rejecting the plaintiff's bid was failure of its 3⅛ inch patch panel to comply with Electronic Industries Association standards. The plaintiff argues the patch panel meets EIA standards, but the defendants refused to permit the plaintiff to offer documentary proof to substantiate its contention. On the contrary, the defendants, having heard the objection of a competitive bidder, claimed a discrepancy existed with respect to the provision for a 3⅛ inch patch panel on the ground it did not meet EIA standards. On this item the defendants deliberately and wrongfully refused to hear the plaintiff because the defendants had reached an "irrevocable decision" to reject all bids. The foregoing are the plaintiff's contentions.

Mr. Brickhouse filed a verified answer and affidavit stating in substance that four sites had been selected and money appropriated for the installation of a transmitter at each site to complete the educational television network of the University of North Carolina. Site

I was located in Winston-Salem, Site II at Farmville, Site III at Delco in Columbus County, and Site IV at Franklin in Macon County. A single bid was requested on each of the four sites; a single bid on the combination of I, II and III, and a single bid on the combination of all four.

After bids were received and opened, it was found the plaintiff was the lowest bidder on the equipment for the combination of Sites I, II and III, but RCA was the lowest bidder on the combined four sites. At the time bids were opened the acquiring agency was not ready for the installation at Franklin. Consequently, Site IV was to be eliminated and the bid on Site IV deleted. The deletion of Site IV made the plaintiff the low bidder and removed RCA from that category.

The plaintiff's bid on Sites I, II and III was $655,000. RCA's bid was $656,500. The plaintiff's bid on the four sites was $833,000. RCA's bid was $822,580. RCA filed some objection to the award of the contract to the plaintiff on Sites I, II and III. The exact ground of the objection is not disclosed. However, it appears there was a claim that a small item in the plaintiff's specifications did not meet EIA standards. At any rate, RCA's agent appeared at a hearing before the State Purchasing Officer. The plaintiff was neither notified nor present at the hearing.

[1] When the plaintiff was not offered a contract, its agent requested a hearing. He was told that an "irrevocable decision" had been made to call for new bids. That decision may or may not be profitable, depending upon the future bidding. However, the making of an "irrevocable decision" in an important business controversy, after hearing one side and refusing to hear the other, does not qualify as commendable procedure. Nevertheless, the defendants were given the right to make the administrative decision whether to contract or to call for new bids. Evidence is lacking that the State officers acted either corruptly, or in violation of law, or in excess of authority. We conclude, therefore, the plaintiff's showing was insufficient to warrant the court in restraining the call for new bids. "The administrative features of the law are not to be set aside by recourse to the courts". *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896; *R. R. Comm. v. Oil Co.,* 310 U.S. 573, 84 L. Ed. 1368; *Schloss v. Highway Comm.,* 230 N.C. 489, 53 S.E. 2d 517.

[2] We have discussed the merits of the case for the reason that the plaintiff has sued the defendants as individuals, and has obtained a restraining order. Neither mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary

duty. *Ponder v. Joslin,* 262 N.C. 496, 138 S.E. 2d 143; *Hospital v. Wilmington,* 235 N.C. 597, 70 S.E. 2d 833; *Harris v. Bd. of Education,* 216 N.C. 147, 4 S.E. 2d 328.

The plaintiff prays for this relief only: (1) That the defendants be permanently restrained from opening or accepting bids or awarding contracts based on any bids for the television transmitting equipment for Sites I, II and III; and (2) That by mandatory injunction the defendants be required to award the contract to the plaintiff as the lowest responsible bidder on the original offer submitted in response to request No. 690462.

[3] The record discloses that every act charged against any defendant was performed in his capacity as representative of the State, and related to a contract to be performed on behalf of the State. The facts and issues involved, and the relief demanded, permit only one conclusion: This is an action against the State of North Carolina. The suit was without the State's consent.

> "It is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission. . . . An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State." *Ins. Co. v. Unemployment Compensation Comm.,* 217 N.C. 495, 8 S.E. 2d 619; *Dredging Co. v. State,* 191 N.C. 243, 131 S.E. 665; *U. S. v. Lee,* 106 U.S. 196, 25 R.C.L. 412.
>
> "That the sovereign may not be sued, either in its own courts or elsewhere, without its consent, is an established principle of jurisprudence in all civilized nations (citing many authorities). . . . In the absence of consent or waiver, this immunity against suit is absolute and unqualified." *Schloss v. Highway Comm., supra.*
>
> "The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. . . ." *Ins. Co. v. Gold,* 254 N.C. 168, 118 S.E. 2d 792.

On the basis of the foregoing and many other authorities of like import, we conclude (1) this action is against the sovereign State of North Carolina; (2) the State has not consented to the suit; (3) the injunction was improvidently granted, and (4) the demurrer should have been sustained and the action dismissed.

Reversed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BERRY v. CITY OF WILMINGTON

No. 2 PC.

Case below: 4 N.C. App. 648.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

CAMPBELL v. O'SULLIVAN

No. 3 PC.

Case below: 4 N.C. App. 581.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

FARMER v. REYNOLDS

No. 6 PC.

Case below: 4 N.C. App. 554.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

KILBY v. DOWDLE

No. 70 PC.

Case below: 4 N.C. App. 450.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 June 1969.

LAWS v. PALMER

No. 68 PC.

Case below: 4 N.C. App. 510.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 June 1969.

MOREHEAD v. HARRIS

No. 51 PC.

Case below: 4 N.C. App. 235.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 June 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PETTY v. ASSOCIATED TRANSPORT

No. 59 PC.

Case below: 4 N.C. App. 361.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 11 July 1969.

STATE v. BATTLE

No. 4 PC.

Case below: 4 N.C. App. 588.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

STATE v. BLOUNT

No. 77 PC.

Case below: 4 N.C. App. 561.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 June 1969.

STATE v. GASTON

No. 79 PC.

Case below: 4 N.C. App. 575.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

STATE v. HORTON

No. 7 PC.

Case below: 5 N.C. App. 141.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 11 July 1969.

STATE v. LEDBETTER

No. 57 PC.

Case below: 4 N.C. App. 303.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 June 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WILLIS

No. 1 PC.

Case below: 4 N.C. App. 641.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

SWAIN v. WILLIAMSON

No. 78 PC.

Case below: 4 N.C. App. 622.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 June 1969.

THOMPSON APEX COMPANY v. TIRE SERVICE

No. 65 PC.

Case below: 4 N.C. App. 402.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 June 1969.

THRASHER v. THRASHER

No. 5 PC.

Case below: 4 N.C. App. 534.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 10 July 1969.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1969

BLUE JEANS CORPORATION AND WHITEVILLE MANUFACTURING COMPANY v. AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO, AND CHARLES ENGLISH, EDDIE GEE, JAMES DUNCAN, BILL WILLIAMS, EULA McGILL, VERA WARD, MACY KING, FRANK TYLER, ROGER STEVENS, MAXINE KELLIHAN, HAZEL LARAY GIBSON, RUBY FISHER, MILDRED NYE, BETTY JO HAYES, GLENDORA TANNER, ELIZABETH WELLS, HUBBARD WELLS, KATHLEEN MINCEY, EARLIE WARD, LEONA WARD, VERA JONES, RHOLETTA FAIRCLOTH, RUBY McPHERSON, LEONA SELLERS, JAXIE WILLIAMSON, HILDA POPE, JAMES H. MARTIN, SOLOMON TOON, JO ANN CUNNINGHAM, VAUGHN CHERRY, EMLLOUISE STEELE, QUEEN ESTHER BELLAMY, MARVA BEARD, GERALDINE KELLY, QUEEN ESTHER WEBB, FRED LYONS (ISHMEL) JERRY MARTIN, BLANCHIE FRINK, HATTIE D. McKENZIE, JOYCE FOXWORTH, DANIEL GODWIN, ROSCOE SHAW, JR., AND JOHN BRYANT

No. 5

(Filed 15 October 1969)

1. Contempt of Court § 6; Constitutional Law § 29— right to jury trial — criminal contempt proceeding — unlawful picketing

In criminal contempt proceedings against striking workers for the willful violation of a restraining order against unlawful picketing, defendants are not entitled to a trial by jury, since criminal contempt is a petty offense and the constitutional right to trial by jury does not extend to petty offenses. G.S. 5-4; U. S. Constitution Art. III, § 2; N. C. Constitution, Art I, § 13.

2. Contempt of Court §§ 3, 7— willful disobedience of court order — punishment

Willful disobedience of an order lawfully issued by the court is contemptuous conduct and is punishable by fine not to exceed $250 or im-

prisonment not to exceed 30 days, or both, in the discretion of the court. G.S. 5-1(4), G.S. 5-4.

3. Contempt of Court § 8— appeal and review

Contemnors are entitled to appeal from a judgment finding them guilty of contempt not committed in the presence of the court. G.S. 5-2.

4. Contempt of Court §§ 2, 3— civil and criminal contempt — distinctions

A proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 are distinct, the first relating to acts or omissions having a direct tendency to interrupt the proceedings of the court or to impair the respect due its authority, and the latter to acts or neglects tending to defeat, impair, impede or prejudice the rights or remedies of a party to an action pending in the court, the distinction being important because of differences in procedure, punishment and the right of review.

5. Contempt of Court § 3— criminal nature of contempt proceedings

The fact that contemptuous conduct arises in a civil action does not alter the fact that contempt proceedings are criminal in nature.

6. Contempt of Court §§ 2, 3— nature of contempt proceedings

A contempt proceeding is *sui generis*, criminal in its nature, and may be resorted to in civil or criminal actions.

7. Contempt of Court § 2— criminal contempt — picketing activities — accomplished acts

The accomplished acts of striking workers in willfully violating a court order restraining them from engaging in unlawful picketing activities against their employer, which acts tended to impair the respect due the authority of the court and to interfere with the administration of justice, are punishable as criminal contempt.

8. Contempt of Court § 5— unlawful picketing activities — procedure for indirect contempt

In contempt proceeding against striking workers for the violation of restraining order against unlawful picketing, the court properly followed procedure for indirect contempt, G.S. 5-7, since the contemptuous acts were committed outside the actual or constructive presence of the court.

9. Criminal Law § 4— "serious offense" defined

A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine.

10. Constitutional Law § 29— right to jury trial — petty offense

There is no constitutional right to a jury trial for a petty offense in either federal or state courts. U. S. Constitution, Art. III, § 2.

11. Constitutional Law § 29; Contempt of Court § 6— trial by jury — criminal contempt — punishment — side effects

The possibilities that striking workers adjudged guilty of criminal contempt under G.S. 5-1 might be denied the right to return to work or might

be disqualified from drawing unemployment benefits for as long as twelve weeks *are held* irrelevant on the issue of whether the strikers are entitled to trial by jury in the contempt proceedings, since the possibilities are no part of the punishment which the court may impose for criminal contempt. G.S. 5-4.

BOBBITT, J., dissenting.

SHARP, J., joins in dissenting opinion.

APPEAL by defendants Maxine Kellihan, Frank Tyler, and James Martin from decision of the Court of Appeals upholding judgment of *Clark, J.*, at the 3 August 1968 Session, COLUMBUS County Superior Court.

This is a civil action instituted on 1 April 1968 to restrain the Amalgamated Clothing Workers of America, AFL-CIO, and other individually named defendants from committing certain allegedly unlawful acts arising out of a strike against the Blue Jeans Corporation and Whiteville Manufacturing Company. On 1 April 1968 Judge Clark signed a temporary restraining order containing, among other things, the following provision: "No person or persons shall interfere, in any manner whatever, with the free ingress or egress, of any individual whomsoever, to and from the plaintiffs' aforesaid plant and premises. No person or persons shall at any time or at any place assault or threaten to assault or injure or threaten to injure the persons or property or family of any individual or use any abusive, insulting or threatening language toward any individual, because of such individual's working, seeking to work, for the plaintiffs or doing business, or seeking to do business with the plaintiff." This order was returnable before Judge Clark at the courthouse in Whiteville at 10 a.m. on 20 April 1968 where defendants were directed to appear and show cause why the order should not be continued in force until the merits of the cause had been determined.

On 20 April 1968 defendants through counsel moved to continue the hearing until out-of-state attorneys representing defendants could be present, which motion was granted and the hearing set for 23 April 1968 at 2:30 p.m. At the hearing on that date the court found that on 11 April 1968 defendants Vaughn Cherry and James Martin had willfully violated that portion of the restraining order above quoted and imposed a fine of $25.00 as to each of said defendants. No appeal was taken from that finding and judgment. The restraining order was continued in full force and effect.

On 13 July 1968 Maxine Kellihan, Frank Tyler, James Martin and certain other defendants were cited by Judge Clark to appear

before him and show cause why they should not be adjudged in contempt for willful violation of the restraining order. Pursuant to this citation a hearing was held on 3 August 1968, and counsel for those who had been cited to appear moved in apt time for a jury trial. The motion was denied and exception duly taken. After hearing the evidence offered by both sides the court discharged four individuals who had been cited to appear and continued the hearing as to others. With respect to James Martin, Frank Tyler and Maxine Kellihan the court found that each had been served with a copy of the original restraining order and had been present in court at previous hearings; that while engaged in picketing the Blue Jeans plant on July 8 said defendants had used loud, boisterous and insulting language to persons lawfully using the driveways of the Blue Jeans plant and directed such language at said persons in a willful attempt to intimidate and harrass or insult employees and other persons doing business with Blue Jeans Corporation; that on the same date these three defendants were impeding the vehicles using the driveways of said plant and were attempting to impede their lawful and orderly ingress or egress; that James Martin while so engaged used vulgar and indecent language in a loud and boisterous voice clearly audible to persons in the immediate vicinity. Based upon the findings of fact recited in its order, the court adjudged Maxine Kellihan, Frank Tyler and James Martin in contempt and fined Kellihan and Tyler $10.00 each. James Martin was sentenced to the Columbus County Jail for a period of five days and restrained from engaging in any further picketing activities of the Blue Jeans plant.

From the judgment pronounced defendants Maxine Kellihan, Frank Tyler and James Martin appealed to the Court of Appeals. The order of Judge Clark was affirmed by decision of that court appearing in 4 N.C. App. 245, 166 S.E. 2d 698. Said defendants thereupon appealed to the Supreme Court alleging involvement of a substantial constitutional question, to wit, denial of the right to trial by jury.

Rountree & Clark by John Richard Newton, Attorneys for defendant appellants.

Powell, Lee and Lee by J. B. Lee, Attorneys for plaintiff appellees.

HUSKINS, J.

The Constitution of North Carolina, Article I, Section 13, reads as follows: "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."

The Constitution of the United States, Article III, Section 2, reads in pertinent part as follows: "The trial of all cases, except in cases of impeachment, shall be by jury. . . ." The Sixth Amendment thereto provides, *inter alia*, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

[1] Were appealing defendants in this contempt proceeding entitled to a jury trial under the foregoing provisions of the State and Federal Constitutions? That is the only question presented by this appeal.

[2, 3] Maxine Kellihan, Frank Tyler and James Martin have been adjudged guilty of willful disobedience of an order lawfully issued by the court. This is contemptuous conduct. G.S. 5-1, subsection 4; *Nobles v. Roberson*, 212 N.C. 334, 193 S.E. 420; *Elder v. Barnes*, 219 N.C. 411, 14 S.E. 2d 249. Such conduct is punishable by "fine not to exceed two hundred and fifty dollars, or imprisonment not to exceed thirty days, or both, in the discretiton of the court." G.S. 5-4. The right of review on appeal is afforded by G.S. 5-2 since the contempt was not committed in the presence of the court.

[4] "A person guilty of any of the acts or omissions enumerated in the eight subsections of G.S. 5-1 may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. A person guilty of any of the acts or neglects catalogued in the seven subdivisions of G.S. 5-8 is punishable as for contempt because such acts or neglects tend to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court.

"It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. 5-1 and a proceeding as for contempt under G.S. 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings." *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345.

The line of demarcation between civil and criminal contempts is hazy at best. "A major factor in determining whether a contempt

is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. . . . Civil contempt proceedings look only to the future." 17 Am. Jur. 2d, Contempt § 4.

In *Rose's Stores v. Tarrytown Center,* 270 N.C. 206, 154 S.E. 2d 313, there was a violation of a temporary restraining order in a civil action. There, as here, defendants were cited to show cause why they should not be held in contempt for violating the temporary order. The court said: "Criminal contempt or punishment *for contempt* is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt or punishment *as for contempt* is applied to a continuing act," and the proceeding is used to compel obedience to orders and decrees made for the benefit of private parties and to preserve and enforce private rights.

[5] While some jurisdictions hold that a criminal contempt proceeding is independent and not a part of the case out of which the alleged contempt arose (*Berlandi v. Commonwealth,* 314 Mass. 424, 50 N.E. 2d 210), there is authority that a contempt proceeding based on the violation of an injunction, regardless of whether the proceeding is civil or criminal in nature, is a part of the original injunction suit and properly triable as such (*Frey v. Willey,* 161 Kan. 196, 166 P. 2d 659). "Although contempt of court, in its essential character, is divided into various kinds, such as direct or constructive, and civil or criminal, nevertheless in every species of contempt . . . there is said to be necessarily inherent an element of offense against the majesty of the law savoring more or less of criminality. Therefore it is said that the process by which the party charged is reached and tried . . . is essentially criminal or quasi-criminal." 17 Am. Jur. 2d, Contempt § 78; *Jenkins v. State,* 242 Miss. 627, 136 So. 2d 205. The fact that contemptuous conduct arises in a civil action does not alter the fact that contempt proceedings are criminal in nature. *Gompers v. Bucks Stove and Range Co.,* 221 U.S. 418, 55 L. ed 797, 31 S. Ct. 492.

[6] In this State a contempt proceeding has been described as *sui generis,* criminal in its nature, which may be resorted to in civil or criminal actions. *In Re Hege,* 205 N.C. 625, 172 S.E. 345; *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577; accord, *Blackmer v. United States,* 284 U.S. 421, 76 L. ed 375, 52 S. Ct. 252.

[7, 8] Here, appellants were punished for acts already accomplished which tended to impair the respect due the authority of the court and interfere with the administration of justice. Hence, they were properly charged with and punished for criminal contempt. *Dyer v. Dyer,* 213 N.C. 634, 197 S.E. 157. The procedure prescribed for indirect contempt was followed — and properly so since the contemptuous acts were not committed in the actual or constructive presence of the court. G.S. 5-7; *Galyon v. Stutts,* 241 N.C. 120, 84 S.E. 2d 822.

We now examine the validity of the contention that appellants are entitled to a jury trial in a criminal contempt proceeding.

It is said in *State v. Yancy,* 4 N.C. 133, that punishment for contempt is "the exercise of a power incident to all courts of record, and essential to the administration of the laws. The punishment, in such cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court."

In *Baker v. Cordon,* 86 N.C. 116, defendant was charged with violating an injunction in a civil action. He was cited to show cause why he should not be attached for contempt in disobeying the order. Defendant contended he was entitled to a jury trial. Held: "The proceeding by attachment for violating an order of the Court made in furtherance of a pending action is necessarily summary and prompt, and to be effectual it must be so. The Judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so or not." This legal principle has been approved in many decisions of this Court, including *In Re Deaton,* 105 N.C. 59, 11 S.E. 244; *In Re Gorham,* 129 N.C. 481, 40 S.E. 311; *Manufacturing Co. v. Arnold, supra* (228 N.C. 375, 45 S.E. 2d 577); and it is in accord with the weight of authority in the United States. The general rule for more than 150 years has been that a constitutional guaranty of jury trial does not apply to proceedings for contempt of court. 31 Am. Jur., Jury, § 38; *Bessette v. W. B. Conkey Co.,* 194 U.S. 324, 48 L. ed 997, 24 S. Ct. 665; *In Re Debs,* 158 U.S. 564, 39 L. ed 1092, 15 S. Ct. 900; *Gompers v. United States,* 233 U.S. 604, 58 L. ed 1115, 34 S. Ct. 693; *Green v. United States,* 356 U.S. 165, 2 L. ed 2d 672, 78 S. Ct. 632; *United States v. Barnett,* 376 U.S. 681, 12 L. ed 2d 23, 84 S. Ct. 984; *Neel v. State,* 9 Ark. 259; *Blodgett v. Superior Court,* 210 Cal. 1, 290 P. 293, 72 A.L.R. 482; *O'Brien v. People,* 216 Ill. 354, 75 N.E. 108; *State v. Shumaker,* 200 Ind. 716, 164 N.E. 408; *Flannagan v. Jepson,* 177 Iowa 393, 158

N.W. 641; *Root v. MacDonald,* 260 Mass. 344, 157 N.E. 684, 54 A.L.R. 1422; *Osborne v. Purdome,* (Mo.) 244 S.W. 2d 1005, 29 A.L.R. 2d 1141, cert. den. 343 U.S. 953, 96 L. ed 1354, 72 S. Ct. 1046, reh. den. 343 U.S. 988, 96 L. ed 1375, 72 S. Ct. 1072; *State ex rel Stewart v. District Ct.,* 77 Mont. 361, 251 P. 137, 49 A.L.R. 627; *Carter v. Commonwealth,* 96 Va. 791, 32 S.E. 780; *State v. Fredlock,* 52 W.Va. 232, 43 S.E. 153.

Historically speaking, there was no constitutional right of trial by jury in a criminal contempt case prior to 1968. "It has always been the law of the land, both state and federal, that the courts — except where specifically precluded by statute — have the power to proceed summarily in contempt matters." *United States v. Barnett, supra* (376 U.S. 681, 12 L. ed 2d 23, 84 S. Ct. 984). The claim that those charged with criminal contempt have a constitutional right to a jury trial was rejected by the United States Supreme Court in more than fifty cases — from *United States v. Hudson and Goodwin,* 7 Cranch 32, 3 L. ed 259, in 1812 to *United States v. Barnett, supra,* in 1964.

Finally, however, in *Bloom v. Illinois,* 391 U.S. 194, 20 L. ed 2d 522, 88 S. Ct. 1477 (1968), those precedents embodying the judicial wisdom of eminent jurists for 156 years were overruled with respect to *serious* contempts, i.e., contempts for which the authorized punishment exceeds imprisonment for six months or a $500 fine. Bloom was charged with criminal contempt for which Illinois law provided no maximum punishment. Request for a jury trial was denied; defendant was found guilty and sentenced to prison for twenty-four months. The Supreme Court of Illinois affirmed, and on certiorari the Supreme Court of the United States reversed, holding (1) that criminal contempt is a crime in the ordinary sense — a public wrong punishable by fine or imprisonment or both, and (2) that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of Article III, Section 2 of the Federal Constitution, and of the Sixth Amendment thereto, which is binding upon the states by virtue of the Due Process Clause of the Fourteenth Amendment.

The same day *Bloom* was decided (May 20, 1968), the United States Supreme Court rendered its decision in *Duncan v. Louisiana,* 391 U.S. 145, 20 L. ed 2d 491, 88 S. Ct. 1444, wherein defendant was charged with simple battery, a misdemeanor punishable by a fine of not more than $300 or imprisonment of not more than two years, or both. Demand for a jury trial was denied. Upon conviction defendant was sentenced to sixty days in jail and fined $150.

The Supreme Court of Louisiana denied review, and on appeal the United States Supreme Court reversed, holding that a crime punishable by two years in prison is a serious crime — not a petty offense — and thus requires a trial by jury.

In *Cheff v. Schnackenberg,* 384 U.S. 373, 16 L. ed 2d 629, 86 S. Ct. 1523 (1966), defendant was sentenced to prison for six months for violating an order of the court. The Supreme Court of the United States affirmed, holding the contempt proceedings equivalent to a prosecution for a petty offense and that the right of trial by jury in criminal cases secured by Article III, Section 2 of the Federal Constitution, and by the Sixth Amendment thereto, does not extend to petty offenses.

[9, 10] *Bloom, Duncan* and *Cheff* were the basis for decision by this Court in *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1966), wherein we held that "a serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine." Thus, if the authorized maximum punishment is within that limit, or if no maximum penalty is provided by law and the penalty actually imposed is within that limit, the offense is petty and there is no constitutional right to a jury trial in either federal or state courts. It was so held in *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 20 L. ed 2d 538, 88 S. Ct. 1472 (1968).

[1] Here, the maximum punishment authorized by G.S. 5-4 for criminal contempt is a fine of $250 or imprisonment for thirty days, or both. This makes it a petty offense with no constitutional right to a jury trial. *State v. Morris, supra.*

[11] Defendants say, however, that in addition to the maximum punishment authorized by G.S. 5-4, holding them in contempt visits additional punishment upon them in that (1) Blue Jeans Corporation may deny them the right to return to work when the strike ends (*National Labor Relations Board v. Thayer Co.,* 213 F. 2d 748); and (2) they are disqualified from drawing unemployment benefits for as long as twelve weeks "if it is determined by the Commission [Employment Security Commission] that such an individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. . . ." G.S. 96-14(2); *In Re Stutts,* 245 N.C. 405, 95 S.E. 2d 919. These contingencies, however, are not part of the punishment which the trial court is authorized to impose for criminal contempt. Rather, they are possible side effects that may or may not materialize. They are totally irrelevant here. The only *punishment* prescribed by law for the contempts enumerated in G.S. 5-1 is a fine not to exceed $250 or

imprisonment not to exceed thirty days, or both, as authorized by G.S. 5-4.

The decision of the Court of Appeals affirming the order which denied appellants a jury trial is

Affirmed.

BOBBITT, J., dissenting:

Appellants were tried at August 3, 1968 Session of Columbus Superior Court for their alleged contemptuous violation on July 8, 1968 of the specific provisions of a restraining order.

The alleged contempt was not committed in the presence of the court. There was no disruption of or interference with any court session or proceeding. Nor does the alleged contempt involve continuous or repetitive conduct in violation of the court's order. The hearing was to determine whether appellants were guilty of terminated past conduct constituting a wilful violation of the court's order; and, if so, what punishment should be imposed. The appeal presents this question: Did the court err in refusing appellants' request for a jury trial as to whether in fact appellants were guilty of the conduct alleged to constitute a wilful violation of the court's order?

I accept with full approval the decisions of the Supreme Court of the United States in *Duncan* (391 U.S. 145) and in *Bloom* (391 U.S. 194). However, these decisions do not apply to criminal prosecutions or to criminal contempt proceedings in State courts involving "petty offenses" which, as defined in the federal statute and decisions, are offenses punishable by a maximum fine of five hundred dollars or by a maximum prison sentence of six months or both. Since Chapter CLXXVII, Public Laws 1868-9, now codified as N.C. G.S. 5-4, provides that criminal contempt is punishable "by fine not to exceed two hundred and fifty dollars, or by imprisonment not to exceed thirty days, or both, in the discretion of the court," decision herein is not affected by *Duncan* and *Bloom*.

In *Bloom*, Mr. Justice White stated: "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." He quotes with approval this excerpt from the opinion of Mr. Justice Holmes in *Gompers v. United States*, 233 U.S. 604, 610, 58 L. ed. 1115, 1120, 34 S. Ct. 693, 695, *viz:* "These contempts are infractions of the law, visited with punishment as such. If such acts are not

criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." The majority hold the present proceeding is for criminal contempt. I agree.

In prior decisions, this Court has held whether an accused person has committed acts alleged to constitute wilful contempt of a court order is determinable by the court rather than by a jury. The right to a jury trial has been denied without reference to whether the alleged contempt was committed in the presence of the court or disrupted court sessions or proceedings or otherwise disturbed the conduct of the court's business. In respect of an accused person's right to a jury trial, no distinction has been drawn between contemptuous conduct in the presence of the court and alleged contemptuous conduct occurring beyond the presence and observation of the court.

The contemptuous conduct involved in *State v. Yancy,* 4 N.C. 133, consisted of an assault "committed in view of the court." With reference to this factual situation, Taylor, C.J., said: "The punishment, in such cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage which impedes the business of the court."

Contemptuous conduct involved in *State v. Woodfin,* 27 N.C. 199, consisted of "fighting in the yard of the courthouse, before the courthouse door, and in the presence of the court." With reference to this factual situation, Ruffin, C.J., said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curiæ* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial."

The contemptuous conduct involved in *Baker v. Cordon,* 86 N.C. 116, consisted of the continuing violation by the defendant of a court order which restrained him from engaging in a competitive business in violation of his covenant obligation. No interference with or disturbance of any business of the court was involved. The court's factual determinations were based on evidence rather than upon observation. Upon the court's factual findings, the defendant was adjudged in contempt for violation of the court's order and sentenced to imprisonment for ten days. This Court, holding untenable the defendant's contention that he was entitled to a jury trial as to the controverted facts, found "No error."

In *Baker v. Cordon, supra,* Smith, C.J., for the Court, said: "The proceeding by attachment for violating an order of the Court made in furtherance of a pending action is necessarily summary and prompt, and to be effectual it must be so. The Judge determines the facts and adjudges the contempt, and while he may avail himself of a jury and have their verdict upon a disputed and doubtful matter of fact, it is in his discretion to do so or not. *State v. Yancey,* 4 N.C. 133; *State v. Woodfin,* 27 N.C. 199; *Moye v. Cogdell,* 66 N.C. 403; *Crow v. State,* 24 Texas 12."

The factual situations in *Yancy* and in *Woodfin* are set forth above. Contempt proceedings were not involved in *Moye v. Cogdell,* 66 N.C. 403.

In subsequent contempt cases in which there was no interference with or disturbance of the court and in which the factual determinations were made on the basis of evidence rather than observation, the opinions repeat in substance the statement in *Baker v. Cordon, supra,* that "(t)he Judge determines the facts and adjudges the contempt." *In re Deaton,* 105 N.C. 59, 11 S.E. 244; *In re Gorham,* 129 N.C. 481, 40 S.E. 311; *Manufacturing Co. v. Arnold,* 228 N.C. 375, 45 S.E. 2d 577. Whether the alleged contemners were entitled to a jury trial was not raised on the appeals in *Deaton, Gorham* and *Arnold.* In *Deaton,* the opinion cites *Baker v. Cordon, supra,* and quotes the portion of the opinion set forth above. In *Gorham,* the opinion cites *Baker* and *Deaton.* In *Arnold,* the opinion cites *Gorham.* In *Baker,* primary reliance was placed upon *Yancy* and *Woodfin,* which involved contempts in the presence of the court and then and there directly interfering with the conduct of its business. The only reasons assigned as a basis for the rule are those set forth in the *Yancy, Woodfin* and *Baker* cases. Obviously, these reasons do not apply to the factual situation here considered.

The real question for decision is whether appellants were entitled to a jury trial as a matter of right under the provisions of Article I, Section 13, of the Constitution of North Carolina, which 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."

Although this constitutional provision, on which appellants' principal contention is based, is quoted in the first paragraph of the majority opinion, there is no further reference thereto or discussion thereof. Nor do I find any prior decision involving contempt proceedings in which this provision of the North Carolina Constitution

is considered with relation to a person's right to jury trial when charged with criminal contempt. Hence, the question would seem to be open for consideration at this time.

Under Article I, Section 13, the General Assembly may provide "other means of trial, for petty misdemeanors, *with the right of appeal.*" (My italics.) Referring to this portion of Article I, Section 13, Merrimon, J. (later C.J.), in *State v. Crook,* 91 N.C. 536, 539-540, said: "This plainly implies that, 'as to petty misdemeanors,' a method of trial other than by jury in the ordinary methods may be provided by the legislature, if the right of appeal be allowed -- that is, the right to appeal to a court where trial by jury may be had." In *State v. Pulliam,* 184 N.C. 681, 114 S.E. 394, Walker, J., for the Court, said: "The offense here, of course, is a petty misdemeanor, but this Court has held that the expression used in the Constitution 'with right of appeal' confers upon the defendant, when the appeal is taken, the right of trial by jury in the Superior Court. . . ."

"Petty misdemeanors," within the meaning of Article I, Section 13, *include* offenses for which (as for criminal contempt) the punishment may not exceed a fine of two hundred and fifty dollars or imprisonment for thirty days or both. *State v. Lytle,* 138 N.C. 738, 51 S.E. 66; *State v. Hyman,* 164 N.C. 411, 79 S.E. 284. In *Lytle,* Clark C.J., said: "The object of the statute creating the police court is to relieve the Superior Courts of petty business, to relieve the taxpayers, and defendants, also, of heavy costs, and to give a speedy trial, lightening jail expenses, and dispensing often with long imprisonment or detention till a term of court comes around with its jury and judge. There is no harm done, since an appeal always lies open to a convicted defendant to the Superior Court, where he has the right of trial by jury; whereas to the acquitted defendant or to one who takes no exception to his punishment, there is a relief from unnecessary delay and costs as well as diminution of court expenses to the public."

In *State v. Pasley,* 180 N.C. 695, 104 S.E. 533, the defendant was charged in a criminal action before a justice of the peace with going or entering upon the lands of another, without a license therefor, after having been forbidden to do so, a violation of the statute now codified as G.S. 14-134, a criminal offense then punishable by a fine not exceeding fifty dollars or by imprisonment not exceeding thirty days. The defendant was found guilty by the justice of the peace who entered judgment taxing the defendant with the costs. The defendant appealed. In the superior court, the parties negotiated for a settlement of the controversy. However, final agreement

was not reached on account of the defendant's refusal to pay the costs. Thereupon the court, against the consent of the defendant and without allowing the defendant a jury trial, affirmed the judgment of the justice of the peace as to the costs. This Court set the judgment aside and ordered "a new trial by jury." Walker, J., for the Court, said: "Article I, section 13, of the Constitution says: 'With right of appeal.' And this Court has held in the case of *S. v. Brittain,* 143 N.C. 668, that when a defendant asserts his right of appeal, and the case comes up in the Superior Court, the defendant's right of trial by jury, as guaranteed by the Constitution, is preserved to him. It makes no difference what the real issue is, so that the charge involves the commission of a crime for which he can be punished and made to pay the costs." Accord: *State v. Pulliam, supra.*

Our decisions establish that Article I, Section 13, confers upon every person accused of having committed a criminal offense, even though it be a petty misdemeanor, the right to trial by jury either in the inferior court (*State v. Ham,* 83 N.C. 590) or in the superior court upon original trial or trial *de novo* upon defendant's appeal from an inferior court. *State v. Tate,* 169 N.C. 373, 85 S.E. 383; *State v. Thomas,* 236 N.C. 454, 460, 73 S.E. 2d 283, 287; *State v. Norman,* 237 N.C. 205, 212, 74 S.E. 2d 602, 608. I perceive no reason why a person accused of terminated past conduct (neither in the presence of the court nor interfering with the functioning of the court) constituting criminal contempt is not equally entitled to the right of trial by jury. Where guilt for past conduct and punishment therefor are involved, I find no sound basis for applying different rules simply because guilt is related to the violation of a court order rather than to the violation of a State statute or municipal ordinance. Hence, I reach the conclusion that appellants were entitled to a trial by jury in respect of all controverted material facts relating to their alleged guilt of criminal contempt.

The views herein expressed are in substantial accord with those stated by Sheran, J., for the Supreme Court of Minnesota, in *Peterson v. Peterson,* 153 N.W. 2d 825 (1967).

SHARP, J., joins in dissenting opinion.

IN RE: BARBARA BURRUS (69-J-17), SARAH WHITNEY (69-J-18), DARLENE McCOY (69-J-19), NINA WHITNEY (69-J-20), DORENE HARRIS (69-J-21), PATRICIA COLLINS (69-J-22), DOLLIE GIBBS (69-J-23), MARIA HARRIS (69-J-24), TRINA SELBY (69-J-1), DORENE HARRIS (69-J-3), JULIA ANNA COLLINS (69-J-4), CHERLYN WHITNEY (69-J-5), CATHERINE GIBBS (69-J-6), DEBORAH ANN COLLINS (69-J-8), MARIA HARRIS (69-J-9), EDDIE WHITLEY (69-J-10), ALONZO EDWARD HOLLOWAY (69-J-30), EVELYN EVANGELINE GIBBS (69-J-11), ROSE MARY COLLINS (69-J-12), DEBRA ANN COLLINS (69-J-13), CATHERINE GIBBS (69-J-14), JULIA ANNA COLLINS (69-J-16), ELVIRA VASHTI WESTON (69-J-28), SUDIE BELL McCULLOR (69-J-29), BARBARA BURRUS (68-J-4), WILLIAM BLOUNT (68-J-5), NEKOLA GREEN (68-J-6), SHARON HARRIS (68-J-7), SARAH ANNETTE WHITNEY (68-J-8), WALTER ANTHONY GREEN (68-J-9), DESSIE HARRIS (68-J-10), EVELYN GIBBS (68-J-11), RONNIE LEE TOPPING (68-J-12), TYRONE DUDLEY (68-J-13), THERESA BLOUNT (68-J-14), LINDA SUE GIBBS (68-J-15), PATRICIA COLLINS (69-J-27), DONALD WHITE (69-J-25), WILMA JOYCE WHITAKER (69-J-26), JAMES LAMBERT HOWARD (68-J-3), ROSE MARY WHITNEY (69-J-15), CHERLYN D. WHITNEY (69-J-2), TRINA SELBY (69-J-7), ALONZO EDWARD HOLLOWAY (69-J-31), SELMA SHELTON (69-J-32), JOHN GREEN CUNNINGHAM (69-J-33)

No. 15

(Filed 15 October 1969)

1. Constitutional Law § 29; Courts § 15; Infants § 10— juvenile proceedings — delinquency — jury trial

A juvenile has no constitutional right to a jury trial in a juvenile court proceeding on the issue of his delinquency.

2. Constitutional Law § 30— criminal prosecution — public trial — state courts

Right to a public trial in criminal prosecutions accorded by the Sixth Amendment to the U. S. Constitution is now applicable in both state and federal courts by virtue of the Due Process Clause of the Fourteenth Amendment.

3. Courts § 15; Infants § 10— juvenile proceedings — criminal prosecutions

Juvenile proceedings are not "criminal prosecutions," nor is a finding of delinquency in a juvenile proceeding synonymous with "conviction of a crime."

4. Courts § 15; Infants § 10— juvenile delinquency hearing — due process

The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency.

5. Courts § 15; Infants § 10— juvenile delinquency hearing — coerced confession

The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile.

6. Courts § 15; Infants § 10— juvenile delinquency hearing — adequate notice

Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare and the notice must set forth the alleged misconduct with particularity.

7. Courts § 15; Infants § 10—juvenile delinquency hearing — right to counsel

In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same.

8. Courts § 15; Infants § 10— juvenile delinquency hearing — self-incrimination

Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a state institution, must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination.

9. Constitutional Law § 30; Courts § 15; Infants § 10— juvenile delinquency hearing — public trial

A juvenile has no constitutional right to a public trial in a juvenile court proceeding on the issue of his delinquency.

10. Courts § 15; Infants § 10— juvenile cases — jurisdiction — district court

The district court has exclusive, original jurisdiction over cases involving juveniles, which jurisdiction is to be exercised solely by the district judge. G.S. 7A-277.

11. Courts § 15; Infants § 10— juvenile delinquents — wards of State — duty of juvenile court

The North Carolina Juvenile Court Act deals with delinquent children as wards of the State, not as criminals, and makes it the constant duty of the juvenile court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State.

12. Statutes § 4— constitutionality — vagueness

While due process of law is violated by a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, constitutional requirements are met when the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly.

13. Disorderly Conduct § 1; Highways and Cartways § 10; Schools § 15— disorderly conduct in county building — interrupting school — impeding traffic — constitutionality

In this juvenile proceeding to determine delinquency for alleged viola-

tions of State law, statutes which the juveniles allegedly violated, G.S. 14-132, prohibiting rude or riotous noise, disorderly conduct or nuisance in any public building of any county, G.S. 14-273, prohibiting the wilful interruption or disturbance of a school or injury to school property, and G.S. 20-174.1, prohibiting the wilful standing, sitting or lying upon the highway so as to impede traffic, *are held* not unconstitutional for vagueness.

14. Courts § 15; Infants § 10— juvenile delinquency statute — delinquent — violation of State law — constitutionality

Provision of G.S. 110-21 subjecting to supervision by the district court any child less than sixteen years of age who is delinquent or who violates any State law is not unconstitutional for vagueness.

15. Courts § 15; Infants § 10— juvenile delinquency proceeding — violation of State law — other provisions of G.S. 110-21

Where juveniles were disciplined pursuant to G.S. 110-21 for violations of State law, it is unnecessary upon appeal to determine whether further provisions of the statute are void for vagueness in failing to define the terms "unruly," "wayward," "misdirected," "disobedient," or "beyond the control of their parents."

16. Courts § 15; Infants § 10— juvenile statutes — commitment "during minority" — constitutionality

The juvenile statutes are not unconstitutional in that a juvenile may be committed "during minority" for a violation of State law, which may be a longer period of time than the criminal law visits upon an adult for a violation of the same statute, since the protective custody of children under juvenile laws cannot be equated with the trial and punishment of adults under the criminal statutes.

17. Courts § 15; Infants § 10— juvenile delinquency proceeding — due process

In this juvenile delinquency proceeding, the basic requirements of due process were satisfied where the alleged misconduct of the children was stated with particularity in the petitions and brought to the attention of the juveniles and their parents in apt time, the juveniles were given timely notice of the hearing and afforded adequate opportunity to prepare for it, they were represented by able counsel and faced their accusers with lengthy cross-examination, no statements or confessions were offered against them, and they were accorded and exercised the privilege of remaining silent and declining to testify.

18. Appeal and Error § 6; Courts § 15; Infants § 10— juvenile proceedings — appeal to Court of Appeals

An appeal may be taken from any order or judgment of a juvenile court to the Court of Appeals, such appeals being on the record on questions of law or legal inference. G.S. 7A-195; G.S. 110-40.

19. Criminal Law § 152; Courts § 15; Infants § 10— juvenile proceedings — appeal in forma pauperis — criminal procedure

Statutes dealing with appointment of counsel to represent an indigent criminal defendant upon appeal and permitting them to appeal in forma

pauperis have no application to appeals from juvenile proceedings in the district court.

20. Appeal and Error § 19; Courts § 15; Infants § 10— juvenile proceedings — appeals in forma pauperis — compliance with G.S. 1-288

Appeals in forma pauperis in juvenile proceedings tried in the district court are governed by the statute applicable to civil actions, G.S. 1-288, and compliance with its terms is necessary to entitle juveniles to an order allowing them to appeal in forma pauperis.

21. Appeal and Error § 19— appeal in forma pauperis — failure to comply with G.S. 1-288

In this juvenile delinquency proceeding, the district court did not err in declining to issue an order providing for an appeal in forma pauperis, where the required affidavit and certificate of counsel were not filed in compliance with G.S. 1-288, no prejudice having resulted to the juveniles involved in any event since their appeals have been prepared, docketed and heard by both courts in the Appellate Division of the General Court of Justice.

22. Appeal and Error § 26— error on face of record — modification of judgment

Where there is error on the face of the record, an appeal presents the matter for review, and the judgment may be modified to conform to legal requirements.

23. Courts § 15; Infants § 10— juvenile proceedings — disposition by the court — alternatives in G.S. 110-29

When the juvenile court finds that a child is delinquent, neglected or in need of more suitable guidance, the court may use any one of the alternative dispositions set forth in G.S. 110-29 but is not empowered to use two or more at the same time.

24. Courts § 15; Infants § 10— juvenile proceedings — probation — commitment — validity of order

Where the juvenile court placed each child on probation subject to the conditions named in the order, the court exhausted its immediate authority, and further provision of the order in each case which adjudged that the juvenile be committed to the custody of the county welfare department to be placed in a State institution for delinquents is unauthorized and must be deleted.

25. Courts § 15; Infants § 10— juvenile proceedings — probation

When a juvenile is placed on probation, the judge determines the duration and conditions thereof, and may modify same at any time.

26. Courts § 15; Infants § 10— juvenile proceedings — revocation of probation — alternative dispositions

Probation of a juvenile may be revoked at any time the court finds the conditions of probation have been breached, and the court may then commit the juvenile or make such other disposition as it might have made at the time the child was placed on probation.

BOBBITT and SHARP, JJ., dissent.

IN RE BURRUS

APPEALS by respondents from decisions of the Court of Appeals affirming judgments of *Ward, J.*, entered at the 9 and 21 January 1969 Juvenile Sessions, HYDE County District Court.

These cases, more than forty in number, were consolidated by consent for hearing in the Juvenile Court of Hyde County. On appeal to the Court of Appeals they were lumped into one record. Upon appeal to this Court it was made to appear that the factual situation in two additional cases involving the juveniles Selma Shelton and John Green Cunningham was substantially identical to the factual situation in the case of *In Re Burrus, et al.*, and this Court ordered a consolidation and heard all the cases as one appeal.

All persons involved in these proceedings are juveniles residing in Hyde County, North Carolina. On six different occasions in November and December, 1968, these juveniles (with the exception of James Lambert Howard) were observed by State Highway Patrolmen standing upon the public highway tossing a basketball back and forth and singing, clapping, and marching. "Between September 11th and November 13th they marched practically every day." As a result, vehicular traffic was prevented from proceeding in either direction. The juveniles and numerous adults were asked to remove themselves from the road to allow traffic to pass. They either refused to do so or left the roadway and immediately returned. Said juveniles, with numerous adults who were also participating in the unlawful conduct, were then taken into custody. After ascertaining the juveniles herein named to be under sixteen years of age the officers obtained juvenile petitions. The following petition *in re* Barbara Burrus is substantially identical to the petitions in all cases (except James Lambert Howard):

"STATE OF NORTH CAROLINA
COUNTY OF HYDE

In the General Court of Justice
District Court Division

In the Matter of
Barbara Burrus
Age 13
Box 83, Fairfield, N. C.

Charles Smith, Petitioner, having sufficient knowledge or information to believe that the child named above (whether one or more) is in need of the care, protection or discipline of the State, alleges:

1. That said child is less than sixteen years of age, and is now residing within the territorial jurisdiction of the District Court for this County at the address shown above.

2. That the names of the parents and of the person having the guardianship, custody or supervision of said child if other than a parent, are as follows:

Name	*Relation*	*Address*
Lillie Mae Burrus	mother	Box 83, Fairfield, N. C.
David Burrus	father	Box 83, Fairfield, N. C.

3. That the facts and circumstances supporting this Petition for court action are as follows:

That at and in the county named above on or about Nov. 14, 1968, the defendant above named did intentionally, unlawfully, and willfully stand upon the traveled part or portion of a State highway and street passing through and traversing the community of Swan Quarter and did willfully, intentionally and unlawfully stand upon that portion of said highway and street used by the traveling public in the operation of automobiles, trucks and other motor vehicles in such a way and manner as to cause said motor vehicles being operated upon the traveled portion of said street and highway to stop and cease their traveling or operation and in some cases caused said motor vehicles and the operators of same to be detained, stop and cease operation and to force same, in some cases, to seek detours or other methods of traveling, all in such a way and manner as to obstruct, hinder, impair and stop the progress of said motor vehicles and their operators and to impede the regular flow and normal traffic of said motor vehicles and their operators upon said highway and street, contrary to the statute in such cases made and provided, the same being Section 20-174.1 of the General Statutes of North Carolina, and against the peace and dignity of the State.

Petitioner, therefore, prays the court to hear and determine this case, and, if need be found, to give said child such oversight and control as will promote the welfare of such child and the best interest of the State.

This 3 day of January, 1969.

s/ Sgt. Charles Smith
Petitioner
S. H. P. Washington, N. C.

(Verified by Charles Smith, Petitioner, on 1-3-69.)"

Sergeant Rogers of the State Highway Patrol observed sixteen persons, including James Lambert Howard, in the Principal's office of the O. A. Peay School at 10:30 a.m. on December 5, 1968, while school was in session, yelling, piling objects against the windows,

moving furniture including a metal cabinet, placing a bed against the door, emptying papers on the floor, turning chairs upside down, and generally littering the office with books, papers, a roll of electrical wire and other items of property belonging to the school. As a result, the school closed before noon. None of the sixteen were students or school personnel. All sixteen were taken into custody and a petition filed with respect to Howard in the following language:

"STATE OF NORTH CAROLINA
COUNTY OF HYDE

In the General Court of Justice
District Court Division

In the Matter of
James Lambert Howard
Age 15
P. O. Box 222, Engelhard, N. C.

Clyde Fentress, Petitioner, having sufficient knowledge or information to believe that the child named above (whether one or more) is in need of the care, protection or discipline of the State, alleges:

1. That said child is less than sixteen years of age, and is now residing within the territorial jurisdiction of the District Court for this County at the address shown above.

2. That the names of the parents, and of the person having the guardianship, custody or supervision of said child if other than a parent, are as follows:

Name	*Relation*	*Address*
Thad Howard	Father	P. O. Box 222, Englehard, N. C.
Pearl Howard	Mother	P. O. Box 222, Englehard, N. C.

3. That the facts and circumstances supporting this Petition for Court action are as follows:

That at and in the County named above on or about December 5, 1968 the defendant named above did unlawfully, willfully and intentionally and did knowingly, willfully, and unlawfully interrupt and disturb the O. A. Peay School, the same being a public school owned and operated by the Board of Education of Hyde County, and located in the community of Swan Quarter, North Carolina, and being a public building, by uttering rude and riotous noises and shouts and by engaging

in acts of disorderly conduct in and near said public school building, owned and operated by the Board of Education of Hyde County, which said unlawfully, rude and riotous noises, shouts and other disorderly conduct in and near public school building interrupted and disturbed the operation of said public school.

And, the said Clyde Fentress, complainant as aforesaid, upon oath further alleges that the said defendant, James Lambert Howard, did further interrupt and disturb operation of a public school operated by the Board of Education of Hyde County, the same being the O. A. Peay School, of the Community of Swan Quarter, by engaging in disorderly acts and conduct in and near said public school by seizing and scattering the papers, books and other equipment of said school and by defacing, injuring and damaging the public school furniture and other education equipment of the said O. A. Peay School, owned and operated by the Board of Education of Hyde County, all of which occurred while said public school was in regular session and performing the educational functions administered by said Board of Education.

All of the above riotous and disorderly interruptions and disturbances being contrary to the statutes made and provided, the same being Sections 14-132 and 14-273 of the General Statutes of North Carolina, and contrary to the peace and dignity of the State.

Petitioner, therefore, prays the court to hear and determine this case, and, if need be found, to give said child such oversight and control as will promote the welfare of such child and the best interest of the State.

This 5th day of December, 1968.

s/ C. O. Fentress S.B.I.
Petitioner
Washington, North Carolina

(Verified by C. O. Fentress, Petitioner, on 12-5-68.)"

Summonses were duly issued in each proceeding and at the time and place named therein the District Court judge conducted a hearing at the commencement of which he ordered the general public excluded from the room. The judge stated that he was preparing to conduct a juvenile hearing — not a criminal trial, and that no child would be found to have committed a crime. He thereupon ordered the general public excluded and stated that only officers of the court,

the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing. Judge Ward further announced that only the juvenile cases would be heard and that no other court business would be conducted. In each instance, counsel for the juveniles objected to the exclusion of the general public and demanded a jury trial. The objection was overruled and request for jury trial denied.

At the conclusion of the various hearings, Judge Ward entered the following "Order of Commitment and Probation" with respect to Barbara Burrus:

> "This matter, coming on to be heard, and being heard at this regularly calendared session of Juvenile Court for the County of Hyde convened this 9th day of January, 1969; and the Court having determined that said child is under sixteen (16) years of age and is a resident of Hyde County, N. C.; and the Court having heretofore explained to the child and to Lillie Mae Burrus — her mother — the nature of this proceeding; as will appear in the minutes; and said child being represented by James E. Ferguson II, Esq., Attorney of Record; and it having been agreed to by the said James E. Ferguson, II and Hon. Herbert Small, Solicitor for this The First Solicitorial District, that this matter should be consolidated with 69-J-18; 69-J-19; 69-J-20; 69-J-21; 69-J-22; 69-J-23; 69-J-24, for hearing, findings and disposition and said attorneys having further agreed that such consolidation is in no way prejudicial to said child and does not violate the spirit or intent of Article 2, Chapter 110 of the General Statutes of North Carolina; and it appearing to the Court, and the Court finding as a fact, that on or about the 14 day of November, 1968, the said child did in the company of others go upon one of the main traveled highways in Swan Quarter and did remain upon said traveled portion of said highway in a manner calculated to impede traffic — all of said acts having been willfully and intentionally done and designed to impede traffic, and that said acts constitute a violation of GS 20-174.1, an act for which an adult may be punished by law; and it further appearing to the Court and the Court being satisfied and finding as a fact that the said child is in need of the care, protection and discipline of the State, and is in need of more suitable guardianship and is delinquent;
>
> It is now, therefore, ORDERED, ADJUDGED and DECREED that Barbara Burrus be, and she is hereby committed

to the custody of the Hyde County Department of Public Welfare to be placed by said department in a suitable institution maintained by the State for the care of delinquents (as said institutions are enumerated in G.S. 134-91), after having first received notice from the superintendent of said institution that such person can be received, and held by said institution for no definite term but until such time as The Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State; this commitment is suspended and said child placed upon probation for 12 months, under these special conditions of probation:

1. That said child violate none of the laws of North Carolina for 12 months;

2. That said child report to the Director of the Hyde County Public Welfare Department, or his designated agent, at least once each month at a time and place designated by said Director;

3. That said child be at her residence by 11:00 o'clock P.M. each evening.

4. That said child attend some school, public or private, or some institution offering training approved by the Hyde County Director of Public Welfare.

This matter is retained pending further order of the Court.

This 9th day of January, 1969.

/s/ Hallett S. Ward"

Similar commitment and probation orders were entered with respect to all the other juveniles except James Lambert Howard. As to him the following "Order of Commitment and Probation" was entered:

"This matter coming on to be heard and being heard at this regularly calendared session of Juvenile Court for the County of Hyde convening this 10th day of January, 1969, the Court having determined that the juvenile is under sixteen (16) years of age, the Court having heretofore explained to the child and to Pearl Howard, the mother of the child, the nature of this proceeding, it appearing to the Court, and the Court finding as a fact that on or about the 5th day of December, 1968, the said child did, in the company of 15 others, enter without lawful authority the O. A. Peay School in Swan Quarter, North Carolina, and participate with others in making loud noises

which were calculated to and did in fact disturb and disrupt said school which was then in session and did disarrange and disrupt an office in said school and did join with others in a course of conduct designed to cause a cessation of school activities and that said acts constitute a violation of GS 14-132 and GS 14-273; and it further appearing to the Court and the Court being satisfied and finding as a fact that said James Lambert Howard is in need of the care, protection and discipline of the State and is in need of more suitable guardianship, and is delinquent.

Now, it is therefore, ORDERED, ADJUDGED AND DECREED, that James Lambert Howard be, and he is hereby committed to the custody of the Hyde County Department of Public Welfare to be placed by said department in a suitable institution maintained by the State (as said institutions may be enumerated in GS 134-91) and held by said institution for no definite term, but until such time as the Board of Juvenile Correction or the Superintendent of said institution shall determine, not inconsistent with the laws of this State. This commitment is suspended and said child placed on probation for 24 months:

1. That he violate no laws of the State of North Carolina for 24 months.

2. That he be at his residence by 11:00 P.M. each evening.

3. That said child attend some school, public or private, or some institution offering training approved by the Hyde County Director of Public Welfare.

4. That he report to the Director of the Hyde County Department of Public Welfare, or his designated agent at least once each month at a time and place designated by said Director.

This matter is retained pending further order of the Court.

This 10 day of January, 1969.

s/ Hallett S. Ward"

From the foregoing orders each juvenile through counsel appealed to the Court of Appeals which affirmed the judgments by decisions appearing in 4 N.C. App. 523, 167 S.E. 2d 454, and 5 N.C. App. 487, 168 S.E. 2d 695. Respondents thereupon appealed to the Supreme Court, alleging involvement of substantial constitutional questions.

Chambers, Stein, Ferguson and Lanning by James E. Ferguson, II, Attorneys for respondent appellants.

Robert Morgan, Attorney General, and Ralph Moody, Deputy Attorney General, for the State.

HUSKINS, J.

Four questions, preserved and brought forward, will be discussed in chronological order.

[1] 1. Under the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17, of the Constitution of North Carolina, is a juvenile entitled to a jury trial in a juvenile court proceeding on the issue of his delinquency?

The Constitution of the United States, Article III, Section 2, reads in pertinent part as follows: "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ." The Sixth Amendment thereto provides, *inter alia:* "In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ."

The Constitution of North Carolina, Article I, Section 13, reads as follows: "No person shall be convicted of any crime but by the unanimous verdict of a jury. . . . The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal."

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or Federal Constitution to demand that the issue of his delinquency be determined by a jury. See Annotation: Right to Jury Trial in Juvenile Court Delinquency Proceedings, 100 A.L.R. 2d 1241, where cases are collected from twenty-five states and the District of Columbia. "The view has generally been taken that statutes providing for the custody or commitment of delinquent or incorrigible children are not unconstitutional by reason of failure to provide for a jury trial, where the investigation is into the status and needs of the child, and the institution to which the child is committed is not of a penal character. Thus it is held that a constitutional guaranty of trial by jury has no application to a proceeding under the juvenile court act." 31 Am. Jur., Juvenile Courts, etc. § 67; 50 C.J.S., Juries § 80. North Carolina follows the general rule. *In Re Watson,* 157 N.C. 340, 72 S.E. 1049; *State v. Burnett,* 179 N.C. 735, 102 S.E. 711; *State v. Frazier,* 254 N.C. 226, 118 S.E. 2d 556. Federal decisions to date

have not changed it. *Kent v. United States,* 383 U.S. 541, 16 L. ed 2d 84, 86 S. Ct. 1045; *In Re Gault,* 387 U.S. 1, 18 L. ed 2d 527, 87 S. Ct. 1428; *Duncan v. Louisiana,* 391 U.S. 145, 20 L. ed 2d 491, 88 S. Ct. 1444; *In Re Whittington,* 391 U.S. 341, 20 L. ed 2d 625, 88 S. Ct. 1507. These cases enumerate the basic requirements of due process that must be satisfied in juvenile proceedings; however, the right to jury trial is not listed among them. We have not found and counsel has not cited any case supporting the right to jury trials in juvenile proceedings. We therefore adhere to our former decisions and hold that a juvenile is not entitled to a jury trial in a juvenile court proceeding on the issue of his delinquency.

[9] 2. Is a juvenile entitled to a public trial in a juvenile court proceeding on the issue of his delinquency?

[2] The Sixth Amendment to the Federal Constitution provides, among other things, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. . . ." Article I, Section 13, of the Constitution of North Carolina prohibits conviction of any crime except by jury verdict in "open court." This right to a public trial is now applicable in both state and federal courts by virtue of the Due Process Clause of the Fourteenth Amendment. "In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison." *In Re Oliver,* 333 U.S. 257, 92 L. ed 682, 68 S. Ct. 499 (1948). The right of an adult charged with crime to be publicly tried is thus firmly established as a matter of constitutional law. See Annotation: Right to Public Trial in Criminal Case — Federal Cases, 4 L. ed 2d 2128.

[3-8] Juvenile proceedings, however, stand in a different light. Whatever may be their proper classification, they certainly are not "criminal prosecutions." Nor is a finding of delinquency in a juvenile proceeding synonymous with "conviction of a crime." It has never been the practice in such proceedings, here or elsewhere, wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. See *In Re Oliver, supra* (333 U.S. 257, 266, note 12). So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court

adjudication of delinquency. *Kent v. United States, supra* (383 U.S. 541, 16 L. ed 2d 84, 86 S. Ct. 1045 (1966)); *In Re Gault, supra* (387 U.S. 1, 18 L. ed 2d 527, 87 S. Ct. 1428 (1967)). (2) The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. *Haley v. Ohio,* 332 U.S. 596, 92 L. ed 224, 68 S. Ct. 302 (1948). *Gallegos v. Colorado,* 370 U.S. 49, 8 L. ed 2d 325, 82 S. Ct. 1209, 87 A.L.R. 2d 614 (1962). (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. *In Re Gault, supra.* (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. *In Re Gault, supra.* (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a state institution, must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. *In Re Gault, supra.*

[9] We have been unable to find, and counsel has not cited, any case holding that a public hearing in juvenile proceedings is a constitutional requirement of due process. North Carolina has determined by statutory enactment that a public hearing is neither required nor in the best interest of the youthful offender. We adhere to that view. This assignment of error is therefore overruled.

3. Is the North Carolina Juvenile Court Act (Article 2 of Chapter 110 of the General Statutes) unconstitutional? Brief historical reference seems necessary and appropriate.

[10] The District Court Division of the General Court of Justice was created by Chapter 310 of the 1965 Session Laws, effective in the First Judicial District (embracing Hyde County) on the first Monday in December 1966. G.S. 7A-130, 131. As thus created the district court has exclusive, original jurisdiction over cases involving juveniles, "as such jurisdiction is set forth in chapter 110, article 2, of the General Statutes. This jurisdiction shall be exercised solely by the district judge." G.S. 7A-277.

[11] Chapter 110, Article 2, of the General Statutes delineates the practices and procedures to be followed in juvenile cases. G.S. 110-21 provides in pertinent part that the superior court (now the

district court by virtue of G.S. 7A-277) "shall have exclusive original jurisdiction of any case of a child less than sixteen years of age residing in . . . their respective districts: (1) Who is delinquent or who violates any . . . State law . . . or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so. . . ." This statute makes it the constant duty of the court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State. *In Re Morris,* 224 N.C. 487, 31 S.E. 2d 539. It deals with delinquent children as wards of the State and not as criminals. *State v. Burnett,* 179 N.C. 735, 102 S.E. 711; *State v. Frazier,* 254 N.C. 226, 118 S.E. 2d 556.

Appellants argue that the statute fails to define any of the operative terms such as "delinquent", "unruly", "wayward", "misdirected" and "disobedient" and contend that the statute is therefore void for vagueness and uncertainty.

[12] It is settled law that a statute may be void for vagueness and uncertainty. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 16 Am. Jur. 2d, Constitutional Law § 552; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L. ed 2d 285; 82 S. Ct. 275; *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768. Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo,* 332 U.S. 1, 91 L. ed 1877, 67 S. Ct. 1538.

[13] Here, James Lambert Howard was found to be delinquent for the willful violation of (1) G.S. 14-132 which provides, *inter alia,* that if any person "shall make any rude or riotous noise or be guilty of any disorderly conduct" in any public building of any county, or shall commit any nuisance in such building, he shall be guilty of a misdemeanor; and (2) G.S. 14-273 which provides in pertinent part that if any person "shall wilfully interrupt or disturb any public or private school . . . or injure any school building, or deface any school furniture . . . or other school property, . . . he shall be guilty of a misdemeanor" and fined not more than $50 or imprisoned not more than thirty days.

Barbara Burrus and the remaining juveniles were found to be delinquent for the willful violation of G.S. 20-174.1 which provides that no person "shall wilfully stand, sit, or lie upon the highway or street in such a manner as to impede the regular flow of traffic." Violation is punishable by fine or imprisonment, or both, in the discretion of the court.

There is nothing vague or indefinite about these statutes. Men — even children — of common intelligence can comprehend what conduct is prohibited without overtaxing the intellect. Judges and juries should be able to interpret and apply them uniformly. In *State v. Wiggins,* 272 N.C. 147, 158 S.E. 2d 37, cert. den. 390 U.S. 1028, 20 L. ed 2d 285, 88 S. Ct. 1418, defendants were charged with interrupting and disturbing the Southwestern High School in Bertie County by picketing in front of the school so as to interfere with classes, a violation of G.S. 14-273. There, as here, defendants argued that the statute was void because its prohibitions were uncertain, vague and indefinite. In upholding that statute, the court said: "It is difficult to believe that the defendants are as mystified as to the meaning of these ordinary English words as . . . they profess to be in their brief. Clearly, they have grossly underestimated the powers of comprehension possessed by 'men of common intelligence.'" That observation seems appropriate here.

The Supreme Court of the United States in sustaining a conviction in the courts of New Jersey for a violation of an ordinance forbidding the use of sound trucks emitting "loud and raucous" sound, said: "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Kovacs v. Cooper,* 336 U.S. 77, 93 L. ed 513, 69 S. Ct. 448, 10 A.L.R. 2d 608 (1949).

[14-15] There is nothing vague or mysterious about a statute which provides that any child under sixteen years of age who is delinquent or who violates any state law which would subject an adult to punishment is amenable to the supervision of the juvenile court. Simply stated, that is the complete accusation against these children. It is not alleged that they were unruly or wayward or misdirected or disobedient or beyond the control of their parents. Hence, it is unnecessary to wage a war of words regarding the clarity or vagueness, as the case may be, of such terminology. We confine our discussion to the portion of the statute under which these children

were disciplined. "Generally, delinquent children . . . are children who have committed offenses against the law, or who are found to be falling into bad habits, or to be incorrigible, or who knowingly associate with vicious or immoral persons, or who are growing up in idleness and crime." 31 Am. Jur., Juvenile Courts, etc. § 36. A delinquent child is defined in Black's Law Dictionary 4th Ed. Rev. (1968) as "an infant of not more than specified age . . . who has violated any law. . . ." This seems clear enough. The challenge to these statutes based on vagueness is overruled.

[16, 17] Appellants seek to equate the protective custody of children under the juvenile laws of the State with the trial and punishment of adults under the criminal statutes. By so doing, they conclude that since a juvenile may be committed "during minority" (unless sooner released by the proper authorities) he is required "to serve a longer period of confinement" than the criminal law visits upon an adult for violation of the same statute. Therefore, they argue, the juvenile statutes are constitutionally unsound. The equation is a *non sequitur;* its rationale fallacious. Nothing in *Gault* or other recent federal decisions supports it. There are still many valid distinctions between a criminal trial and a juvenile proceeding. It suffices to say that the laws of this State and their administration by the District Court of Hyde County in these cases comply in full measure with recent constitutional standards for juvenile proceedings laid down by the United States Supreme Court in *Gault.* The record discloses complete fairness on the part of Judge Ward. The alleged misconduct of the children was stated with particularity in the petitions and brought to the attention of the juveniles and their parents in apt time. They were given timely notice of the hearing and afforded adequate opportunity to prepare for it. They were represented by able counsel and faced their accusers with lengthy cross examination. No statements or confessions, coerced or otherwise, were offered against them. They were accorded and exercised the privilege of remaining silent and declining to testify. Thus the basic requirements of due process have been satisfied. The constitutionality of the proceedings is fully sustained by *Kent* and *Gault, supra,* and by our own decisions as well. These juvenile statutes have been construed, applied and upheld in many decisions of this Court including *State v. Burnett, supra* (179 N.C. 735, 102 S.E. 711); *State v. Coble,* 181 N.C. 554, 107 S.E. 132; *In Re Hamilton,* 182 N.C. 44, 108 S.E. 385; *In Re Coston,* 187 N.C. 509, 122 S.E. 183; *Winner v. Brice,* 212 N.C. 294, 193 S.E. 400. Furthermore, statutes similar to our own have been held constitutional in over forty states against a variety of attacks. *In Re Gault, supra.* See Paulsen, *Kent v. United*

States: The Constitutional Context of Juvenile Cases, 1966 Supreme Court Review 167, 174. Whatever may be the shortcomings of the juvenile court, and there are many, we are not inclined to hamstring the State in its efforts to deal with errant children as wards of the State instead of criminals. The Constitution does not require such mischievous meddling. We follow the rule that statutes will not be declared unconstitutional unless they are clearly so. *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1; *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660. Appellants' challenge to the constitutionality of Article 2, Chapter 110 of the General Statutes is overruled.

4. Did the juvenile court judge err by preventing an appeal *in forma pauperis* in these proceedings?

[18, 19] An appeal may be taken from any order or judgment of the juvenile court to the North Carolina Court of Appeals in all cases. When an appeal is thus taken the district judge must summarize the evidence and make findings of fact. All appeals are on the record on questions of law or legal inference. G.S. 7A-195; G.S. 110-40. By way of contrast, it should be noted that appeals from the district court in criminal cases are taken to the superior court for trial *de novo* before a jury. G.S. 7A-196(e). Thus, juvenile court proceedings in the district court are not classified as "criminal cases" appealable to the superior court; and statutes on criminal procedure, dealing with appointment of counsel for indigent defendants and permitting them to appeal *in forma pauperis,* have no application and offer no solution to the problem before us.

Appeals *in forma pauperis* in civil actions tried in superior court are governed by G.S. 1-288 which provides, in pertinent part, that "[w]hen any party to a civil action tried and determined in the superior court . . . desires an appeal from the judgment rendered in the action . . . and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge . . . of said superior court to make an order allowing said party to appeal . . . without giving security therefor. The party desiring to appeal . . . shall . . . make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney . . . that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law."

[20, 21] G.S. 7A-193 provides: "Except as otherwise provided in this chapter, the civil procedure provided in chapter 1 of the General Statutes applies in the district court division of the General Court of Justice. Where there is reference in chapter 1 of the General Statutes to the superior court, it shall be deemed to refer also to the district court in respect of causes in the district court division." It is not "otherwise provided" in Chapter 7A of the General Statutes. It therefore follows that G.S. 1-288 is applicable to appeals in civil actions and juvenile proceedings tried in the district court. Compliance with its terms was necessary to entitle appellants to an order allowing them to appeal *in forma pauperis*. The requirements are mandatory and must be observed. *Anderson v. Worthington*, 238 N.C. 577, 78 S.E. 2d 333; *Williams v. Tillman*, 229 N.C. 434, 50 S.E. 2d 33; *Clark v. Clark*, 225 N.C. 687, 36 S.E. 2d 261; *Franklin v. Gentry*, 222 N.C. 41, 21 S.E. 2d 828; *McIntire v. McIntire*, 203 N.C. 631, 166 S.E. 732. Since the required affidavit and certificate of counsel were not filed in compliance with the statute, the Court of Appeals concluded that the district court judge committed no error in declining to issue an order providing for an appeal *in forma pauperis*. We concur and note parenthetically that no prejudice has resulted to the juveniles involved. Their appeals have been prepared, docketed and heard by both courts in the Appellate Division of the General Court of Justice. They have been diligently represented by able counsel. While this may not conclusively rebut the suggestion of indigency, it conclusively shows that lack of an order providing for appeals *in forma pauperis* was harmless.

[22] When there is error on the face of the record an appeal presents the matter for review, and the judgment may be modified to conform to legal requirements. *James v. Pretlow*, 242 N.C. 102, 86 S.E. 2d 759; *Smith v. Smith*, 223 N.C. 433, 27 S.E. 2d 137; *Sheets v. Walsh*, 215 N.C. 711, 2 S.E. 2d 861.

[23, 24] We note *ex mero motu* that the "Order of Commitment and Probation" signed by the able and patient judge in each of these cases exceeds the disposition authorized by G.S. 110-29. That statute provides that the court, if satisfied that the child is in need of the care, protection, or discipline of the State, may so adjudicate, and may find the child to be delinquent, neglected, or in need of more suitable guidance. Thereupon the court may: (1) place the child on probation subject to named conditions; *or* (2) commit the child to the custody of a relative, etc.; *or* (3) commit the child to the custody of the County Department of Public Welfare to be placed by said department in an institution maintained by the State; *or* (4) com-

mit the child directly to an appropriate State or private institution or family home; *or* (5) render such further judgment or make such further order of commitment as may be authorized by law. These authorized dispositions are stated in the alternative. The judge may use any one of them but is not empowered to use two or more at the same time. When he placed each child on probation subject to the conditions named in the order, he exhausted his immediate authority. Therefore, that portion of the order in each case which adjudged that the juvenile be "committed to the custody of the Hyde County Department of Public Welfare to be placed by said department in a suitable institution maintained by the State for the care of delinquents (as said institutions are enumerated in G.S. 134-91), after having first received notice from the superintendent of said institution that such person can be received, and held by said institution for no definite term but until such time as The Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State" is unauthorized and must be deleted. Each judgment is accordingly modified by deleting the quoted portion together with the words "this commitment is suspended and said child," which are now redundant.

[25, 26] When a child is placed on probation, as here, the judge determines the duration and conditions thereof, and may modify same at any time. Probation may be revoked at any time the court finds the conditions of probation have been breached. The court may then commit the juvenile or make such other disposition as it might have made at the time the child was placed on probation. G.S. 110-32.

The result reached by the Court of Appeals in all other respects is affirmed. Let the cases be remanded to the Court of Appeals for certification to the District Court of Hyde County for compliance with this opinion.

Modified and affirmed.

BOBBITT and SHARP, JJ., dissent.

STATE OF NORTH CAROLINA v. FERRELL ROBBINS

No. 3

(Filed 15 October 1969)

1. Homicide § 4— first-degree murder — elements

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

2. Homicide § 4— first-degree murder — intent to kill

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

3. Criminal Law § 176— review of judgment on motion to nonsuit — consideration of evidence

Where defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, the Court on appeal will consider only the denial of the motion made at the close of all the evidence, and the Court must act in light of all the evidence. G.S. 15-173.

4. Homicide § 21— nonsuit motion — premeditation and deliberation — sufficiency of evidence

Defendant's motion for judgment as of nonsuit in a homicide prosecution presents the question of whether the State has presented substantial evidence—circumstantial, direct, or both—that defendant acted with premeditation and deliberation.

5. Homicide § 21— first-degree murder — premeditation and deliberation — nonsuit

In prosecution charging defendant with the first-degree murder of his wife, there was substantial evidence of premeditation and deliberation on the part of defendant to withstand motion for nonsuit.

6. Constitutional Law § 21— right to security in the home — search warrant

The Fourth Amendment to the U. S. Constitution and Art. I, § 15, of the N. C. Constitution guarantee that, in ordinary circumstances, even the strong arm of the law cannot invade the home except under authority of a search warrant issued in accordance with statutory provisions.

7. Criminal Law § 84— evidence obtained by illegal search — competency

Evidence obtained by an illegal search without a search warrant is inadmissible. G.S. 15-27.

8. Searches and Seizures § 1; Criminal Law § 84— warrantless search — test of unreasonableness

The constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable.

9. Searches and Seizures § 1— reasonableness of search

The reasonableness of the search must be determined by the court from the facts and circumstances of each individual case.

10. Searches and Seizures § 1— what constitutes 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.

11. Searches and Seizures § 1; Criminal Law § 84— entry into defendant's home without warrant — crime scene — admissibility of testimony

In a prosecution charging defendant with the first-degree murder of his wife, a deputy sheriff's entry into defendant's home without a warrant was lawful, and consequently his testimony relating to the view of the crime scene inside the home was properly admitted in evidence, where the officer, unaware of the existence of any crime, entered the dwelling at the request of defendant's brothers who feared that harm had come to their brother and sister-in-law.

12. Criminal Law §§ 73, 77— admission by defendant — testimony of officer — hearsay rule

Testimony by police officer as to a conversation he overheard between defendant and his niece in which defendant admitted his guilt of murdering his wife and stated his motive in doing so, *is held* admissible, the testimony not being in violation of the hearsay rule since its probative force did not depend upon the competency or credibility of any person other than the officer.

13. Criminal Law § 77— competency of admissions

Admissions of fact by a defendant pertinent to the issue which tend to prove his guilt of the offense charged are competent against him.

14. Criminal Law §§ 99, 170— conduct of trial — leading questions by trial court — voir dire

Trial court did not err in asking deputy sheriff leading questions on a *voir dire* hearing in the absence of the jury.

15. Criminal Law § 99— conduct of trial — questions by trial court

The trial court may propound competent questions to a witness in order to develop some relevant fact which had been overlooked.

16. Criminal Law § 73— testimony of assertions of third person — admissibility — voir dire hearing

Testimony by deputy sheriff as to statements of jailer over the telephone that there was trouble at defendant's home and that defendant's brothers were worried *is held* properly admitted on *voir dire* hearing in the absence of the jury, since the testimony was in explanation of why the officer went to defendant's home.

17. Criminal Law § 169— admission of evidence — harmless error

The admission of testimony over objection is ordinarily rendered harmless when defendant elicits similar testimony on cross-examination or introduces similar testimony himself.

18. Homicide § 25— instructions — first-degree murder — definition of "malice"

Where the trial court in first-degree murder prosecution correctly de-

fined the term "malice" before it reached the charge on murder in the first degree, the court was not required to repeat the definition of "malice" in its instructions on the elements of the offense.

19. Criminal Law § 113— instructions — repetition of the definition of a word

Where the trial court correctly defines a word in its charge to the jury, the court is not required to repeat the definition each time the word is repeated in the charge.

APPEAL by defendant from *Martin, J.*, at November Session 1969, RUTHERFORD Superior Court.

After selection of the jury and before the State called its first witness, the defendant moved to suppress the State's evidence on the ground that it was secured by an unlawful search. The court then conducted a voir dire hearing to determine the admissibility of the testimony of Officer Russell Duncan. On voir dire Officer Duncan testified that on the morning of 5 May 1968 he was employed as a Deputy Sheriff of Rutherford County; that at approximately 9:15 A.M. on that date he went to the house of defendant, at the request of defendant's brothers, Elmer and Vernon Robbins, pursuant to a message relayed to him from the Sheriff of Rutherford County. Upon arriving at defendant's house, the officer stated that the brothers told him the following:

"They stated that they received a telephone call earlier —
"— earlier; that it was from Ferrell, but they couldn't understand what he was saying; that they was worried that something was wrong. . . .

"They wanted to get in. They wanted to get in and find out what was wrong. In order to get into the house, I tried to pull the screen open by the handle, but I couldn't. So I took my knife and cut the screen . . . unlocked the screen . . . opened it . . . got hold of the door handle and tried to open the door . . . couldn't get it open . . . tried to kick the door down and I couldn't."

The officer then testified that one of the brothers brought him an iron bar which he used to break out a panel of glass in the door, so that he could reach inside the house, unlock the door, and gain entry into the house. Before entering the house, the officer said that he called as loud as he could to see if anyone would answer. He called for Mr. Ferrell Robbins and "hollered" and beat on the door and the window without receiving any answer. He further testified:

"I figured something was wrong in the house, because the door

> was locked from the inside and nobody could have left and locked the screen from the inside and the door was locked from the inside and I figured there was somebody in there. Mr. Ferrell Robbins' car was parked in the yard."
>
> ". . . I entered to find out what was wrong in the house, because they didn't answer. I wasn't searching the house, no."
>
> ". . . The brothers are the ones who wanted me to go, the sheriff sent me but at the brother's request. The man who talked to me on the telephone didn't say anything about a felony being committed. . . ."

The witness stated that upon entering the house he found the deceased, Beatrice Robbins, and defendant lying together on the floor near the front door. Mrs. Robbins was not breathing. He heard a gurgling sound and discovered that defendant was still alive. He found a rifle at the feet of defendant and several apparent bullet holes in the body of the deceased.

Vernon Robbins, a brother of defendant, testified that in response to a telephone call from defendant he went to defendant's house. On the way he picked up another brother, Elmer. They arrived at approximately 8:00 o'clock A.M. and could not get into the house, and observed defendant's car was parked in front of the house. Vernon testified:

> "We stayed over at my brother's house five or ten minutes before we went over to the jail. He was in bad shape and had been all the time. I was concerned about him. I just wanted an officer to go in there and see what was wrong."

At the conclusion of the voir dire hearing, the trial judge made full findings of fact and conclusions of law and held "that the testimony of the witness Russell Duncan, is competent and admissible in the trial of this case, insofar as the objection to such testimony is concerned for violating of the search and seizure rule." Thereupon the State offered its first witness, Officer Russell Duncan, in the presence of the jury, and he substantially reiterated his voir dire testimony.

The State offered Sheriff Damon Huskey as a witness. The court again conducted a voir dire hearing to determine whether or not the statements made by defendant to the Sheriff would be admissible. On such hearing the Sheriff testified that he went to the hospital room of defendant and upon arrival defendant asked how his wife was getting along. The Sheriff told him that she was dead, and that he was under arrest for murder. The Sheriff then "advised him of

his rights" as approved by *Miranda v. Arizona,* 384 U.S. 436. When the jury returned to the courtroom, the Sheriff merely testified as to wounds he observed on defendant. However, when the Sheriff was recalled for examination, defendant's attorney elicited testimony before the jury as to the conversation between himself and defendant in which defendant said he shot her "because she was going to leave, because her daughter wanted her to go with them down east somewhere." He also testified about a statement he made to defendant's deceased wife to the effect that she should pack up her belongings and leave the county.

State's witness Mrs. Nell Bridges stated that on 4 May 1968 she and Jackie Brandle and decedent went to the Robbins' house to get some clothes. As they started to leave, Robbins took hold of his wife's arm and said, "I just want her to stay one hour and I will bring her." Deceased remained with her husband.

At the close of State's evidence, defendant moved for a judgment as of nonsuit on the first degree charge. Which was denied.

Defendant offered evidence which tended to show that prior to 5 May 1968 he had been upset and despondent. Dr. Ernest Yelton said he had sent defendant to the hospital "to get him off whiskey." He identified Defendant's Exhibit 1 as being Librium 25 mil. capsules.

Dr. Laczko, an expert in psychiatry, testified that defendant was admitted to Dorothea Dix Hospital on 15 May 1968 and remained there under his care until his discharge on 1 July 1968. He stated that defendant was competent to return to court for trial, and that he knew right from wrong. He had no opinion as to whether defendant knew it was wrong to kill his wife as of 5 May 1968.

Defendant offered other evidence which tended to show that on 5 May 1968 he was under the influence of a combination of Librium and whiskey, which caused a clouded consciousness, impaired judgment and impaired memory. Defendant testified and denied any memory of the events of 5 May 1968. He stated that he did not remember having killed his wife and had no memory of any discussions with anyone in which he had admitted killing his wife or making any pact with her in reference thereto.

Dean Sheehan, a special deputy assigned to guard defendant's room, testified that in a discussion with defendant, defendant told him that he shot his wife as a result of a suicide pact.

The jury returned a verdict of guilty of first degree murder with the recommendation that his punishment be imprisonment for life.

Judgment was entered on the verdict, and defendant gave notice of appeal. Appeal was not perfected within the time allowed by the trial court. Defendant's attorneys petitioned that a writ of certiorari issue allowing him to perfect his appeal. This petition was allowed by order of this Court dated 17 February 1969.

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

J. Nat Hamrick for defendant.

BRANCH, J.

Defendant moved for judgment as of nonsuit on the first degree murder charge at the conclusion of the State's evidence and at the close of all the evidence. He assigns as error the failure of the court to grant his motions.

[1, 2] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560.

In *State v. Buffkin,* 209 N.C. 117, 183 S.E. 543, it is stated:

> "Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of the blood in furtherance of some fixed design."

[3] Since defendant offered evidence after his motion for judgment as of nonsuit at the close of the State's evidence, we consider only the denial of the motion made at the close of all the evidence, and we must act in light of all the evidence. *State v. Leggett,* 255 N.C. 358, 121 S.E. 2d 533; *State v. Norton,* 222 N.C. 418, 23 S.E. 2d 301; G.S. 15-173.

[4] Defendant's motion for judgment as of nonsuit presented the question of whether the State had presented substantial evidence — circumstantial, direct, or both — that defendant acted with premeditation and deliberation. We must take the evidence in the light most favorable to the State when considering this question. *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374; *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

In connection with this assignment of error we quote the following testimony:

Defendant's witness Dean Sheehan: "Mr. Robbins told me they made an agreement. That they were in trouble and couldn't get along, and if he would promise to kill himself, she would let him kill her and kill himself, and said she started to walk toward the front door and turned around and he shot her."

State's witness Oris Bridges: ". . . (T)he telephone rang and it was Ferrell Robbins. He called me and said I know where she (deceased wife) is and how she got there. He said, 'she will be sorry of this, in fact, the whole family will be sorry and I do mean sorry.' "

State's witness Damon Huskey: "Ferrell Robbins told me, 'I shot my wife, how is she getting along.' I told him I was sorry. He said, 'Well, I'm not, she is better off, and I would do it again, and you will never try me, I will kill myself.' I told him I was arresting him for murder. When I asked how come you shot her, Ferrell Robbins said because she was going to leave, because her daughter wanted her to go with them down east somewhere, Charlotte or somewhere."

[5] We think this testimony, when considered with all the evidence, discloses facts which constitute substantial evidence of premeditation and deliberation on the part of defendant. Thus, the trial court properly overruled defendant's motion for judgment as of nonsuit.

Defendant contends that the court erred in failing to suppress the testimony of Deputy Sheriff Russell Duncan as being the product of an illegal search and seizure, in violation of Art. 1, § 15, of the North Carolina Constitution and the Fourth Amendment to the United States Constitution.

[6, 7] The Fourth Amendment to the United States Constitution and Art. I, § 15, of the North Carolina Constitution guarantee that, in ordinary circumstances, even the strong arm of the law cannot invade the home except under authority of a search warrant issued in accord with statutory provisions, *In re Walters,* 229 N.C. 111, 47 S.E. 2d 709, and evidence obtained by an illegal search without a search warrant is inadmissible. G.S. 15-27. *State v. Smith,* 242 N.C. 297, 87 S.E. 2d 593; *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed 2d 1081.

[8, 9] The constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *District of Columbia v. Little,* 339 U.S. 1, 94 L. ed. 599. The reasonableness of the search must be

determined by the court from the facts and circumstances of each individual case. *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *Berger v. New York,* 388 U.S. 41, 18 L. ed 2d 1040.

[10] This Court has defined an unreasonable search to be " '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." *State v. Colson, supra.*

The United States Supreme Court considered this question in the case of *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 18 L. ed. 2d 782. There, the police entered respondent's home with his wife's permission minutes after being informed that an armed robbery had occurred and that the suspect had entered respondent's house. Respondent was in the house feigning sleep. He was arrested and the officers, without a search warrant, found damaging evidence which was introduced at his trial. The Supreme Court, in holding the entry and search valid, stated:

> "We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. Under the circumstances of this case, 'the exigencies of the situation made that course imperative.' *McDonald v. United States,* 335 U.S. 451, 456. The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential. . . ."

In the case of *State v. Howard, supra,* Justice Sharp, speaking for the Court, stated:

> ". . . 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 (3rd Cir.)
>
> "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.*"

[11] In the instant case the officer was not engaged in a search for evidence to be used in a criminal prosecution. He entered defendant's dwelling at the request of defendant's brothers, who were very apprehensive and worried about defendant. Under the present law the officer would not have had any basis to request a search warrant since he could not allege a particular object which he sought. *State v. Bullard,* 267 N.C. 599, 148 S.E. 2d 565. He was simply lending the strong arm of the law to a distressed family who feared that harm had come to their brother and sister-in-law. The officer's presence was lawful and his testimony as to things in plain view was properly admitted into evidence.

For the same reasons stated above, defendant's objections to admission of State's Exhibits, discovered as a result of Deputy Duncan's entry into defendant's house, are overruled.

[12] Defendant assigns as error the action of the court in allowing the witness Oris Bridges to testify to a conversation which he allegedly heard between defendant and his niece, Jackie Brandle, as being in violation of the hearsay rule. The pertinent portion of this testimony was as follows:

"Jackie walked up to the bed and told Ferrell —

MR. MAHONEY: Objection

COURT: Overruled.

EXCEPTION NO. 105

A. — that the funeral home was ready for some clothing and we wanted some clothing and Ferrell said —

MR. MAHONEY: Objection to what Ferrell said.

COURT: Overruled.

EXCEPTION NO. 106.

A. — they were in storage and one of his brothers would get them for us, and Jackie said —

MR. MAHONEY: Objection to what Jackie said.

COURT: Overruled. EXCEPTION NO. 107.

A. — Jackie Brandle, my niece asked Ferrell if he had any insurance and he said —

OBJECTION OVERRULED EXCEPTION NO. 108

A. — he said 'You've got the insurance in Raleigh,' and Jackie said 'Why did you do this?"

MR. MAHONEY: Objection, if your Honor please.

COURT: Overruled.

EXCEPTION NO. 109.

A. — and he says, 'I killed her and I'm not a bit sorry of it, because she was mine. She was going to leave me and go with you and I killed her and I'm not a bit sorry of it.'

Q. Then what did she ask about her mother?

A. Jackie said, 'Ferrell, how long did you make my mother suffer?

MR. MAHONEY: Objection now.

COURT: Overruled.

EXCEPTION NO. 110.

A. He was lying on his back and he put kind of shrugged his shoulders and raised his hands up off the bed and says, 'Oh, just a few seconds. It was all over within just a few seconds.' "

We note, parenthetically, that defendant offered testimony of one Dallas Aerial, the guard assigned to defendant, to the effect that he was present when defendant talked with Jackie Brandle and that he never heard the statements which defendant allegedly made to her.

[13] It is well settled law in this jurisdiction that in a criminal prosecution admissions of fact by a defendant pertinent to the issue which tend to prove his guilt of the offense charged are competent against him. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; *State v. Lawhorn,* 88 N.C. 634.

The case of *State v. Hopkins,* 154 N.C. 622, 70 S.E. 394, is factually similar to the instant case. There, a police officer was allowed to testify to a conversation he overheard between one Streeter and the defendant, which tended to establish the guilt of the defendant upon an indictment charging unlawful sale of liquor. Holding the evidence competent, the Court stated:

"Such evidence does not constitute *the ex parte* declaration of Streeter, as contended, but it is competent because it is a conversation of the defendant with Streeter and tends to prove the guilt of the accused by his own declarations."

[12] In support of his contention that this evidence is barred by the hearsay rule, defendant quotes from Stansbury, North Carolina Evidence, § 138, at 335, as follows:

> "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."

We agree that this is a correct statement of the law; however, defendant can find no comfort in this definition, since the probative force of the evidence did not depend upon the competency or credibility of some person other than the witness. Here, the witness testified as to what he actually heard defendant say.

Defendant also cites the case of *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768, as authority to support this contention. *Jones v. Bailey* was a civil action in which plaintiff sought to testify as to statements made by a police officer in answer to an inquiry by defendant. The answer given by the police officer tended to establish relevant facts against defendant. The Court held this evidence inadmissible. However, *Jones v. Bailey* is distinguishable from the instant case because the statements of fact offered against the defendant were not made by the defendant.

The testimony here offered tended to establish motive on the part of defendant to commit the crime and to otherwise establish his guilt. We therefore hold that the admissions made by defendant were properly admitted into evidence. Neither was the admission of the questions contained in the colloquy between Jackie Brandle and defendant erroneous. The questions were necessary to make the purported admissions intelligible.

[14] We next consider the question of whether the trial court committed prejudicial error by asking Deputy Sheriff Duncan leading questions when he was examined on a voir dire hearing in absence of the jury. The trial judge, *inter alia,* questioned the officer as follows:

> "In other words, in addition to the duties of your office to arrest persons accused of crime and investigate the violation of the criminal laws, your office also has the duty and undertakes to carry out the duty of protecting the lives of the citizens of Rutherford County and other people in Rutherford County when the violations of the criminal law are not involved.
>
> A. Yes Sir.
>
> EXCEPTION NO. 19

COURT: And it was in the performance of this duty that you first entered into the home of Ferrell Robbins?

A. Yes Sir.

EXCEPTION NO. 20.

[14, 15] Had the jury been present, the trial judge would have been justified in propounding competent questions in order to develop some relevant fact which had been overlooked. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24. *A fortiori,* the trial judge was justified in asking such questions in the jury's absence, even though the questions may not have been properly framed. None of the evidence was ever before the jury. See *State v. Pressley,* 266 N.C. 578, 146 S.E. 2d 824.

[16] On the same voir dire hearing, in the absence of the jury, Officer Duncan testified, in part:

"COURT: Did you get a radio message, Mr. Duncan, to go to the Robbins' house?

EXCEPTION NO. 29.

A. No, sir, I got a telephone call.

COURT: Who was it from?

EXCEPTION NO. 30

A. The jailer. He said that his brothers were at the jail and concerned about their brother and the sheriff said for me to go down there. The brothers are the ones who wanted me to go, the sheriff sent me but at the brothers' request. The man who talked to me on the telephone didn't say anything about a felony being committed he said there was trouble. That they were concerned about their brother and they couldn't get in and that there was some trouble in the house and they were worried."

In 2 N.C. Index 2d, Criminal Law, § 73, at 573, we find the following:

"While testimony of extrajudicial assertions of a third person is incompetent to prove the truth of the facts asserted by such person, the hearsay rule does not preclude testimony of such assertions for the purpose of showing the state of mind of the witness in consequence of such assertions and not for the purpose of proving the matters asserted."

Clearly the challenged testimony was elicited so that the trial judge could determine why the witness acted as he did. The state-

ment of the jailer proved no relevant facts. Again, this testimony was not before the jury and the content of the testimony was not harmful or prejudicial to defendant's defense.

[17] Defendant assigns as error the action of the trial judge in allowing Sheriff Huskey to testify that as a result of a telephone conversation with the deceased he told her to leave the county.

Sheriff Damon Huskey, a State's witness, testified: "I talked to Mrs. Beatrice Robbins on Saturday, May 4, 1968 about lunchtime by telephone. . . . I told her to go back into the house and get her stuff and leave the county." The Sheriff had previously testified under cross-examination by defendant: "When I asked how come you shot her, Ferrell Robbins said because she was going to leave, because her daughter wanted her to go with them down east somewhere, Charlotte or somewhere. I knew the deceased, Beatrice Robbins, was down in Raleigh at the home of her daughter, Mrs. Jacqueline Brandle, for a week or ten days before May 5, 1968."

Defendant contends that this testimony prejudiced defendant because it amounted to an inference that it was dangerous for deceased to go to her home while defendant was there. The State, on the other hand, contends that this evidence is admissible to show motive. However, without reaching the merits of either contention, it is apparent that the admissions of this evidence becomes harmless and was cured by the testimony elicited by defendant from the Sheriff (quoted above), and for the further reason that defendant's witness Dean Sheehan thereafter gave powerful evidence of motive, premeditation and deliberation when he testified concerning a suicide pact between defendant and deceased.

The admission of testimony over objection is ordinarily rendered harmless when defendant elicits similar testimony on cross-examination or introduces similar testimony himself. *State v. Jarrett,* 271 N.C. 576; *State v. Adams,* 245 N.C. 344; *State v. Humbles,* 241 N.C. 47. This assignment of error is overruled.

[18] The trial court's charge to the jury is challenged because of the failure of the court to define the term "malice" in charging on first degree murder, even though the court had previously defined the term.

[18, 19] The Judge correctly defined "malice" before he reached the charge on murder in the first degree. He correctly defined the crime of murder in the first degree, including the necessity that the killing be with "malice". The trial judge is not required to repeat a definition each time a word or term is repeated in the charge when

it has once been defined. *State v. Davis*, 265 N.C. 720, 145 S.E. 2d 7; *State v. Tyndall*, 230 N.C. 174, 52 S.E. 2d 272. When the charge is read contextually, we do not think that the jury was misled or confused by such omission. This assignment of error is overruled.

We have carefully examined defendant's other assignments of error and find no prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DANIEL ROSS

No. 18

(Filed 15 October 1969)

1. Criminal Law § 88; Witnesses § 8— cross-examination of defendant — collateral matters — negative answers — harmless error

In this homicide prosecution, the trial court did not commit prejudicial error in its rulings on defendant's objections to questions which the solicitor asked the defendant on cross-examination, where the questions involved collateral matters and the defendant's negative answers were conclusive and rendered the questions harmless.

2. Criminal Law § 88; Witnesses § 8— rulings on cross-examination — appellate review

Trial court's rulings on objections to cross-examination should not be disturbed except when prejudicial error is disclosed, since the trial court hears all witnesses, observes their demeanor, knows the background of the case and is thus in a favorable position to control the scope of cross-examination.

3. Homicide § 20; Criminal Law § 42— bullets taken from victim's body — identification — admissibility

In this homicide prosecution, two bullets introduced by the State over defendant's objection were properly identified and therefore admissible in evidence, where the pathologist who performed an autopsy on the victim testified that he removed two bullets from the victim's body and marked them for identification, and that one of these bullets pierced the victim's heart and caused her death.

4. Homicide § 30— instructions — necessity for submission of involuntary manslaughter

In this prosecution for first degree murder, the evidence neither required nor permitted the court to charge the jury that it might return a verdict of involuntary manslaughter.

APPEAL by defendant from *Carr, J.*, March 17, 1969 Session, WAKE Superior Court.

The defendant, Daniel Ross, was indicted, tried, convicted and given a sentence of life imprisonment for the first degree murder of his wife, Mary Elizabeth Young Ross. The State's evidence disclosed the defendant and his wife, prior to November, 1968, were living in a state of separation — he in New York; she and their two children with her mother (Mrs. Young) in Raleigh. On the afternoon of November 2, the defendant and his sister appeared at the Young home, from which they took the defendant's wife and the two children to the shopping center in North Hills. On their return to the Young home, the defendant and his wife entered the house. The wife's brother, Leon Young, age 17 years, testified:

> ". . . I was outside and I heard two shots and I ran into the house and I saw Daniel coming out the front room standing to the hall. Then he went outdoors, unloaded the gun, and came back and shot again. . . .
>
> I could see Daniel standing on the porch as he unloaded the pistol, reloaded it, and shot my sister, who was standing in the middle room of the house. I could see my sister before the last shot was fired and she was not injured. After the last shot, I saw an injury on her right elbow and I saw blood. She did not have a weapon of any kind and I did not hear any conversation between my sister and Daniel Ross.
>
> . . . After the shot was fired, Daniel Ross ran to his sister's car, said something about the hospital, and they drove away. I did not see any injuries on Daniel Ross."

Charles McAllister, another witness to part of the difficulty, testified that while he was in the bathroom he heard a couple of shots. Later, he heard another shot. ". . . I came out of the bathroom and Daniel Ross was standing in the hallway shooting Mary, who was also in the hallway. I heard approximately five shots in all. Mary fell in the hallway and I grabbed her and put a pillow under her head. . . . After the last group of shots, Daniel Ross got in his car and drive away."

Immediately after the shooting, the defendant fled to New York. He was arrested there and returned to North Carolina for trial.

Dr. Pate, who performed the autopsy, testified:

> ". . . I noticed four bullet wounds in all. There was a bullet wound which entered the center of the chest, right on the breastbone. There was a bullet wound in the left flank region. There was another bullet wound that entered just above the left elbow and right on the opposite side of the arm was an exit wound

for that bullet. And there was a bullet wound in the left wrist and on the opposite side, an exit wound. I performed an autopsy on the body and it is my opinion that Mrs. Ross died as a result of a gunshot wound to the heart. I recovered two bullets from Mrs. Ross' body. I initialed these bullets so I could identify them and I turned them over to Mr. J. E. Pearce on November 4, 1968."

Dr. Pate identified the bullets. They were introduced in evidence over defendant's objection.

After motion for nonsuit was made and denied, the defendant testified that after he, his wife and children returned from the shopping center and entered the Young home, his wife asked defendant's sister to leave the room so she and her husband could talk privately.

"My wife and I had a conversation about a girl that I used to mess around with. At that time, Leon Young came inside the room and went into the kitchen. Mary walked to the kitchen and whispered something in his ear.

"My wife and Leon were in the kitchen talking and Leon picked up a knife, fork, or something. When I got up and started back in the room, my wife, all of a sudden, stabbed me in the back of the neck. It felt something like a sting. . . . When I turned around, I turned around shooting. My wife had one arm up with a knife in her hand. I shot twice.

"Charles McAllister came out of the bathroom and Leon approached me with some object in his hand as I was standing on the steps. I unloaded the gun, put another bullet in the gun, and fired a shot toward Leon. . . ."

The defendant's sister, as a rebuttal witness for him, corroborated his evidence that he had a profusely bleeding wound on his neck.

The jury returned a verdict of guilty of murder in the first degree and as a part of the verdict recommended that the defendant's punishment be imprisonment for life in the State's prison. From the judgment imposing a life sentence, the defendant gave notice of appeal assigning errors.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Liles & Merriman by William W. Merriman, III, for the defendant.

HIGGINS, J.

[1] In his brief, the defendant discusses ten exceptive assignments, eight of which involve objections to the solicitor's cross examination

of the defendant, who testified as a witness in his own defense. The cross examination covered nine pages of the record. Under the solicitor's questions, the defendant admitted he had been convicted on a charge of assault on a female with a deadly weapon. He testified he was placed on probation and ordered to pay damages. He contended the shooting was an accident. He was convicted of larceny when he was a minor. He admitted he had been indicted for rape but was acquitted. Perhaps some of the solicitor's questions were objectionable. However, they involved collateral matters. The defendant's negative answers were conclusive and rendered the questions harmless. *State v. King*, 224 N.C. 329, 30 S.E. 2d 230; Strong's N. C. Index, 2d Ed., Witnesses, Sec. 8, Vol. 7, p. 701, et seq.

[1, 2] Unquestionably in a trial for homicide only the survivor can testify. The prosecuting officer has the right, and it is his duty, to cross examine a defendant who testifies in his own defense. A well directed cross examination may disclose fallacies, if any, in the defendant's testimony and thus aid the jury in its search for the truth. A cross examination, especially where there are no eye witnesses, should be searching, but at all times it should be fair. The trial judge hears all witnesses and observes their demeanor as they testify. He knows the background of the case and is thus in a favorable position to control the scope of the cross examination. The appellate court reviews a cold record. For this reason, the trial court, because of its favored position, should have wide discretion in the control of the trial. Its rulings should not be disturbed except when prejudicial error is disclosed. *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195; *State v. Stone*, 226 N.C. 97, 36 S.E. 2d 704; *State v. Wray*, 217 N.C. 167, 7 S.E. 2d 468; *State v. Beal*, 199 N.C. 278, 154 S.E. 604; *State v. Davidson*, 67 N.C. 119; *State v. Patterson*, 24 N.C. 346; Wigmore on Evidence, 3d Ed., 495. The careful and painstaking judge who tried this case did not commit prejudicial error in his rulings on defendant's objections interposed during the cross examination.

[3] The two bullets which the State introduced in evidence over defendant's objection were properly identified and therefore admissible in evidence. Dr. Pate, the Pathologist who performed the autopsy, testified he removed two bullets from Mrs. Ross' body and marked them for identification. He testified one of these bullets pierced the heart and caused death. His identification before the court and jury at the trial made them admissible. "It is permissible to identify something taken from a human body by direct testimony of a witness that to his personal knowledge it is the thing in

question." 21 A.L.R. 2d 1219; *State v. Stroud*, 254 N.C. 765, 119 S.E. 2d 907; *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4.

[4] In addition to the objection to the cross examination of the defendant and the introduction of the bullets in evidence, the defendant contends the court committed error in failing to charge the jury that it might render a verdict of involuntary manslaughter. The court charged the jury that under the evidence it might render one of these verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with recommendation that the punishment be imprisonment for life in the State's prison; (3) guilty of murder in the second degree; (4) guilty of manslaughter; (5) not guilty. The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the State to carry the burden required a verdict of not guilty. The court charged fully and correctly on the defendant's right to defend himself and to repel felonious assault.

The State's evidence revealed the defendant fired 4 or 5 shots at his wife who was unarmed. After the first series of shots, he stepped outside the hall, reloaded his pistol, returned and fired what perhaps was the fatal shot. The evidence was sufficient to support a conviction of murder in the first degree. The jury, as it had the right to do, fixed the punishment at life imprisonment.

While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable. The evidence neither required nor permitted the court to charge on involuntary manslaughter.

No error.

STATE v. THADEUS NATHANIEL ALLRED, ALIAS BERNARD BROWN

No. 11

(Filed 15 October 1969)

1. Jury § 6— right to examine prospective jurors

In selecting the jury in a civil or criminal action, the court or any party to the action has the right to make inquiry as to the fitness and competency of any person to serve as a juror.

2. Jury § 6— voir dire examination — purposes

The voir dire examination of jurors is a right secured to the defendant by statute and enables counsel to ascertain whether there exist grounds for challenge for cause and to exercise intelligently the peremptory challenges allowed by law.

3. Jury § 7— right of challenge — purpose

The right of challenge is given for the purpose of selecting an impartial jury.

4. Jury § 7— challenge to the poll — peremptory — for cause

A challenge to the poll (to each prospective juror) may be peremptory within the limits allowed by law, or for cause without limit if cause is shown.

5. Descent and Distribution § 9— second cousins — degree of kinship

Second cousins are related in the sixth degree of kinship. G.S. 104A-1.

6. Jury § 7— challenge for cause — juror related to defendant — degree of kinship

In this jurisdiction, a juror who is related to the defendant by blood or marriage within the ninth degree of kinship is properly rejected when challenged by the State for cause on that ground.

7. Jury § 7— challenge for cause — juror related to State's witness

While relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for challenge for cause, where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise.

8. Jury § 7— challenge for cause — juror related to State's witness

Ordinarily, there would be no substantial basis for challenge for cause of a prospective juror related within the ninth degree to a State's witness if the testimony of the witness will be directed to proof of some formal matter or to some minor facet of the case.

9. Jury § 7— challenge for cause — juror related to State's key witnesses

In this first-degree murder prosecution, the trial court erred in disallowing defendant's challenge for cause of a prospective juror who stated upon voir dire examination that he and two of the State's witnesses were second cousins and that he had known them for 15 to 20 years, where the State's case depended upon the testimony of the two witnesses, who were also under indictment for the same homicide, and the testimony of the two witnesses pointed to defendant as the murderer and tended to minimize their own culpability, since it would have been reasonable for the juror to believe that acceptance of the witnesses' testimony would or might be advantageous to his kinsmen in the disposition of their own cases.

10. Jury § 7— peremptory challenges defined

Peremptory challenges are challenges which may be made or omitted according to the judgment, will or caprice of the party entitled thereto, without being required to assign a reason therefor.

11. Jury § 7— capital case — defendant's peremptory challenges

Defendant in a capital case has the right to challenge fourteen jurors peremptorily without cause. G.S. 9-21.

12. Jury § 7— challenge for cause — disallowance — preservation of exception

In order to preserve an exception to the court's denial of a challenge for cause, defendant must (1) exhaust his peremptory challenges and (2) thereafter assert his right to challenge peremptorily an additional juror.

13. Jury § 7— challenge for cause — erroneous disallowance — exhaustion of peremptory challenges — denial of further peremptory challenge

Where the trial court in this capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised 14 peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, the trial court's refusal to allow defendant to challenge peremptorily an additional juror on the ground that defendant had exhausted his peremptory challenges *is held* a denial of defendant's right under G.S. 9-21 to challenge 14 jurors peremptorily without cause.

APPEAL by defendant from *Bowman, Special Judge,* March 1969 Criminal Session of RICHMOND.

Criminal prosecution on an indictment charging that defendant, on November 12, 1968, "feloniously, wilfully, and of his malice aforethought, did kill and murder one Braxton Crawford Quick."

Upon arraignment on the charge of murder in the first degree, defendant through his court-appointed counsel, Charles B. Deane, Jr., pleaded "Not Guilty."

During the selection of the jury, defendant challenged peremptorily fourteen of the prospective jurors. One of these prospective jurors, Booker Spencer, was first challenged *for cause.* Upon the court's refusal to allow the challenge for cause, defendant exercised his right of peremptory challenge. When the last juror selected, Robert L. Hicks, Jr., was called for *voir dire* examination, defendant undertook to challenge him peremptorily. The court disallowed this attempted challenge on the ground defendant had exhausted his rights in respect of peremptory challenges. Thereupon, Juror Hicks was accepted as the twelfth member of the panel selected, sworn and impaneled to try the case. A thirteenth (alternate) juror was selected but did not participate in the jury's deliberations and verdict.

The only evidence was that offered by the State.

Braxton Crawford Quick, a salesman for Davis Candy Company, operated a company truck. He sold to retail merchants, making deliveries from the truck.

On November 12, 1968, about 4:45 p.m., passersby noticed the Davis truck on the shoulder of a rural paved road, in a rural area north of Hamlet, N. C. Upon investigation, they discovered the lifeless body of Braxton Crawford Quick. No living person was there. Quick's body, still warm, was inside the truck. His leather money pouch was hooked to his belt. It was open and, except for two checks, was empty. His pants pockets were torn. A few coins were lying on the floor under his body. He had been fatally wounded by a .22-caliber bullet.

Calvin Townsend operated a place of business, which included a store and poolroom, in "north Hamlet." Billy McRae, Eddie McRae and defendant were in Townsend's place of business "in the neighborhood" of 4:00 p.m. on November 12, 1968. Townsend had known Billy McRae and Eddie McRae "practically all their lives." He had not known defendant. Shortly after the McRae brothers and defendant had gone outside, Quick entered Townsend's store. Quick called upon Townsend regularly. On this occasion, Townsend paid Quick $9.20, consisting of "9 ones and 20 cents, two dimes," for merchandise then purchased. Quick left Townsend's place of business. Townsend did not see the McRaes and defendant or any of them, nor did he see Quick, after they went out the door of his place of business.

There was evidence, independent of the testimony of Billy McRae and of Eddie McRae, tending to establish the facts narrated in the preceding paragraphs.

The testimony of Billy McRae and of Eddie McRae, who were offered as witnesses for the State, was sufficient to support a verdict that defendant was guilty of the first degree murder of Quick.

The record shows that, at the conclusion of the jury's deliberations, the following occurred:

"Upon the return of the jury the court asked the clerk to take the verdict from the jury:

"CLERK: Will the prisoner please stand. How say you. Is he guilty of the felony of murder in the first degree whereof he stands indicted or not guilty?

"FOREMAN: Guilty.

"The jury was polled upon motion of the defendant. The foreman was asked by the clerk as follows:

"CLERK: Mr. Goodman, foreman of the jury, you have returned a verdict of guilty of murder in the first degree. Is this your verdict?

"FOREMAN: Yes.

"CLERK: And do you still assent thereto?

"FOREMAN: Yes.

"The following question was asked each juror: 'Your foreman has returned a verdict of guilty of murder in the first degree, is this your verdict?' Each juror answered, 'Yes.' Then the question was asked each juror, 'And do you still assent thereto?' Each juror answered, 'Yes, Ma'am.' "

Upon the foregoing verdict, the court pronounced judgment that defendant suffer death by the inhalation of lethal gas.

Defendant excepted and appealed. On account of defendant's indigency, orders were entered that his appeal be perfected by his court-appointed counsel and that all necessary costs incident to perfecting the appeal be paid by Richmond County.

Attorney General Morgan, Deputy Attorney General Moody and Assistant Attorney General Harrell for the State.

Charles B. Deane, Jr., for defendant appellant.

BOBBITT, J.

Whether the court's refusal to excuse Juror Hicks denied defendant's right under G.S. 9-21 to challenge fourteen jurors "peremptorily without cause," depends upon whether the court erred in refusing to allow defendant's challenge *for cause* of Juror Spencer. To reject Juror Spencer, defendant was required to challenge him peremptorily. The court denied defendant's right to challenge Juror Hicks on the ground that defendant had theretofore expended all of his fourteen peremptory challenges, inclusive of the one used to reject Juror Spencer.

[1, 2] In selecting the jury, the court, or any party to an action, civil or criminal, has the right to make inquiry as to the fitness and competency of any person to serve as a juror. G.S. 9-15(a). "The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second,

to enable counsel to exercise intelligently the peremptory challenges allowed by law." *State v. Brooks,* 57 Mont. 480, 188 P. 942. "The presiding judge shall decide all questions as to the competency of jurors." G.S. 9-14.

[3, 4] "The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one." *State v. English,* 164 N.C. 497, 507, 80 S.E. 72, 76. "A challenge to the poll (to each prospective juror) may be peremptory within the limits allowed by law, or for cause without limit if cause is shown." *State v. McKethan,* 269 N.C. 81, 87, 152 S.E. 2d 341, 346.

The portion of the record pertinent to defendant's challenge of Juror Spencer discloses the matters set forth below.

When examined by the solicitor on *voir dire,* Juror Spencer testified he and the McRae brothers were second cousins and that he had known them "about 15 or 20 years." The record indicates that, after Spencer had so testified, no further question was asked by the solicitor.

In response to inquiry by defense counsel, the solicitor stated the McRae brothers would be called to testify as witnesses for the State. Juror Spencer was then examined by defense counsel. The material portion of this examination is quoted below.

"Q. . . . if Billy and Eddie McRae testified against my client, but all of the evidence taken together showed that the truth was elsewhere, would you rule against the McRaes if the facts prove that to be true?

"A. Rule against them?

"Q. That is, against whatever the McRaes say if the facts prove that they are in fact different from what they say they are?

"A. I would not go against them.

"Q. You would not go against the McRaes? Maybe you misunderstand me. If either Eddie or Billy McRae takes the stand and testifies to some item, some evidence, against my client, but all the evidence that is brought out at the trial tends to prove something different from what they say?

"A. That's right.

"Q. Would you believe and hold for that which was brought out on the whole or you just believe whatever the McRaes said?

"A. I just believe —

"Q. Believe whatever they say?

"A. That's right."

At this point, defense counsel challenged Juror Spencer for cause. To this challenge, the court said, "No." In explanation of this ruling, the court stated in substance that defense counsel, in asking whether the juror would or would not believe the McRae boys, failed to take into consideration that a juror may believe *all* of what a witness says, or *part* of what a witness says, or *none* of what a witness says. Thereafter, speaking to defense counsel, the court said: "Now, I suggest that you question him a little further with regard to whether he could give — well, I shall let you select — "

Defendant noted formal objection to the court's refusal at that time to grant challenge for cause. Thereafter, in deference to the court's suggestion, defense counsel resumed his examination of Juror Spencer. The record thereof is quoted below.

"Q. Mr. Spencer, how well do you know Eddie and Billy?

"A. I know them pretty good, fact, I have been knowing them quite a while.

"Q. If Eddie or Billy told you a certain thing was true, would you believe what they told you?

"A. Well, they tell — I sure would, if they say anything to be true.

"Q. And regardless of what anybody else would say, you'd believe what Eddie and Billy would tell you?

"A. If I didn't know no better.

"Q. The fact you are kin to them, you would not have reservations in rendering a verdict adverse to what they say?

"A. No — ask that question again.

"Q. Well, would it embarrass you to return a verdict against the testimony of what they would have to say in court?

"A. That's right.

"Q. If the verdict was opposite of what they had testified to?

"A. That's right.

"Q. Would that embarrass you?

"A. No.

"Q. You could meet them or their kinfolks the next day and it

wouldn't have any effect on you, the fact you ruled your verdict was adverse to what they testified to?

"A. No.

"Q. It wouldn't have any effect on you?

"A. No.

"CLERK: Juror look upon the prisoner, prisoner look upon the juror, do you like him?

"MR. DEANE: No."

At the conclusion of this examination, defendant again excepted to the court's failure to grant his challenge for cause of Juror Spencer.

The State's case rests on the testimony of Billy and Eddie McRae. Absent their testimony, the evidence against defendant was insufficient for submission to the jury.

In determining whether Juror Spencer was subject to challenge for cause, consideration must be given (1) to the relationship between Spencer and the McRae brothers, and (2) to the relationship of the McRae brothers to the murder of Quick and the trial of defendant therefor.

[5] Spencer had known the McRae brothers, his second cousins, "about 15 or 20 years." Second cousins are related in the sixth degree of kinship. See G.S. 104A-1.

[6] In this jurisdiction, a juror, who is related to the defendant by blood or marriage within the ninth degree of kinship, is properly rejected when challenged by the State *for cause* on that ground. *State v. Perry,* 44 N.C. 330; *State v. Potts,* 100 N.C. 457, 461, 6 S.E. 657, 658; *State v. Levy,* 187 N.C. 581, 586, 122 S.E. 386, 389; McIntosh, North Carolina Practice and Procedure, § 555(6). An earlier rule is referred to by Nash, C.J., in *Perry,* as follows: "*Lord Coke* says that relationship is a good cause of principal challenge, 'no matter how remote soever, for the law presumeth that one kinsman doth favor another before a stranger.' Thomas's Coke, 3 Vol., 518."

In *State v. Tart,* 199 N.C. 699, 155 S.E. 609, the opinion of Brogden, J., implies that the defendant had the right to challenge for cause a juror who was related within the seventh degree to the prosecuting witness. The prosecution was for carnal knowledge of a girl under sixteen years of age. The juror had made no reply when counsel for defendant stated: "If there is any member of the jury related to the prosecutrix by blood or marriage, please let that fact be known

and excuse himself." After the jury had returned a verdict of guilty, this juror disclosed that, although he had not recognized his relationship to the prosecuting witness when the jury was being selected, he became aware of their relationship before any evidence was introduced. Notwithstanding the court found the juror was not prejudiced, the cause was "remanded to the Superior Court for a finding as to whether the defendant or his counsel was misled, and if the judge shall find that the defendant or his counsel was misled, the judgment should be set aside; otherwise to remain in full force and effect."

[7, 8] We do not hold that relationship within the ninth degree between a juror and a State's witness, standing alone, is legal ground for challenge for cause. This is in accord with the weight of authority in other jurisdictions. Annotation, "Relationship to prosecutor or witness for prosecution as disqualifying juror in criminal case," 18 A.L.R. 375; 31 Am. Jur., Jury § 192; 50 C.J.S., Juries § 218(b)(1). Even so, where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. Ordinarily, if the testimony of the witness will be directed to proof of some formal matter or to some minor facet of the case, there would be no substantial basis for challenge for cause. Here we are considering a radically different factual situation.

[9] In addition to (1) the fact that the McRae brothers were kinsmen of Juror Spencer, and (2) the fact that the State's case depended upon their testimony, each of the McRaes was also under indictment for the murder of Braxton Crawford Quick. The record does not show what had occurred with reference to the disposition, if any, of their cases prior to their use as State's witnesses.

It is unnecessary to set forth the testimony of the McRaes on which the conviction of defendant was based. It is sufficient to note they testified they and defendant had been together prior to the robbery-murder of Quick; that shortly thereafter the three left the scene of the robbery-murder and traveled all night in Eddie's car to Washington, D. C.; and that, after the robbery-murder, each of the McRaes received money from defendant. In gist, their testimony pointed to defendant as the robber-killer and tended to minimize their own culpability. Under these circumstances, it would have been reasonable for Juror Spencer to believe that acceptance of the McRae testimony would or might be advantageous to his kinsmen in the disposition of their own cases.

We reach the conclusion that the court erred in refusing to grant defendant's challenge for cause of Juror Spencer. When all factors set forth above are considered, we hold there was no basis for a finding, if such had been made, that Juror Spencer was acceptable as a disinterested and impartial juror.

[13] After exhausting his fourteen peremptory challenges, inclusive of the one used to challenge Juror Spencer, the court refused to allow defendant to challenge Juror Hicks, the last juror seated.

[10, 11] "Peremptory challenges are challenges which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor." 50 C.J.S., Juries § 280(a). Accord: *Freeman v. Ponder,* 234 N.C. 294, 302, 67 S.E. 2d 292, 298; 31 Am. Jur., Jury § 229. G.S. 9-21 conferred upon defendant the right to challenge fourteen jurors "peremptorily *without cause.*" (Our italics.)

[12] Numerous decisions of this Court, *e.g., State v. Dixon,* 215 N.C. 438, 440, 2 S.E. 2d 371, 372, hold that a defendant has not been prejudiced by the acceptance of a juror who is challenged for cause and the cause is disallowed unless he exhausts his peremptory challenges before the panel is completed. Other decisions, *e.g., Carter v. King,* 174 N.C. 549, 94 S.E. 4, hold that a defendant, in order to preserve his exception to the court's denial of a challenge for cause, must (1) exhaust his peremptory challenges *and* (2) thereafter assert his right to challenge peremptorily an additional juror. These rulings are plainly and succinctly summarized in the first headnote in *Carter v. King* (174 N.C. 549), which epitomizes the decision in that case, as follows: "Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it."

In *Oliphant v. R. R.,* 171 N.C. 303, 88 S.E. 425, the plaintiff challenged for cause Juror Darden. The court overruled the challenge. The plaintiff excepted and then challenged Juror Darden peremptorily. In so doing, the plaintiff exhausted the last of the four peremptory challenges then allowed him by statute. Thereafter, the plaintiff challenged peremptorily Juror Clayton. The court denied the challenge, holding the plaintiff's peremptory challenges had been exhausted. The plaintiff excepted to this ruling. This Court held the

denial of defendant's challenge for cause of Juror Darden was erroneous and therefore the peremptory challenge the defendant was required to use to excuse Juror Darden should not have been considered. This Court held further that the plaintiff had been prejudiced and was entitled to a new trial because of the court's refusal to permit plaintiff to challenge peremptorily Juror Clayton. The rationale of decision is set forth in the following excerpt from the opinion of Brown, J.: "If the plaintiff had not attempted to challenge peremptorily after Darden had been stood aside by a peremptory challenge, he could not review the ruling of the judge upon the cause assigned, for the error would have been harmless. *S. v. Cockman,* 60 N.C. 485. But inasmuch as he afterwards challenged Clayton peremptorily, and the court erroneously held that his peremptory challenges had been exhausted with Darden, the ruling was not harmless, for it deprived plaintiff of one peremptory challenge. But it is contended that plaintiff challenged Clayton without any real objection to the juror, solely to give him the right to review the ruling of the court in respect of Darden's eligibility. A party's reason for challenging a juror peremptorily cannot be inquired into. The law gives the litigant the right to object to a number of jurors without assigning cause. *Dupree v. Ins. Co.,* 92 N.C. 419."

In *State v. Avant,* 202 N.C. 680, 163 S.E. 806, the defendant was convicted of murder in the first degree and judgment imposing a death sentence was pronounced. The defendant had challenged for cause Juror McMillan. The court overruled the challenge. The defendant excepted and then challenged peremptorily Juror McMillan. Thereafter, the defendant challenged peremptorily Juror Currie. The court denied this challenge on the ground the defendant had exhausted his peremptory challenges. The defendant excepted to this ruling. This Court held the denial of the defendant's challenge for cause of Juror McMillan was error and therefore the peremptory challenge the defendant was required to use to excuse Juror Currie should not have been considered. The defendant was awarded a new trial. The ground of decision is succinctly stated in this final paragraph from the opinion of Brown, J.: "For the error of the judge in refusing to allow defendant's peremptory challenge to the juror, N. A. Currie, we must hold that defendant is entitled to a New trial."

In *Bank v. Oil Mills,* 150 N.C. 683, 64 S.E. 883, and *Peanut Growers Exchange v. Bobbitt,* 188 N.C. 335, 124 S.E. 625, the appellant had exhausted his peremptory challenges and thereafter had challenged a juror for cause. In each of these cases, this Court awarded a new trial on the ground the trial judge had erroneously

denied the challenge for cause. The rationale of these decisions is in accord with *Oliphant* and *Avant.*

If the court had allowed defendant an additional peremptory challenge, that is, defendant's challenge peremptorily of Juror Hicks, it would seem that this would have rendered harmless any error in the refusal of the court to allow defendant to challenge for cause Juror Spencer. See Annotation, "Effect of allowing excessive number of peremptory challenges," 95 A.L.R. 2d 957, 977-978.

[13] In accordance with our decisions in *Oliphant v. R. R., supra,* and in *State v. Avant, supra,* and in approval of the rationale of those decisions, we hold that the court's refusal to allow defendant to challenge peremptorily Juror Hicks constituted a denial of defendant's clear statutory right and entitles him to a new trial.

New trial.

STATE OF NORTH CAROLINA v. BOBBY PERRY

No. 19

(Filed 15 October 1969)

1. Criminal Law § 34— evidence of defendant's release from prison — competency — identification of defendant

In a prosecution for kidnapping and rape in which the prosecutrix testified that her assailant told her he had been released from prison the day before the events related by her occurred, testimony by the supervisor of a unit of the prison system that defendant had been released from his unit on the day preceding those events is competent on the issue of the identity of defendant, notwithstanding the supervisor's testimony tended to show that defendant had committed some other crime and the prosecutrix had made an in-court identification of defendant.

2. Criminal Law § 24— effect of plea of not guilty

Defendant's plea of not guilty puts in issue every material element of the charges against him.

3. Criminal Law § 66— identification of defendant — admission of other evidence

In a prosecution for kidnapping and rape, it was not necessary for the State to rely solely upon the prosecutrix' in-court identification of defendant as her assailant, but the State could introduce other evidence, not otherwise incompetent, which was relevant to the identification of the assailant.

4. Criminal Law § 34— defendant's guilt of other offenses — competency of evidence

In the trial of an accused who has not testified as a witness in his own

behalf, the State may not, over objection by defendant, introduce evidence to show that the accused has committed another independent, separate criminal offense where such evidence has no other relevance to the case on trial than its tendency to show the character of the accused and his disposition to commit criminal offenses.

5. Criminal Law § 34— identity of defendant — evidence of other offenses

Evidence relevant to the question of the identity of the accused with the perpetrator of the offense with which he is presently charged is not rendered incompetent by the mere fact that it discloses the commission by him of some other criminal offense.

6. Criminal Law §§ 34, 66— identification of defendant — defendant's guilt of other crimes — competency of evidence

Where the identity of the defendant and the perpetrator of the offense with which he is charged is at issue, evidence tending to show his commission of another criminal offense, and thereby to show his identity with the perpetrator of the offense with which he is presently charged, is not rendered incompetent by the fact that a witness has testified to such identity.

7. Criminal Law § 162— objection to evidence — motion to strike

An objection must be interposed to an improper question without waiting for the answer and, if the objection is not made in apt time, a motion to strike a responsive answer is addressed to the discretion of the trial court, except where the evidence is rendered incompetent by statute.

8. Criminal Law § 51— medical expert testimony — failure to qualify witness as expert

In a prosecution for kidnapping and rape, the admission of a doctor's opinion testimony as to his interpretation of the result of a laboratory test on certain specimens taken from the person of the prosecutrix, *held* harmless error notwithstanding there was no specific finding by the court that the witness was an expert, since defendant did not object to the doctor's being accorded the status of an expert witness, and since the doctor's testimony was a foregone conclusion in view of his earlier testimony, admitted without objection, concerning the nature and conclusiveness of the test.

9. Criminal Law § 51; Evidence § 48— qualification of expert witness — necessity for findings

In the absence of a request by the appellant for a finding by the trial court as to the qualifications of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

10. Criminal Law § 42— articles connected with crime — bag and playing cards — admissibility

In a prosecution for kidnapping and rape, trial court properly admitted into evidence a bag and its contents that included a deck of cards bearing the name of defendant, the bag being found within two hours after the

kidnapping and within a short distance from the parking lot where the prosecutrix was first accosted and seized by her assailant.

11. Rape § 6— instructions

In a prosecution for rape, the trial court in its charge correctly defined the offense of rape and instructed the jury as to its elements, and the verdicts which the jury might render upon the indictment.

12. Kidnapping § 1— definition of the offense — instructions

An instruction that kidnapping is the taking and carrying away of a human being by physical force or by constructive force unlawfully and without lawful authority, *held* sufficient.

13. Kidnapping § 1— sufficiency of instructions

In a prosecution for kidnapping, an instruction that the jury is to return a verdict of guilty of kidnapping if they should find "from the evidence beyond a reasonable doubt that this defendant did by the use of force, by the threat of force sufficient to cause the prosecuting witness to leave the place where she had a right to be and was and goes to some other place under the control and direction of defendant without any lawful authority," *held* without error.

APPEAL by defendant from *McKinnon, J.*, at the Special March 1969 Criminal Session of WAKE.

By separate indictments, each proper in form, the defendant was charged with the kidnapping and the rape of Williamean Creekmore Womble on 27 September 1968. Upon motion of his court appointed counsel, he was committed to Dorothea Dix Hospital in Raleigh to determine his mental capacity to plead to the charges against him. Following the prescribed period of examination, he was returned to the court by the hospital authorities as competent to stand trial. In due time his counsel moved to quash each bill of indictment, each of which motions was denied. He thereupon entered a plea of not guilty to each charge.

By consent the two cases were consolidated for trial. Upon the charge of rape, the jury returned a verdict of guilty with a recommendation that the defendant be sentenced to life imprisonment. Judgment was entered in that case in accordance with the verdict. Upon the charge of kidnapping, the jury found the defendant guilty as charged. Judgment was entered in that case that the defendant be imprisoned for life in the State prison, this sentence to run concurrently with the sentence imposed in the rape case. From each judgment the defendant appealed.

The defendant offered no evidence. The evidence for the State consisted of the testimony of Mrs. Womble, Detective Sergeant Jones of the Raleigh Police Department, Maurice Henry, a supervisor of

the Wake Advancement Center of the North Carolina Department of Correction, and Dr. Arthur Rogers Summerlin, together with an exhibit consisting of certain articles found by the police near the scene of the alleged kidnapping.

In substance, Mrs. Womble testified as follows:

She is a night operator for the Southern Bell Telephone Company in Raleigh. On 27 September 1968, she drove her automobile into a church parking lot across the street from her place of employment at about 9:45 p.m. As she was in process of getting out of her automobile, the defendant, whom she identified in the courtroom, came up from behind her and seized her by the shoulder. He ordered her to get back in the car, saying that if she did as he told her he would not hurt her. She saw that he had a knife in his hand, the blade of which was approximately three inches long. He kept it in his hand throughout the events to which she testified. She offered him her money and the automobile if he would let her go. In reply, he ordered her to get in the car and do as he directed. Seeing the knife, she reentered the car and the defendant also got in it. At his direction she drove from the parking lot and out of the city, making turns as specified by him from time to time, he telling her repeatedly to do as he directed and she would not be hurt.

At a point outside the city, some ten miles from the parking lot, he directed her to turn off the highway and, upon reaching a dead end road, to stop the car. At that point he had sexual intercourse with her without her consent, retaining the knife in his hand at all times.

Thereupon, they drove back to the city after she persuaded him that if he would let her go she would not report the matter to the police. In the course of this conversation, he told her he had been in prison and had been released just the day before this occurrence. He told her that if she did "turn him in" he would "get" her.

Upon returning to the city, she let him out of the automobile, returned to the parking lot, went to the office of her employer and reported the matter. Upon arrival of the police officers, she told them what had occurred and described the defendant, relating to them his statement that he had been released from prison the day before. She picked the defendant's picture out of each of two lots of photographs shown to her by the police officers.

Within the city, the route followed by her, with the defendant in her automobile, was lighted so that she had a clear view of him. Though she passed many stop lights and at one time was followed

by a police car, she did not seek assistance because of the knife in the hand of the defendant. She had never seen the defendant prior to this occurrence. She was examined at the hospital by Dr. Summerlin.

Detective Sergeant Jones testified, in substance:

After talking with Mrs. Womble, which he did approximately two hours after her first arrival at the parking lot, he searched the parking lot and the church grounds adjacent to it. Under some shrubbery in the church grounds he found a bag containing a deck of cards and a box of hair dye. The point at which this was found was twelve feet west of the parking lot and immediately across that lot from where her car was parked on the east side of it. Attached to the deck of cards, when it was so found by the officer, was a piece of paper with the name "Bobby Perry" written upon it. (These items were introduced in evidence as the State's Exhibit No. 1. The side of the paper bearing the name "Bobby Perry" was exhibited to the jury, but the reverse side bearing other information relative to the State Department of Correction was not shown to the jury.) Sergeant Jones arrested the defendant upon the street at approximately 10 a.m. the morning after the alleged offenses.

Mr. Henry testified, in substance:

He is a supervisor of the Wake Advancement Center of the North Carolina Department of Correction. He knows the defendant. The defendant was an inmate of that institution prior to his release therefrom on 26 September 1968 (the day preceding the events related by Mrs. Womble).

Dr. Summerlin testified, in substance:

He is licensed to and does practice medicine in North Carolina, specializing in obstetrics and gynecology. He has had specifically described medical education and practice. In the early morning of 28 September 1968, he examined Mrs. Womble in the emergency room at Rex Hospital. Certain specimens and smears were taken from her person and sent to the laboratory for analysis. The tests showed the presence in the specimens of acid phosphatase in large quantity, indicating sexual intercourse.

The defendant assigns as error the denial of his motion to quash the bills of indictment, various rulings of the court upon objections to the admission of evidence, the denial of his motion in each case for judgment of nonsuit, and numerous portions of the court's charge to the jury.

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

Alfonso Lloyd and R. P. Upchurch for defendant.

LAKE, J.

[1] Without objection, Mrs. Womble testified that her assailant told her he had been released from prison on the day before the events related by her occurred. The defendant assigns as error the admission, over his objection, of testimony by the supervisor of the Wake Advancement Center, a unit of the prison system, that the defendant had been released from the Center on the day preceding those events. There was no error in this ruling.

[2, 3] The defendant offered no evidence. Nevertheless, his plea of not guilty put in issue every material element of the State's charges against him. The identity of the defendant with the perpetrator of the acts to which Mrs. Womble testified was obviously a material issue. It remained an issue notwithstanding Mrs. Womble's in-court identification of the defendant as her assailant. The defendant did not admit that he was the person who accompanied Mrs. Womble at the time in question. It was not necessary for the State to rely solely upon the identification made by Mrs. Womble in proving its contention that he was that person. It could introduce other evidence, not otherwise incompetent, which was relevant to the identification of the assailant.

The statement by the assailant placed him within a narrowly limited group — men released from prison the preceding day. Had the group been, instead, men released from a specified hospital or other group on a specified date, evidence that the accused was released from such institution or group on such date would clearly be competent in the absence of other ground for objection.

The defendant contends that testimony of his release from prison was incompetent because it is evidence that he committed a criminal offense other than those for which he is presently indicted.

[4-6] It is well settled that in the trial of one accused of a criminal offense, who has not testified as a witness in his own behalf, the State may not, over objection by the defendant, introduce evidence to show that the accused has committed another independent, separate criminal offense where such evidence has no other relevance to the case on trial than its tendency to show the character of the accused and his disposition to commit criminal offenses. *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 365; *State v. Fowler,* 230 N.C. 470,

53 S.E. 2d 853; Stansbury, North Carolina Evidence, 2d Ed, § 91; 29 Am. Jur. 2d, Evidence, § 320. It is, however, equally well settled that evidence relevant to the question of the identity of the accused with the perpetrator of the offense with which he is presently charged is not rendered incompetent by the mere fact that it discloses the commission by him of some other criminal offense. *State v. McClain, supra; State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *State v. Stancill,* 178 N.C. 683, 100 S.E. 241; 29 Am. Jur. 2d, Evidence, §§ 321, 322. Thus, in *State v. Spencer,* 176 N.C. 709, 97 S.E. 155, a witness having testified that she observed at the scene of the offense charged a man named Spencer "who had been in the reformatory," the State was permitted to show that the defendant Spencer had been an inmate of the reformatory. Where the identity of the defendant and the perpetrator of the offense with which he is charged is at issue, the evidence tending to show his commission of another criminal offense, and thereby to show his identity with the perpetrator of the offense with which he is presently charged, is not rendered incompetent by the fact that a witness has testified to such identity. *State v. Biggs, supra; State v. Tate,* 210 N.C. 613, 188 S.E. 91. In the present case, the testimony did not disclose the details or even the nature of the offense for which the defendant had previously been imprisoned.

[7] The defendant also assigns as error the admission in evidence of certain testimony by Dr. Summerlin. This witness testified that specimens taken by him from the person of Mrs. Womble shortly after the alleged assault were "sent to the laboratory" for a test for acid phosphatase. In response to the question, "What was the finding in this particular test?" he answered, "7,824 units per cc." At that point the defendant objected and moved to strike the answer. The record strongly indicates, if it does not require, the conclusion that the witness was not the person who made the test. Thus, the question was subject to objection on the ground that it called for hearsay evidence. However, it is well settled that an objection must be interposed to an improper question without waiting for the answer and, if the objection is not made in apt time, a motion to strike a responsive answer is addressed to the discretion of the trial court, except where the evidence is rendered incompetent by statute. *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341; *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763; *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598; *State v. Stancill, supra; State v. Pitts,* 177 N.C. 543, 98 S.E. 767; *State v. Merrick,* 172 N.C. 870, 90 S.E. 257; *State v. Lowry,* 170 N.C. 730, 87 S.E. 62; *State v. Lane,* 166 N.C. 333, 81 S.E. 620; Stansbury, North Carolina Evidence, 2d Ed, § 27, note 95. In the

present instance, the answer was responsive, there is no statute involved and there is nothing to indicate abuse of discretion in the ruling of the trial court.

[8] There is, likewise, no merit in the contention of the defendant that it was error for the court to permit Dr. Summerlin to give his opinion as to the interpretation of the result of this test. Uncontradicted and unchallenged testimony in the record is ample to support a finding that Dr. Summerlin is a medical expert, qualified to testify as an expert witness in the field to which his testimony in this case relates. The basis for the contention of the defendant is the following statement in the record before us, apparently a stipulation by counsel in the preparation of the record on appeal:

> "The State did not request the court to find this witness to be an expert. The court did not make a finding that this witness was an expert; the defendant did not admit this witness to be an expert, and the defendant did not object to testimony of this witness on the ground that he was not an expert."

[8, 9] In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131; *Kientz v. Carlton*, 245 N.C. 236, 96 S.E. 2d 14; *State v. Coal Company*, 210 N.C. 742, 188 S.E. 412; *Brewer v. Valk*, 177 N.C. 476, 99 S.E. 358; Stansbury, North Carolina Evidence, 2d Ed, § 133; Strong, N. C. Index, 2d Ed, Evidence, § 48. Here, the record shows the defendant did not object to Dr. Summerlin's being accorded the status of an expert witness. Though it would have been better practice for the solicitor to have tendered him formally as an expert, and for the court so to rule expressly, under the circumstances disclosed in this record there was no error in permitting the witness to state his opinion in response to a question otherwise competent. Furthermore, his testimony as to the interpretation of the result of the test was a foregone conclusion in view of earlier testimony by him, admitted without objection by the defendant, concerning the nature and conclusiveness of the test. Thus, the overruling of the objection to the specific question and answer, which the defendant assigns as error, was, at the most, harmless error.

[10] There was no error in the admission of the State's Exhibit No. 1. The bag and its contents were found in the adjoining lot and only a short distance from the place where Mrs. Womble's car was

parked when she was first accosted and seized by her assailant. It was found by a search of the area approximately two hours after the alleged kidnapping. Taped to the deck of cards in the bag was a paper bearing the name of the defendant. The relevance of this evidence as corroboration of Mrs. Womble's identification of the defendant as her assailant is obvious. Its weight was, of course, for the jury.

[11, 12] The assignments of error relating to the instructions to the jury are without merit. The court in its charge correctly defined the crime of rape and instructed the jury correctly as to its elements, the burden of proof and the verdicts which the jury might render upon the indictment charging the defendant with that offense. See: *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190. As to the crime of kidnapping, the court instructed the jury, "Kidnapping is the taking and carrying away of a human being by physical force or by constructive force *unlawfully and without lawful authority.*" (Emphasis added.) This definition is in accord with our decision in *State v. Lowry and State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870. See also: *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99; *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118.

The defendant complains that the court in its charge did not instruct the jury that in order to return a verdict of guilty, upon the indictment charging the defendant with kidnapping, it must find beyond a reasonable doubt that the acts were done "unlawfully", "wilfully", and "feloniously" or "with felonious intent" and that the court failed in its instructions to define the terms "feloniously" or "with felonious intent." In *State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497, this Court said that it is not sufficient to instruct the jury that it should return a verdict of guilty of kidnapping if the State has satisfied it beyond a reasonable doubt that the defendant "did forcibly take and carry away the person of the prosecuting witness." There, this Court said "there must be a further finding that the taking and carrying away was unlawful or done without lawful authority or effected by fraud."

[13] We need not determine whether such an instruction is essential where, as here, the defendant offers no evidence and there is neither any evidence nor any assertion that he had a lawful right or authority to force the alleged kidnap victim to accompany him from one place to another. For the present, it is sufficient to note that, in addition to the above quoted definition of kidnapping, the court instructed the jury: "Upon the charge of kidnapping * * * I in-

struct you that, if you find from the evidence beyond a reasonable doubt that this defendant * * * did by the use of force, by the threat of force sufficient to cause the prosecuting witness to leave the place where she had a right to be and was and goes to some other place under the control and direction of the defendant *without any lawful authority,* it would be your duty to find the defendant guilty of kidnapping as charged." (Emphasis added.) While the grammatical structure of this sentence, as it appears in the record, indicates a possible omission or alteration of a word in the transcription, the meaning is clear and it complies with the requirement of the *Witherington* case. In the next sentence the jury was told, "If you fail to so find as to any or all of those facts, it would be your duty to return a verdict of not guilty as to that charge * * *"

The defendant also contends that there was error in denying his motions to quash each of the bills of indictment and in instructing the jury that, upon the charge of rape, they might return a verdict of guilty as charged without adding thereto a recommendation that the defendant be sentenced to imprisonment for life, in which event the death sentence would be imposed.

The indictments were proper in form. The motions to quash were properly denied. The jury having returned a verdict of guilty upon the charge of rape with a recommendation that the sentence be imprisonment for life, which sentence was imposed, we do not in this case reach the question of whether a death sentence could lawfully be imposed under the statutes in effect at the time of this offense and at the time of the trial. A similar question, upon the charge of murder, was considered by us in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, and decided adversely to the contention of the defendant here, but it is not before us in the present case. In any event, the conviction and sentence upon the charge of kidnapping would not be affected by the instruction of the court as to the several verdicts which might be rendered by the jury upon the charge of rape.

The defendant's court appointed counsel have with diligence combed the record and have made 51 assignments of error. In view of the serious nature of the offenses charged and the imposition in each case of a sentence to imprisonment for life, we have carefully considered each of these assignments of error, including those abandoned by the failure of the defendant to bring them forward in his brief. We find no error which would justify reversal or modification of the judgment of the court below, either in the kidnapping case or in the rape case.

No error.

STATE OF NORTH CAROLINA v. ALVIS THOMAS WILLIFORD AND BOYD BAXTER SQUIRES

No. 1

(Filed 15 October 1969)

1. Criminal Law § 75— confessions — test of admissibility

The test of admissibility of a confession is whether the statements made by defendant were in fact voluntarily and understandingly made.

2. Criminal Law § 75— confessions — admissibility — defendant wounded and in custody

A confession does not become inadmissible solely upon the showing that defendant was wounded, in pain and in police custody when he confessed.

3. Criminal Law § 76— confession — admissibility — defendant's desire not to be interrogated — testimony before jury after voir dire — failure to strike confession

In this armed robbery prosecution, the trial court did not err in failing to strike testimony of defendant's confession admitted after a voir dire hearing when a police officer thereafter testified before the jury that defendant told him, before he allegedly made the confession to another officer, that "I am not going to tell you a damn thing," where the record shows that defendant's statement was addressed solely to the officer who testified about it, that such officer immediately terminated his conversation with defendant, and that defendant thereafter talked with other police officers without coercion or intimidation, the officer's testimony not having conclusively demonstrated that defendant's confession was involuntary or that defendant was denied due process.

4. Criminal Law § 76— admission of confession — sufficiency of findings

In this armed robbery prosecution, findings of fact by the trial court were not sufficient to support the court's conclusion that incriminating statements made by defendant to a police officer while receiving hospital treatment for a gunshot wound were voluntarily and understandingly made, where the findings related to constitutional warnings given to defendant before he was taken to the hospital for treatment, and the court made no findings as to the immediate circumstances surrounding the making of the purported confession, extensive evidence of defendant's mental and physical condition at the hospital having been given, and defendant having testified that he had no recollection of making any statement.

5. Criminal Law § 74— confession defined

Any extra-judicial statement of an accused is a confession if it admits defendant's guilt of an essential part of the offense charged.

6. Criminal Law §§ 76, 169— erroneous admission of confession — prejudicial error

In this armed robbery prosecution, trial court's erroneous admission into evidence of statements made by defendant to a police officer without findings of fact sufficient to support its conclusion that the statements

were made voluntarily and understandingly was prejudicial to defendant, where the statements made by defendant admitted that defendant was "in on the robbery" and related to the manner in which it was planned, and defendant contended at trial that he knew nothing of its plan and was forced to participate by an armed stranger.

7. Criminal Law § 113— joint trial — instructions — one defendant guilty — conviction of both defendants

In this joint trial of two defendants for the same offense of armed robbery, a charge susceptible to the construction that should the jury find beyond a reasonable doubt that either defendant committed the robbery it should convict both defendants *is held* to constitute prejudicial error.

APPEAL from *Canaday, J.*, 2d April 1967 Criminal Session, WAKE Superior Court.

This is a criminal prosecution upon bill of indictment which charged that defendants, Alvis Thomas Williford and Boyd Baxter Squires, forcibly took from Thomas R. Freeman, Jr., and James Walter Edwards the sum of $580.15 in United States money by the threatened use of a shotgun.

The State, in substance, offered evidence as follows:

State's witnesses Thomas R. Freeman, Jr., and James Walter Edwards testified that they were employed by the Wake County Alcoholic Beverage Control Board at Store No. 4 located on E. Cabarrus Street in the City of Raleigh; that on 6 December 1966, Alvis Thomas Williford and Boyd Baxter Squires entered the store. Williford went behind the counter, took money from the cash registers, and stuffed it in his coat pockets while Squires held a sawed-off shotgun on them. One Robert Woods entered the store, and money was taken from his person by Williford. Defendants then fled the store.

Milton "Bud" Hunter testified that he worked next door and that he started to enter the ABC Store on Cabarrus Street when he saw Squires and Williford. Squires had a double barrel shotgun, and the employees of the store and "another boy" were in the store with their hands up. Hunter returned to his place of employment and got a pistol and took the cash from his employer's store and hid it in a truck parked between the ABC Store and his place of employment. Squires and Williford passed Hunter in the alley. Williford stopped, cursed and struck Hunter in the face. Hunter fired three shots at the fleeing Williford. Williford boarded a city bus and Hunter then notified the police.

The State offered other evidence which tended to show that the bus stopped near the corner of Davie and Fayetteville Streets and

police officers J. L. Denning and J. A. Mohiser boarded the bus. They found Williford in the bus, bleeding profusely from a wound near his ankle.

Officer Mohiser testified that he placed the defendant Williford under arrest and at that time searched him and found "green folding money" stuffed in his pockets. An ambulance was called and the police officers had Williford admitted to Wake Memorial Hospital.

While Officer Mohiser was testifying, the trial judge excused the jury, upon objection by defendants, and held a voir dire hearing in its absence. Upon the voir dire hearing Officer Mohiser testified that he fully warned defendant of his rights according to the requirements of *Miranda v. Arizona*, 384 U.S. 436. Officer Mohiser further stated:

> "The defendant was conscious at that time. The only thing I asked him on the bus was how bad his leg was hurt. He was holding it in a straight out position. His face was kindly drawed up with pain. He was just saying how bad he was hurt and squinting his eyes, and that was all that was said on the bus. He didn't make any statement to me while on the bus concerning the armed robbery. He didn't make any statement to me concerning the charge of armed robbery against him when I told him he was under arrest for it. He just sit there with his left leg out in front of him and squeezing his leg above his knee and his face was distorted with pain, it looked like."

On the voir dire hearing Officer Denning testified that he talked with Williford in the emergency room at the hospital. He, in part, stated:

> "Mr. Williford talked about wanting water very much. He was sweating very bad. That is about all he talked about other than what I questioned him about. He wanted some water very bad. I questioned him about the robbery, he stated that the fellow was with him, he didn't know him by name, said he called him Joe and had been knowing him approximately three days. . . .
>
> "He was sweating right bad all this time. At the time I was talking to him they was giving him some glucose. I talked to the defendant there at the hospital in the emergency room and he was conscious at that time. He carried on a conversation with us. . . . (H)e was talking to me freely, sensible."

Defendant Williford testified on voir dire that he did not remember the officers' warning him of his rights and he did not remember making any statement to anyone.

Upon the conclusion of the voir dire hearing the court found that the officers had properly warned defendant of his rights, and the court concluded, "that the statements made by the defendant Williford to Officer J. L. Denning at Wake Memorial Hospital were made voluntarily and with understanding."

Officer Denning then testified, over defendant's objection, before the jury as to statements by defendant, including the following:

> ". . . I asked him about who was in on the robbery with him.
>
> "He stated that he didn't know the man by name, had been knowing him about three days, had just got out of prison and all he knew he called him Joe. . . . The defendant Williford stated that after the robbery they were planning to mingle with the pedestrians downtown and walk back to the hotel. He didn't state why."

Defendant Williford testified that he went in the ABC Store on Cabarrus Street to make a purchase and that a man whom he did not know came in with a shotgun and ordered him to take the money from the cash registers and from a customer who came in the store. The unidentified man then took the money from him and ordered him to leave. He was running from the unidentified man with the gun when he was shot by Bud Hunter. Williford also testified before the jury that he did not remember making any statements to the police officers.

The jury returned verdicts of "guilty of armed robbery as charged" as to each defendant. Each defendant gave notice of appeal from the judgment entered on the jury verdict. Defendant Squires perfected his appeal to this Court, and by an opinion reported at 272 N.C. 402, was granted a new trial. Defendant Williford withdrew his notice of appeal on 8 May 1967, but on 12 February 1969 he petitioned this court for an order allowing him to appeal. On 5 March 1969 this Court entered an order permitting Williford to perfect his appeal.

Attorney General Morgan and Staff Attorney Shepherd for the State.

Tharrington & Smith for defendant Williford.

BRANCH, J.

Defendant's first assignment of error challenges the admission of the confession alleged to have been made by defendant to Officer J. L. Denning.

[1] The test of admissibility is whether the statements made by defendant were in fact voluntarily and understandingly made. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, *cert. denied* 386 U.S. 911; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Roberts,* 12 N.C. 259.

Defendant contends, *inter alia,* that the purported confession was not voluntarily and understandingly made because of his physical and mental condition at that time. He relies upon the case of *Beecher v. Alabama,* 389 U.S. 35, where the defendant was shot in the leg while fleeing from the police. Immediately after the defendant was shot by the police officers, an oral confession was obtained by threats on his life accompanied by the firing of a rifle near his ear while he lay wounded on the ground. Later, he was questioned by two investigators after a morphine injection and while he was feverish and in pain. The medical assistant in charge told him to cooperate, and in the defendant's presence told the investigators to let him know if defendant "did not tell them what they wanted to know." The defendant was left alone with the investigators, and after a 90-minute "conversation" signed a written confession prepared by the officers similar to the one first signed at gunpoint. In holding the confession inadmissible, the U. S. Supreme Court said:

> "The petitioner, already wounded by the police, was ordered at gunpoint to speak his guilt or be killed. From that time until he was directed five days later to tell Alabama investigators 'what they wanted to know,' there was 'no break in the stream of events,' *Clewis v. Texas,* 386 U.S. 707, 710. For he was then still in pain, under the influence of drugs, and at the complete mercy of the prison hospital authorities. Compare *Reck v. Pate,* 367 U.S. 433.
>
> ". . . A realistic appraisal of the circumstances of *this* case compels the conclusion that this petitioner's confessions were the product of gross coercion. Under the Due Process Clause of the Fourteenth Amendment, no conviction tainted by a confession so obtained can stand."

The distinctions between *Beecher v. Alabama* and the facts of the instant case are obvious. In *Beecher v. Alabama,* there is an unbroken stream of events that reek of intimidation, threat and coercion calculated to frighten and obviate the free will of the defendant. The only apparent similarity between the two cases is the fact that defendant was wounded and gave the statement to police officers while in custody.

The weight of authority appears to be that the admissibility of

a confession is not, *ipso facto,* rendered involuntary because defendant was suffering from physical injuries and resulting pain at the time he made the confession. These are circumstances to be taken into consideration by the jury in weighing the evidence. *State v. Horner,* 139 N.C. 603, 52 S.E. 136; *State v. Hamson,* 104 N.H. 526, 191 A. 2d 89; *State v. Dolan,* 86 N.J.L. 192, 90 A. 1034; *State v. Wise,* 19 N.J. 59.

[2] It is further well settled in this jurisdiction that a confession is not rendered involuntary and incompetent by the mere fact that at the time of making it defendant was in prison or under arrest. *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232; *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300. It is the mental condition and compulsions that control when a confession is given. The confessor's physical condition is of little consequence unless it so affects his mental condition as to destroy voluntariness or understanding. Thus, we hold that the confession did not become inadmissible solely upon the showing that defendant was wounded, in pain, and confessed while in police custody.

[3] In connection with the admission of the purported confession, the defendant assigns as error the court's failure to strike the confession, in light of testimony given by police officer R. L. Johnson before the jury and after the voir dire hearing, and the court's ruling on the admissibility of the confession. Pertinent to this contention is the testimony of Officer Johnson that defendant told him, before he allegedly made the confession, "I am not going to tell you a damn thing." Defendant contends that the officers were then precluded from further questioning by that portion of the opinion in *Miranda v. Arizona,* 384 U.S. 436, which states: "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."

It has long been the rule in this state that the admissibility of a confession is to be determined by the facts appearing in evidence when it is received or rejected, and not by facts appearing in evidence at a later stage of the trial. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572; *State v. Richardson,* 216 N.C. 304, 4 S.E. 2d 852. Doubt has been cast upon this position by cases which hold that when the involuntariness of a confession is conclusively demonstrated, a defendant is deprived of due process by admission of a confession even though important evidence regarding involuntariness was introduced after admission of the confession. *Blackburn v. Alabama,* 361 U.S. 199; *Indiana ex rel Anderson v. Brand,* 303 U.S. 95.

The facts of the instant case do not require that we resolve this

doubt since it does not appear that the testimony of Officer Johnson conclusively demonstrated that defendant's confession was involuntary or that defendant was deprived of due process. The record indicates that this statement was addressed solely to Officer Johnson, who immediately terminated his conversation with defendant. The ensuing events seem to imply that, for some unknown reason, defendant did not desire to tell Officer Johnson anything. Apparently, the defendant, without coercion or intimidation of any kind, talked with the other police officers.

[4] However, a more serious question is presented by defendant's assignment of error and contention that the trial court failed to make sufficient findings of fact to support his conclusions of law. In *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, Higgins, J., speaking for the Court, stated: "Under present procedures it is essential not only that a full investigation be made and the evidence recorded, but the facts must be found which disclose the circumstances and conditions surrounding the making of the incriminating admissions."

In the instant case the trial judge properly excused the jury and heard evidence from both the State and defendant on the question of whether the alleged confession was voluntarily and understandingly made. *State v. Gray, supra; State v. Rogers, supra.*

At the conclusion of the voir dire hearing the trial judge found the following facts:

> ". . . The Court finds that Officer Jimmy A. Mohiser and Officer J. L. Denning were present together on December 6, 1966 in the bus on Fayetteville Street with the defendant Williford; that on the bus on Fayetteville Street Officer Mohiser advised the defendant Williford prior to asking him any questions and prior to any admission or statement having been made by the defendant Williford, that anything that the defendant Williford — strike that — that the defendant Williford had the right to remain silent and that anything the defendant Williford said could be used against him and that he further advised the defendant Williford that he had the right to consult with a lawyer and to have the lawyer with him during interrogation and further that he advised the defendant Williford that if he were unable to secure a lawyer by reason of indigency, that a lawyer would be appointed for him; that the Court further finds that Officers Mohiser and Denning were in the presence of the defendant Williford some 30 or 40 minutes later at Wake Memorial Hospital at which time the defendant Williford made

certain statements and admissions to Officer J. L. Denning. . . ."

Based on these findings the trial judge concluded that "the statements made by the defendant Williford to Officer J. L. Denning at Wake Memorial Hospital were made voluntarily and with understanding. . . ."

There were no findings of fact as to the immediate circumstances and conditions surrounding the making of the purported confession. Findings of fact as to defendant's mental or physical condition were conspicuously absent. The failure to make these findings is highlighted by the voluminous evidence as to defendant's physical condition and by defendant's testimony that he had no recollection of making any statement. His contention that he did not know he had made a statement strikes at the very heart of the rule that to be admissible a statement offered in the nature of a confession must have been "voluntarily and *understandingly* made." (Emphasis ours) Clearly the evidence in the case sustains the facts found; however, the findings of fact are not sufficient to support the conclusion that the statements made by the defendant Williford to Officer J. L. Denning at Wake Memorial Hospital were made voluntarily and with understanding.

[6] The admission of the statement made by defendant was prejudicial. There seems to be plenary evidence to present a strong case against defendant without the purported confession; but the question of law for this Court is not whether there was sufficient admissible evidence to convict, but whether incompetent evidence of a prejudicial nature was admitted over objection. *State v. Squires*, 272 N.C. 402, 158 S.E. 2d 345.

[5, 6] Any extra-judicial statement of an accused is a confession if it admits defendant's guilt of an essential part of the offense charged. *State v. Hamer*, 240 N.C. 85, 81 S.E. 2d 193. The statement made by defendant admitted that he was "in on the robbery" and related the manner in which it was planned. His defense upon trial was that he was not "in on the robbery," that he knew nothing of its plan and was forced to take part in the robbery by an armed stranger.

[7] Defendant further assigns as error this portion of the court's charge:

> ". . . so, gentlemen of the jury, if the State has satisfied you from the evidence in this case beyond a reasonable doubt, the burden being upon the State so to do that on December the

6th, 1966, at about 5:30 or 5:45 o'clock p.m., the defendants, Boyd Baxter Squires and Alvis Thomas Williford, "or either of them," entered ABC Store #4 in the City of Raleigh and that in said store with the use of a sawed-off shotgun, which gun was at the time actually in the possession of the defendants or one of them, and that the defendants at the time and place aforesaid feloniously took and stole an amount of money, which money was in the possession or custody of James Walter Edwards or Thomas R. Freeman, as employees of said ABC Store, and that said sum of money was taken from the persons of or in the presence of the said Edwards or Freeman without the consent of or against the will of the said Edwards or Freeman and that such money was taken by violence, intimidation or by putting said Edwards or Freeman in fear by use of or the threatened use of said shotgun or other dangerous weapons and if the State has further satisfied you from the evidence and beyond a reasonable doubt that at said time and place the defendants or either of them acted with the specific felonious intent to take and steal said money and thereby deprive the owner or owners thereof permanently of such money and to convert said money to their own use, that is to the use of the defendants, then it would be your duty to return a verdict of guilty against the "defendants" of the charge of armed robbery in violation of the provisions of Section 87 of Chapter 24 of the General Statutes as charged in the Bill of Indictment in this case."

Defendant contends that this portion of the court's charge led the jury to believe that the guilt or innocence of both defendants would rest or fall upon the guilt or innocence of either of them.

In the case of *State v. Wolfe*, 227 N.C. 461, 42 S.E. 2d 515, the trial court charged:

"'Like every other person who is put upon trial and charged with the commission of a crime, they are both presumed to be innocent, (and before you can return a verdict against them or either of them, upon either one of these charges, it is necessary for the State to offer evidence which satisfies you beyond a reasonable doubt of the guilt of one or both of them.)'

"'If you find from the evidence and beyond a reasonable doubt that these two defendants, or either one of them, broke the door and went in the house, as contended by the State, that is, that there was a forcible entry of the house with intent at the time to commit an assault upon Jasper Best, it would be your duty to convict them upon that count of house-breaking.'"

Holding this to be prejudicial error, the Court stated:

> "Thus the jury was directed that if they found, beyond a reasonable doubt, that there was a felonious breaking and entering by either defendant they should return a verdict of guilty as to both. Certainly this conclusion is reasonably implied. Hence the vice in the instruction lies in the fact that the guilt of both was made to depend upon the guilt of either. *S. v. Walsh,* 224 N.C. 218, 29 S.E. (2d) 743."

See also *State v. Walsh*, 224 N.C. 218, 29 S.E. 2d 743, and *State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13.

This assignment of error is well taken, as the sense of this instruction is that the jury should convict both defendants if either of them committed the crime of armed robbery. This is prejudicial error.

For errors indicated there must be a

New trial.

STATE OF NORTH CAROLINA v. WILLIAM E. RHODES

No. 6

(Filed 15 October 1969)

1. Criminal Law §§ 120, 135, 138— imposition of punishment — role of judge and jury

Except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute, the exception being capital cases in which the jury may reduce the penalty from death to life imprisonment. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

2. Criminal Law §§ 33, 103— facts relevant to issues — quantum of punishment

The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt and is, therefore, no concern of the jurors'.

3. Criminal Law § 168— instructions — quantum of punishment — error

Instructions to the jury disclosing the amount of punishment authorized by statute in noncapital cases will not always constitute prejudicial error, but the effect of such instructions must be considered in the light of the circumstances of the trial.

4. Criminal Law §§ 111, 115— instructions on verdicts — recommendation of mercy — leniency — prejudicial error

It is always material and prejudicial error for the trial judge to instruct the jury, either in the general charge or in response to their inquiry, that they may return their verdict with a recommendation of mercy or to intimate that he will not impose the maximum penalty if the defendant is convicted.

5. Criminal Law § 170— remarks of judge or solicitor — possibility of parole

Any reference by the judge or prosecuting attorney to the possibility of a parole will constitute prejudicial error.

6. Criminal Law § 124— form of verdict — recommendation of leniency — surplusage

Recommendations of leniency when made by the jury of its own volition, without any authority or suggestion from the court, are no part of the verdict and may be disregarded.

7. Criminal Law §§ 103, 111, 122— instructions — quantum of punishment — prior law

The statement in *S. v. Garner*, 129 N.C. 536, that a jury in a noncapital case is entitled to be informed as to the punishment prescribed for the offense or offenses with which a defendant is charged is expressly disapproved.

8. Criminal Law §§ 111, 122— instructions on punishment — duty of trial court — noncapital cases

In the absence of some compelling reason which makes disclosure as to punishment necessary in order to keep the trial on an even keel and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases; if information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence.

9. Criminal Law § 168— error in instructions — quantum of punishment inadvertently given to jury

When information as to punishment in noncapital cases is inadvertently given to the jury, the error will be evaluated like any other.

10. Criminal Law §§ 111, 122; Rape § 6— inadvertent instructions on quantum of punishment — harmless error

Although it was error for the trial judge in a prosecution for rape to tell the jury, in answer to their inquiry, the punishment for assault with intent to commit rape, the defendant was not prejudiced by the disclosure where all the evidence tended to show an accomplished rape and to prove defendant's guilt beyond a reasonable doubt and where neither the State nor defendant offered any evidence to support a guilty verdict of the lesser and included offense.

11. Rape § 6— submission of issue of lesser offense of rape

Where all the evidence tends to show an accomplished rape, and neither

the State nor defendant offers any evidence to support a guilty verdict of assault with intent to commit rape, the trial court is not required to submit to the jury the issue of guilt of the lesser offense.

APPEAL by defendant from *Burgwyn, E. J.*, 27 January 1969 Criminal Session of DURHAM.

Defendant was convicted of raping Annette Jones. Both are Negroes. The jury recommended that his sentence be life imprisonment, and the court entered this mandatory judgment.

Evidence for the State was plenary to establish the following facts: About 6:30 a.m. on 30 November 1968, Annette Jones, a married woman living with her husband and two children, was walking along a city street in Durham en route to her work at Duke Hospital. Defendant, a stranger, drove alongside and offered her a ride, which she refused. When he stopped his automobile and started to alight, she ran. He gave chase, caught her, and forced her into his car at knife point. In her flight she lost the heel from one of her shoes. Holding the knife at her neck, defendant drove to the terminus of a dead-end street. After raping her, he put her out and drove away. Mrs. Jones wrote his license number on the ground. A passerby took her to a telephone. She called her husband, who came and took her to the police station. Approximately two hours later defendant had been placed under arrest for rape.

The police found the shoe heel which Mrs. Jones had lost in her flight. Fibers on the prosecutrix's undergarments, when examined microscopically at the F. B. I. Laboratory in Washington, D. C., were found to be identical with those taken from defendant's trousers and coat. In the vacuum sweepings from defendant's car was one full-length hair which, when microscopically examined, matched that of Mrs. Jones.

On 10 December 1968 a letter signed "William Rhodes" was addressed and mailed to Mrs. Jones. F. B. I. experts testified that defendant's fingerprints were "lifted" from the letter and that the handwriting was identical with that of defendant. The writer said that he was truly sorry for "the dastardly act and evil deed" which had been forced upon Mrs. Jones' person. He beseeched her to forgive him for what he had done and begged her to consider the fact that he did not hurt her. The letter concluded: "I would surely owe you my life or what is left of it if you would but find it in your heart to help me. . . . I would readily be your slave if you but spare me, spare us both the embarrassment the task and toil of a trial. . . . Have mercy on me!"

Defendant did not testify. He offered evidence tending to show that he spent the night of 29 November 1968 going from one juke-box house to another; that he had been accompanied by a friend, from whom he separated about 5:30 on the morning of 30 November 1968; and that he was then intoxicated.

Judge Burgwyn instructed the jury that they could return one of five verdicts: Guilty of rape, guilty of rape with a recommendation that defendant's punishment be fixed at life imprisonment, guilty of an assault with intent to commit rape, guilty of an assault upon a female, and not guilty. After deliberating ten minutes, the jurors returned to the courtroom and inquired as to the penalty for assault with intent to commit rape. Judge Burgwyn replied as follows:

"Up to ten years imprisonment. Of course, the question of the punishment is not a question for you to determine. It is a question for the court entirely, but that would be the limit, ten years. It could be less. 'Every person convicted of assault with intent to commit rape upon the body of any female shall be imprisoned in the State's Prison not less than one or more than 15 years.' I am sorry, I made a mistake about that. That is a question for the court. It is no concern of the jury at all. All you are concerned with is a question of guilt of whatever you find him guilty of, if anything."

The jury went back to the jury room and fourteen minutes later returned with a verdict of "guilty of rape with the recommendation of life imprisonment."

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General, for the State.

Lina Lee S. Stout; A. H. Borland, for defendant appellant.

SHARP, J.

Defendant brings forward one assignment of error and presents this single question: Did the judge commit error prejudicial to defendant when, in answer to their inquiry, he told the jurors the penalty for assault with intent to commit rape?

[1] In this jurisdiction, except in one class of cases, the presiding judge fixes the punishment for a convicted defendant within the limits provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment. G.S. 14-17 (murder in the first degree); G.S. 14-21 (rape); G.S. 14-52 (burglary in the first degree); G.S. 14-58 (arson). In all other instances, the jury has performed its function and dis-

charged its duty when it returns its verdict of guilty or not guilty. *State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630; *State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917; *State v. Matthews,* 191 N.C. 378, 131 S.E. 743.

[2] The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt. It is, therefore, no concern of the jurors'. *State v. Walls,* 211 N.C. 487, 191 S.E. 232; *State v. Williams,* 121 N.C. 629, 28 S.E. 405. *See also State v. Davis, supra,* and *State v. Matthews, supra;* 53 Am. Jur. *Trial* § 807 (1945). Ordinarily, the judge should tell them so — in appropriate judgmatical language — if they inquire of him about it. *See State v. Davis, supra,* wherein the reply which the trial judge made to a jury's inquiry was approved. As Devin, C.J., said: "The minds of the jurors engaged in the trial of a criminal case should not be diverted from the question of the guilt or innocence of the accused under the evidence by improper reference to the significance or *quantum* of punishment possible or probable upon conviction." *Id.* at 254, 77 S.E. 2d at 631; *accord, State v. Matthews, supra.*

[3] It does not follow, however, that instructions disclosing the punishment authorized by statute will always constitute prejudicial error. The propriety and effect of such an instruction must be considered "in the light of the circumstances of the trial, as, for example, where it is made in response to remarks of counsel on the subject made in the presence of the jury." 23A C.J.S. *Criminal Law* § 1290 b. (1961). *Accord, State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917, and *State v. Ward,* 222 N.C. 316, 22 S.E. 2d 922.

In both *Howard* and *Ward, supra,* after the defendant's attorney had made an erroneous argument as to the law with reference to the severity of the minimum punishment provided for embezzlement, the judge "outlined and defined to the jury" the applicable statutory provisions. Upon appeal this Court was "not disposed to hold, under these circumstances," that the defendants could take advantage of the instruction. The rationale was that defense counsel had made disclosure necessary to remove an erroneous impression "and place the cause back on an even keel so that it might be decided by the jury with complete fairness to all parties." The Court also noted that, in each case, the judge "carefully and fully cautioned the jury that they were to decide the issue upon the evidence without regard to the punishment that might or might not be imposed in the event of conviction." *State v. Ward, supra* at 321, 22 S.E. 2d at 925. In *State v. Howard, supra* at 294, 22 S.E. 2d at 919, the Court said:

"While the reading of a statute to the jury in regard to punishment is not to be commended, . . . the trial judge's ruling should be considered by the appellate Court in the light of the circumstances of the trial. The rule prevails that in order to overthrow the verdict and judgment it must be made to appear not only that the action of the trial judge complained of was erroneous, but that it was 'material and prejudicial, amounting to a denial of some substantial right.' "

[4-6] It is always material and prejudicial error for the judge to instruct the jury, either in the general charge or in response to their inquiry, that they may return their verdict with a recommendation of mercy or to intimate that he will not impose the maximum penalty if the defendant is convicted. Indeed, where the law gives the judge no discretion as to punishment but fixes a mandatory penalty for the offense with which the defendant is charged, the judge is powerless to heed a jury's recommendation of mercy. In such instance, by authorizing a recommendation, the judge would not only encourage a verdict of guilty but justify the defendant's complaint that he had misled the jury into rendering it. *State v. Davis, supra; State v. Rowell,* 224 N.C. 768, 32 S.E. 2d 356; *State v. Matthews, supra.* For the same reasons, any reference by the judge or prosecuting attorney to the possibility of a parole will constitute prejudicial error. *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664; *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542; *see* Annot., 16 A.L.R. 3d 1137; 35 A.L.R. 2d 769. Recommendations of leniency, however, when made by the jury of its own volition, without any authority or suggestion from the court, are no part of the verdict and may be disregarded. *State v. Matthews, supra; State v. Stewart,* 189 N.C. 340, 127 S.E. 260.

In at least four cases this Court has considered the question whether the judge's disclosure or refusal to disclose penalties constituted material and prejudicial error in trials for rape and assault with intent to commit rape. In *State v. Williams,* 121 N.C. 629, 28 S.E. 405, the defendant was convicted of assault with intent to commit rape. On appeal he assigned as error the judge's refusal to tell the jury the punishment for simple assault and the felony charged. The Court noted that "this exception was properly abandoned." At the same term (September 1897) the Court considered the case of *State v. Hairston,* 121 N.C. 579, 28 S.E. 492, in which the defendant indicted for rape, was convicted of carnal knowledge of a child over ten years of age and under fourteen. The judge, in his charge, told the jury that the punishment for rape was death and, for the lesser

offense, a fine or imprisonment in the penitentiary. The Court disposed of the defendant's exception to this portion of the charge by saying: "We have at this term approved the ruling of Judge Starbuck (the trial judge in *State v. Williams, supra,*) in refusing, at the request of the jury, to give this instruction, and we do not wish to be understood as approving it in this case. But what grounds the defendants have to object to it, we are unable to see. In all probability, it saved them from the gallows."

Four years later, when the Court decided *State v. Garner,* 129 N.C. 537, 40 S.E. 6, it apparently overlooked the decisions in *Williams* and *Hairston, supra,* for it made no reference to them. Garner, convicted of an assault with intent to commit rape, was tried prior to the enactment of Chapter 193, Public Laws of 1911 (now codified as G.S. 14-33), which made an assault upon a female by a male over eighteen years of age a misdemeanor punishable in the discretion of the court. *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861. The trial judge, therefore, could not submit that issue. (Were Garner tried today it seems clear that the evidence against him would sustain only a verdict of an assault upon a female.) The judge instructed the jury to return a verdict of guilty of assault with intent to commit rape, simple assault, or not guilty. The jury, after being out some time, returned to ask the judge "to restate the law on the different phases of the testimony." In redefining simple assault the judge informed the jury that "the punishment could be a fine of fifty dollars or thirty days on the roads."

Upon appeal, a majority of the Court could see no prejudice to the defendant from his Honor's charge as to punishment. Cook, J., writing the opinion, said the jury knew that some punishment follows a verdict of guilty. "They are entitled to be informed upon the law creating the offense charged, and, as the punishment prescribed is a part thereof, we see no reason why the Court should not accurately and correctly inform them as to the same, rather than leave them to rely upon their own information." Douglas, J., joined by Furches, C.J., dissented upon the ground that there was insufficient evidence to go to the jury on the felony charged. Although not prepared to say that it was reversible error for the judge to tell the jury the punishment for a crime, they registered their disagreement with the majority's statement that the jury are entitled to be informed as to punishment. "The jury," wrote Justice Douglas, "have nothing to do with the *quantum* of punishment. Their only province is to determine the guilt or innocence of the accused, leaving the question of punishment to be determined by the Court within the limitations

of law. . . . [T]he better practice is not to inform the jury of the possible punishment. . . ."

In *State v. Green,* 246 N.C. 717, 100 S.E. 2d 52, the defendant was indicted for rape. When a juror asked the punishment for assault with intent to commit rape, the judge replied that it would be in the discretion of the court, the maximum punishment being fifteen years. The defendant was convicted of an assault with intent to commit rape. He appealed, assigning that disclosure as error. The Court disposed of the assignment without discussion, saying merely, "This assignment of error is overruled upon the authority of *State v. Garner,* 129 N.C. 536, 40 S.E. 6."

In *State v. Green, supra,* and *State v. Hairston, supra,* each defendant was indicted for rape and, in both cases, after being informed of the matter of punishment, the jury returned a verdict of guilty of a lesser, included offense. Obviously, therefore, no prejudice resulted to the defendant from the disclosure — quite the contrary as the Court noted in *State v. Hairston, supra.* Therefore, in *Green,* it was not necessary for the Court to rely upon *Garner;* the facts called for the rationale of *State v. Hairston, supra.*

[7] In *Garner's* case, after being informed that the penalty for simple assault was only thirty days, the jury returned a verdict of guilty of assault with intent to commit rape, the only other verdict of guilty which they could render upon the charge. Today, sixty years after *Garner* was decided, it seems clear that the judge's disclosure dictated the verdict. The defendant, by most reprehensible conduct, had frightened a fourteen-year-old girl, causing her to abandon her path and flee from him. The jury obviously did not think that thirty days was adequate punishment for what he had done. So far as our research has disclosed, the opinion in *State v. Garner, supra,* contains the only statement in our reports that a jury in a noncapital case is entitled to be informed as to the punishment prescribed for the offense or offenses with which a defendant is charged. This statement is expressly disapproved.

[8, 9] Jurors, as every trial judge knows, are always interested in the consequences of their verdict. As laymen, it is hard for them to understand that they have nothing to do with punishment. When they ask the judge the direct question he wonders whether it is better to give them the correct information and tell them to disregard it (thus making sure they do not act upon misinformation!) or to refuse to inform them and tell them at the same time that punishment has no bearing upon the guilt or innocence of the accused. There is, of course, no entirely satisfactory solution to the problem posed.

However, the most satisfactory one seems to us to be this: In the absence of some compelling reason which makes disclosure as to punishment necessary in order "to keep the trial on an even keel" and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in noncapital cases. If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other. *State v. Howard, supra.*

[10, 11] In this case, it was error for the trial judge to tell the jury the punishment for assault with intent to commit rape, but we can perceive no prejudice to defendant from the disclosure. After erroneously stating that the maximum punishment was ten years, the judge read to the jury the statute which fixed the punishment at fifteen years (G.S. 14-22); so they could not have been misled as to the *quantum* of punishment. All the evidence tended to show an accomplished rape and to prove defendant's guilt beyond a reasonable doubt. Neither the State nor defendant offered any evidence upon which a verdict of guilty of the lesser and included offense of assault with intent to commit rape could have been based. The judge was not required to submit that issue to the jury, and a request to do so would have been properly refused. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481; *State v. Jones,* 249 N.C. 134, 105 S.E. 2d 513; *State v. McNeely,* 244 N.C. 737, 94 S.E. 2d 853; *State v. Church,* 231 N.C. 39, 55 S.E. 2d 792. Upon the facts of this case we have no apprehension that defendant was prejudiced by the jury's knowledge of the penalty for a crime of which there was no evidence.

No error.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BROWN v. R. R. CO. AND PHILLIPS v. R. R. CO.

No. 46 PC.

Case below: 4 N.C. App. 169.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 7 October 1969.

BUNDY v. BOARD OF EDUCATION

No. 38 PC.

Case below: 5 N.C. App. 397.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

DAVIS v. CAHOON

No. 8 PC.

Case below: 5 N.C. App. 46.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

ESTRIDGE v. DEVELOPMENT CO.

No. 50 PC.

Case below: 5 N.C. App. 604.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 18 September 1969.

FREEZE v. CONGLETON

No. 37 PC.

Case below: 5 N.C. App. 472.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 September 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

GALLIGAN v. TOWN OF CHAPEL HILL

No. 32 PC.

Case below: 5 N.C. App. 413.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 23 September 1969.

PERSONNEL CORP. v. ROGERS

No. 20 PC.

Case below: 5 N.C. App. 219.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 29 August 1969.

HALES v. CONSTRUCTION CO.

No. 49 PC.

Case below: 5 N.C. App. 564.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 October 1969.

HARDEE'S v. HICKS

No. 52 PC.

Case below: 5 N.C. App. 595.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 October 1969.

HENDRICKS v. GUARANTY CO.

No. 17 PC.

Case below: 5 N.C. App. 181.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

HIGHWAY COMM. v. LANE

No. 40 PC.

Case below: 5 N.C. App. 507.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 September 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

INGRAM v. INSURANCE CO.

No. 24 PC.

Case below: 5 N.C. App. 255.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

IN RE WILL OF BAKER

No. 10 PC.

Case below: 5 N.C. App. 224.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

JONES v. INSURANCE CO.

No. 53 PC.

Case below: 5 N.C. App. 570.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 16 October 1969.

KEY v. WELDING SUPPLIES, INC.

No. 55 PC.

Case below: 5 N.C. App. 654.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 October 1969.

MIDGETT v. MIDGETT

No. 15 PC.

Case below: 5 N.C. App. 74.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 September 1969.

OVERMAN v. SAUNDERS

No. 9 PC.

Case below: 4 N.C. App. 678.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

PEASELEY v. COKE CO.

No. 61 PC.

Case below: 5 N.C. App. 713.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 16 October 1969.

SMITH v. PERKINS

No. 14 PC.

Case below: 5 N.C. App. 120.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. CHAPMAN

No. 36 PC.

Case below: 4 N.C. App. 438.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. CULP

No. 54 PC.

Case below: 5 N.C. App. 625.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 October 1969.

STATE v. JENNINGS

No. 13 PC.

Case below: 5 N.C. App. 132.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 29 August 1969.

STATE v. McCOY

No. 60 PC.

Case below: 3 N.C. App. 420.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 16 October 1969 without prejudice to petitioner's right to file a post conviction proceeding in the Superior Court of Nash County, or seek executive clemency as he may be advised.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MARKHAM

No. 41 PC.

Case below: 5 N.C. App. 391.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. MUNDAY

No. 47 PC.

Case below: 5 N.C. App. 649.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 September 1969.

STATE v. PATTON

No. 12 PC.

Case below: 5 N.C. App. 164.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. PATTON

No. 34 PC.

Case below: 5 N.C. App. 501.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. VERBAL

No. 39 PC.

Case below: 5 N.C. App. 517.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

STATE v. WILLIAMS

No. 59 PC.

Case below: 6 N.C. App. 14.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 7 October 1969.

THAYER v. LEASING CORP.

No. 42 PC.

Case below: 5 N.C. App. 453.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 23 September 1969.

TRUELOVE v. INSURANCE CO.

No. 23 PC.

Case below: 5 N.C. App. 272.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 29 August 1969.

WARD v. CLAYTON, COMR. OF REVENUE

No. 18 PC.

Case below: 5 N.C. App. 53.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 29 August 1969.

WHITLEY v. REDDEN

No. 62 PC.

Case below: 5 N.C. App. 705.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 16 October 1969.

WILSON v. DEVELOPMENT CO.

No. 45 PC.

Case below: 5 N.C. App. 600.

Petition for writ of *certiorari* to North Carolina Court of Appeals allowed 18 September 1969.

C. H. CUTTS *v.* S. WORTH (WIRT) CASEY AND WIFE, MARTHA B. CASEY

No. 4

(Filed 19 November 1969)

1. Trial § 58; Judgments § 2— waiver of jury trial — filing of judgment

When a jury trial is waived the judge must give his decision in writing, stating his findings of fact and conclusions of law separately, and absent consent of the parties the judgment must be filed with the clerk during the session at which the trial takes place. G.S. 1-185.

2. Judgments § 2— judgment out of session and out of county — authority of court

In this action of trespass to try title, the trial judge announced at the conclusion of all the evidence that "I am going to find that the defendant is entitled to his 53 poles and the plaintiff is entitled to the balance," and instructed plaintiff's counsel to draw a judgment finding specific facts in accordance with his decision. The parties stipulated that the judgment could be signed at the next criminal session of another county. When called upon to sign the judgment tendered by plaintiff's counsel, the judge stated that he had reconsidered the case and changed his mind, and signed a judgment prepared by counsel for defendants adjudicating that defendants are the owners of the premises described in the answer: *Held:* The stipulation did not limit the trial judge to any particular decision, and the judge had authority to make findings of fact, conclusions of law and render judgment in favor of defendant at the next criminal session of the stipulated county.

3. Boundaries § 2— monuments — established line of another tract

An established line of another tract is a fixed monument.

4. Boundaries § 2— distance between fixed monuments — distance called for in deed

The actual distance between fixed monuments will control over a conflicting distance called for in the deed.

5. Boundaries § 15; Trespass to Try Title § 4— ownership of land — findings as to disputed boundaries

In this action in trespass to try title to land claimed by plaintiff and defendants from a common source, an 1859 grant, wherein the location of the southwest line of this grant and the location of an 1879 conveyance of a portion of this grant are in dispute, findings of fact by the court were insufficient to support the court's conclusion that defendants are the owners of the lands and premises described in the answer, where the court failed to make findings specifically locating the disputed boundary lines of the 1859 grant and of the 1879 conveyance.

APPEAL by plaintiff from *Bundy, J.*, 30 September 1968 Civil Session of PENDER. Upon plaintiff's petition for certiorari this case

was certified for review before determination by the Court of Appeals.

In this action for trespass plaintiff seeks (1) an adjudication that he is the owner and entitled to the immediate possession of the land described in the complaint, 2.8 acres on Topsail Beach, being lot No. 3 of the division of the lands of Jesse W. Batson, deceased; (2) an order permanently restraining defendants from trespassing upon the premises; and (3) damages for trespass. Defendants deny that plaintiff owns the lands described in the complaint. They allege that they own the lands described in the answer, lot No. 1 of the subdivision of lot No. 3 of the Millie Bishop estate. They pray that they be declared the owners and entitled to the possession of these premises, that plaintiff be permanently restrained from trespassing thereon, and that they recover of plaintiff damages for trespass.

The case was first heard by a referee in October 1965. His findings of fact, conclusions of law, and decision, filed 8 June 1966, were in favor of defendants. Plaintiff filed exceptions to the referee's report, submitted proposed findings of fact, tendered issues, and demanded a jury trial. At the October 1966 Session, the case was heard by Fountain, J., and a jury. At the conclusion of plaintiff's evidence, Judge Fountain allowed defendants' motion for nonsuit and then declared a mistrial as to defendants' cross action. Plaintiff appealed and, at the Spring Term 1967, we reversed the judgment of nonsuit. See the opinion by Parker, C.J., in *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519, for a more detailed exposition of the pleadings and a preliminary statement of plaintiff's evidence.

At the 30 September 1968 Session the parties waived a jury trial, and Judge Bundy heard the cause upon the transcript of the evidence which plaintiff and defendants had offered before the referee. At the conclusion of all the evidence, Judge Bundy announced his decision as follows: "I am going to find that the defendant is entitled to his 53 poles; and the plaintiff is entitled to the balance." At the time of making this statement he pointed to defendants' Exhibit 12, the Utley map, which showed the Batson grant to be the area lying between the lines A-B-C, C-D, D-E, and E-A. He instructed Mr. Rountree, counsel for plaintiff, to draw a judgment finding specific facts in accordance with his decision.

In open court it was agreed by the parties that the judgment could be signed at the next Criminal Term of New Hanover. On 1 November 1968 counsel appeared before Judge Bundy in Wilmington. When plaintiff's counsel tendered judgment prepared in

accordance with their understanding of the court's instructions, Judge Bundy announced that he had reconsidered the case and changed his mind, and had instructed counsel for defendants to prepare the judgment for his signature. He then signed the judgment of record, which adjudicates that defendants are the owners of the premises described in the answer. Plaintiff appealed, assigning as error (1) the judge's refusal to make the findings of fact set forth in plaintiff's proffered judgment, (2) his refusal to enter judgment in accordance with his statement made at the conclusion of the trial at the September 1968 Session in Pender, and (3) his entry of judgment decreeing that defendants owned the property described in the answer.

Wyatt E. Blake and George Rountree, Jr., for plaintiff-appellant.

Corbett & Fisler for defendant appellees.

SHARP, J.

This appeal presents two questions: (1) Did Judge Bundy have authority to render judgment in this case in New Hanover County on 1 November 1968 and (2) if so, do the facts he found support the judgment he signed.

[1, 2] When a jury trial is waived the judge must give his decision in writing, stating his findings of fact and conclusions of law separately. Absent consent of the parties the judgment must be filed with the clerk during the session at which the trial takes place. G.S. 1-185. It appears of record that all parties agreed that the judgment in this case "could be signed at the next criminal term in Wilmington." Plaintiff contends, however, that the parties' agreement did not authorize the judge to sign, out of session and out of county, "the particular judgment" he rendered; that he was only authorized to sign a judgment in accordance with his announced decision; and that "this case should be reversed and remanded to the Superior Court of Pender County with directions to enter judgment on behalf of the plaintiff as proposed in the unsigned judgment of record," *i.e.*, the judgment tendered by plaintiff's counsel. The inappropriateness of this contention — and the impossibility of drafting a judgment upon the judge's cryptic statement "I am going to hold that the defendant is entitled to his 53 poles and the plaintiff is entitled to the balance" — will appear as the evidence is hereinafter developed. For now it suffices to say that the parties did not attempt thus to circumscribe Judge Bundy's authority. The stipulation did not limit him to any specific decision, announced or unannounced.

When, at the end of the trial, he made the statement upon which plaintiff places his reliance he had neither filed with the clerk nor dictated into the record findings of fact which would control his judgment. When he adjourned the court, he left in Pender County no findings of fact constituting a judicial "verdict" which would support any judgment.

In a land suit as complicated as this one the parties had every reason to anticipate that any findings of fact prepared by either party would "bring on more talk." According to the judge's statement to counsel in Wilmington, after leaving Pender County, and upon further consideration of the case, he changed his mind and requested the attorney for defendants to prepare a judgment different from that which plaintiff's attorney understood he was to draw. There is nothing in the record which suggests that before changing his mind he had conducted any one-sided hearing from which plaintiff's counsel were excluded. Upon the authority of *Dellinger v. Clark,* 234 N.C. 419, 67 S.E. 2d 448, a case involving a situation strikingly similar to the one here, we hold that Judge Bundy had authority to make his findings of fact, conclusions of law, and render judgment in New Hanover County at the next criminal term of court.

Adjudication of the second question requires consideration of the evidence. Plaintiff and defendants claim from a common source, a grant "for 51 acres of land" on Topsail Banks in Pender County (then New Hanover), made 20 April 1859 by the State of North Carolina to Jesse W. Batson. This grant began at a stake, William B. Sidberry's corner on the sound, and ran with Sidberry's line across the banks S. 25° E. 66 poles to a stake at the edge of the ocean; thence with the edge of the ocean N. 53° E. 107 poles to Frederick Rhue's line; thence with Rhue's line N. 25° W. 88 poles to Crooked Creek; thence with the creek to the beginning. Thus, the Batson grant called for a quadrangular-shaped tract lying between the lands of Rhue and Sidberry and between two natural boundaries, Crooked Creek and the Atlantic Ocean. Frederick Rhue and William B. Sidberry also acquired their lands by grant from the State of North Carolina. The Sidberry grant was dated 4 January 1845; the Rhue grant, 18 November 1854.

[3] The location of the Rhue line (Batson's northeastern boundary) is not in controversy. It begins "at a stake at Cockle or Crooked Creek Landing on the sound side, then South 35° E. 92 poles to the ocean." It is well known and established on the ground. Thus, it is a fixed monument, *Batson v. Bell,* 249 N.C. 718, 107 S.E. 2d 562.

The parties dispute the location of the Sidberry line which must be located before the Batson grant can be defined.

The Sidberry grant purported to convey 170 acres between Topsail and Stump Inlets. It is described as beginning "on a dead cedar at the east end of a hammock near Cockle Creek Pond; thence S. 23° E. 50 poles to a stake; thence S. 50° W. for 260 poles at a stake between the Hammock and the Atlantic; thence N. 23° W. 160 poles to a stake in the sound; thence to the beginning." The evidence tends to show that Sidberry also owned other lands in the vicinity.

In March 1861 the lands of William B. Sidberry, deceased, were divided. In the division his daughter, Vashti Atkinson, received three tracts totaling 239 acres. One tract, containing 55 acres, was described as beginning on a dead cedar, running thence S. 23° E. 125 poles to a stake; thence N. 23° W. 100 poles to a stake on the sound; thence to the beginning.

On 1 August 1879, Jesse W. Batson conveyed approximately half of the lands described in his grant to Millie Bishop. The deed described the land as lying on Topsail Banks and beginning at a stake, Vashti Atkinson's corner in the sound; thence with her line across the banks S. 25° E. 66 poles to the ocean; thence with the edge of the ocean, N. 53° E. 53 poles (874.5 feet) to a stake; thence N. 25° W. 88 poles to the sound; thence with the meanders of the sound to the beginning. This deed is the foundation of defendant's claim, and the location of Vashti Atkinson's corner is the major problem in this case.

Plaintiff's evidence tended to show that the northeastern line of the Sidberry tract and of the Vashti Atkinson tract were one and the same. If so, Batson conveyed to Millie Bishop the southern half of his grant as plaintiff contends, and not the northern portion as defendants contend. On the basis of the description in his grant—which called for an ocean frontage of 107 poles (1765.5 feet) — Batson would have retained a tract fronting 54 poles (891 feet) on the Atlantic Ocean. However, on the basis of the survey upon which plaintiff relies, he contends that Batson actually retained 2574 feet.

On 21 January 1956 a petition was filed by heirs of Jesse W. Batson and S. G. Blake, the grantee of some of the heirs, to partition that portion of Batson's grant which remained after his conveyance to Bishop. Commissioners were appointed, and they employed a surveyor, Raymond Price, to locate and divide the land which Batson had retained. On 2 June 1956 the commissioners filed their report showing a division of the property into twelve lots. The

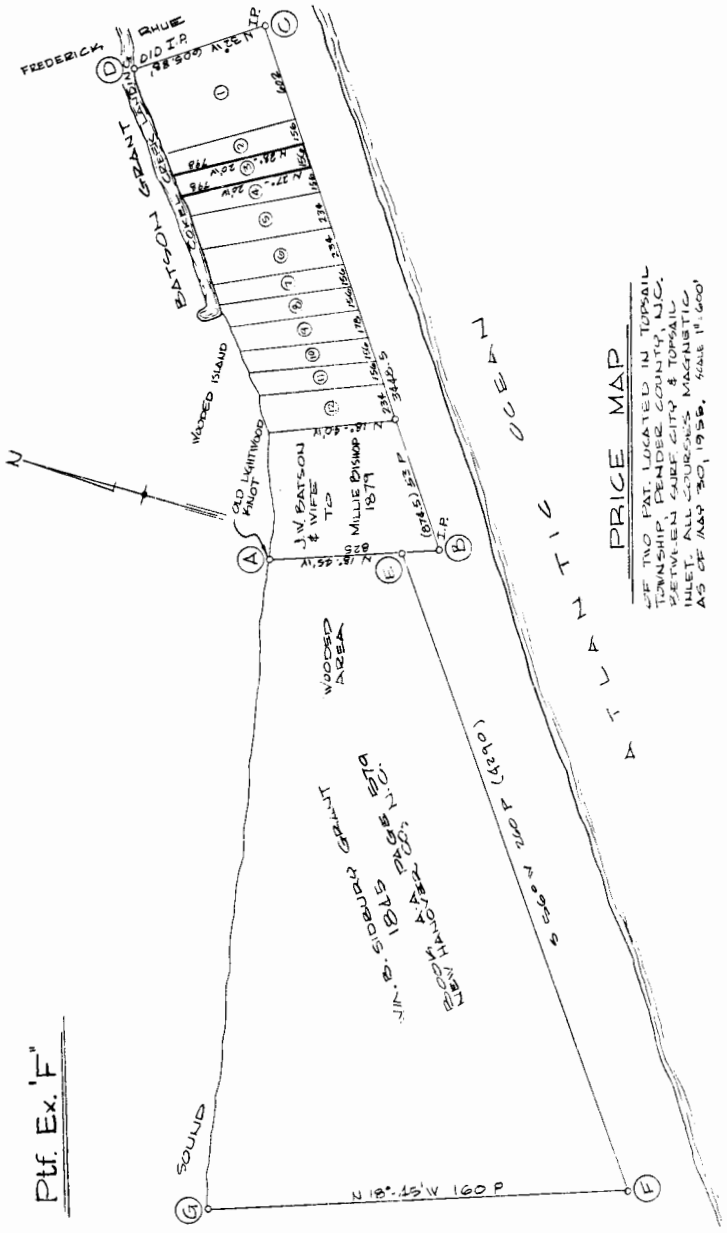
map of this division is plaintiff's Exhibit F (also marked defendants' Exhibit 5). The Clerk of the Superior Court approved the report on 13 June 1956, and it was recorded on 9 July 1956.

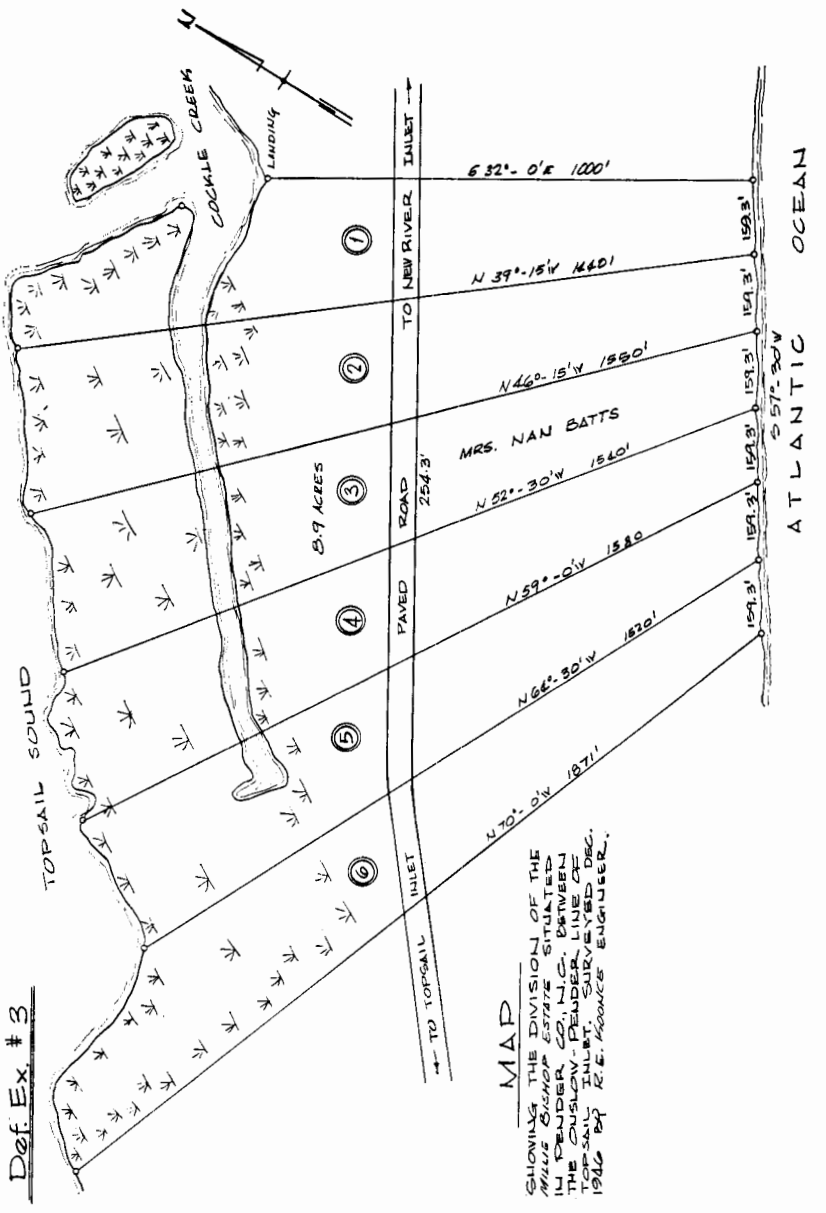
In the Sidberry grant, the beginning point was designated as a dead cedar as was the beginning point in the 55-acre tract allotted to Vashti Atkinson in the division of his estate. According to plaintiff's evidence, in May 1956 the site of the dead cedar was marked by an old lightwood knot of indefinite age. Price testified that it could have been there "one year or fifty," that he found it implanted in the marsh approximately 300 feet from the northeast end of Horse Hammock, which was at the end of Cockle Creek Pond. The knot is designated by the letter A on plaintiff's Exhibit F. There were several cedar stumps in the area but none within 200 feet of the lightwood knot. Approximately 300 feet southeast of it in the line A-B (Exhibit F) is an old cedar snag in a hammock.

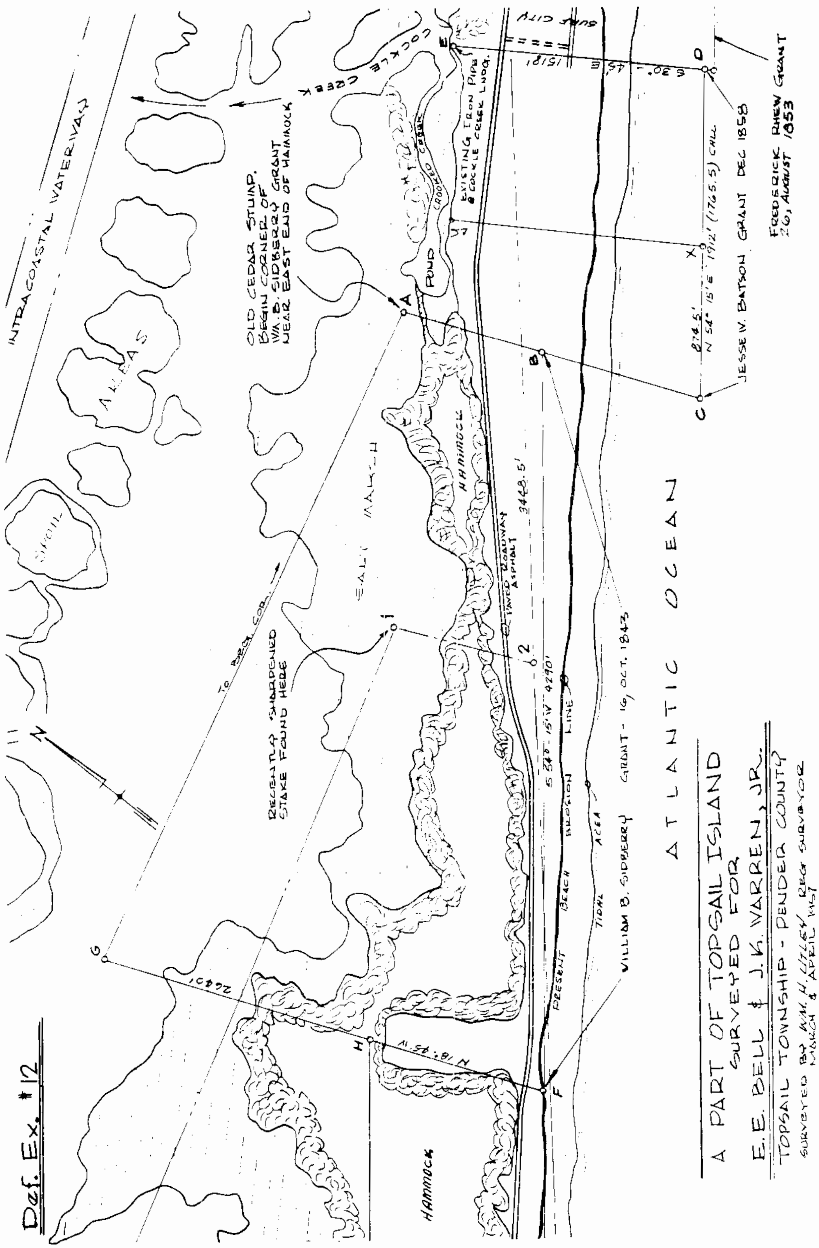
In making his survey for the Batson division, Price began at this lightwood knot. From it, he ran the first two calls in the Sidberry grant, lines A-E and E-F (Exhibit F). At the end of the second call (line E-F) he came to an old marked line, the third call (line F-G), which took him to the sound. Beginning at Point A, Price also ran the southwest line of the Batson grant (line A-B). He ran with the Sidberry grant for 50 poles (Point E) and then continued the same course for 16 poles (thus running the 66 poles called for in the Batson grant) to the ocean, the end of the first call (Point B). He then ran the second call (B-C), "thence with the ocean N. 53° E. 107 poles (1765.5 feet) to Rhue's line." However, to get from Point B, Sidberry's line extended, to Rhue's established line, Point C, he had to go 211 poles (3448.5 feet) instead of the 107 poles (1765.5 feet) called for in the grant.

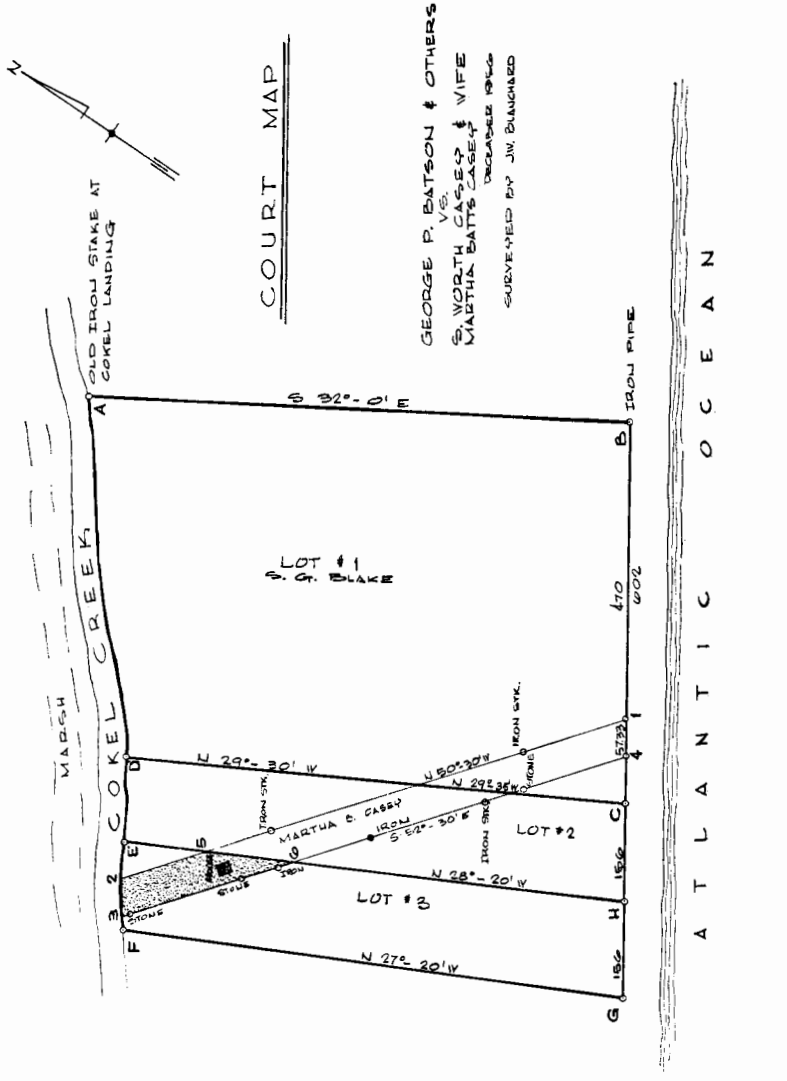
Price testified that in making the division among the Batson heirs he showed on Exhibit F what he found on the ground. It appears that he laid off the Millie Bishop tract by treating Point A as Vashti Atkinson's corner and surveying from there in accordance with the calls in the deed from Batson to Bishop. From Point B he ran 53 poles (874.5 feet) along the edge of the ocean. He then turned N. 18° W. to the sound and from there to the beginning. After thus defining the Millie Bishop tract, between its northeast line and the Rhue line, there remained 2574 feet of ocean frontage instead of 891 feet which would have been the remaining frontage had the entire distance been 107 poles as specified in the grant.

Beginning at the Rhue line Price divided this tract into twelve lots, the northeast line of lot No. 1 being the southwest line of the


Ptf. Ex. 'F'
PRICE MAP
OF TWO PAT. LOCATED IN TOPSAIL TOWNSHIP, PENDER COUNTY, N.C. BETWEEN SURF CITY & TOPSAIL INLET. ALL COURSES MAGNETIC AS OF MAY 30, 1958. SCALE 1"=200'
ATLANTIC OCEAN
FREDERICK RHUE
DID I.P.
BATSON GRANT
WOODED ISLAND
J.W. BATSON & WIFE TO MILLIE BISHOP 18.79
WOODED AREA
SOUND
N 18°-45'W 160 P


Def. Ex. #3
MAP
SHOWING THE DIVISION OF THE MILLS BISHOP ESTATE SITUATED IN PENDER CO. N.C. BETWEEN THE OLSLOW-PENDER LINE & TOPSAIL INLET. SURVEYED DEC. 1940 BY R.E. HODGES ENGINEER.
TOPSAIL SOUND
COONTZ CREEK
LANDING
TO TOPSAIL INLET
PAVED ROAD 254.3'
TO NEW RIVER INLET
8.9 ACRES
MRS. NAN BATTS
S 32°-0'E 1000'
N 39°-15'W 1460'
N 46°-15'W 1550'
N 52°-30'W 1580'
N 59°-0'W 1580
N 66°-30'W 1820'
N 70°-0'W 1971'
S 57°-30'W
159.3'
ATLANTIC OCEAN


Def. Ex. #12
INTRACOASTAL WATERWAY
SPOIL AREAS
OLD CEDAR STUMP, BEGIN CORNER OF WM. B. SIDBERRY GRANT NEAR EAST END OF HAMMOCK
COCKLE CREEK
EXISTING IRON PIPE @ COCKLE CREEK LNDG.
CROOKED CREEK
POND
SURF CITY
SALT MARSH
HAMMOCK
PAVED ROADWAY ASPHALT
3448.5'
S 54° 15' W 4290'
PRESENT BEACH EROSION LINE
TIDAL AREA
WILLIAM B. SIDBERRY GRANT - 16, OCT. 1843
ATLANTIC OCEAN
874.5'
N 54° 15' E 1912' (1765.5) CALL
JESSE W. BATSON GRANT DEC 1858
FREDERICK RHEW GRANT 26, AUGUST 1853
RECENTLY SHARPENED STAKE FOUND HERE
TO BEG. COR.
2640'
N 18° 45' W
A PART OF TOPSAIL ISLAND SURVEYED FOR
E.E. BELL & J.K. WARREN, JR.
TOPSAIL TOWNSHIP - PENDER COUNTY
SURVEYED BY WM. H. LILEY REG SURVEYOR


COURT MAP
GEORGE P. BATSON & OTHERS
VS
S. WORTH CASEY & WIFE
MARTHA BATTS CASEY
DECEASED
SURVEYED BY J.W. BLANCHARD
N
OLD IRON STAKE AT COKEL LANDING
COKEL CREEK
MARSH
ATLANTIC OCEAN
S 32°- 0' E
IRON PIPE
LOT #1
S. G. BLAKE
N 29°- 30' W
N 50°-30' W
N 29°-30' W
IRON STK.
STONE
MARTHA B. CASEY
IRON
S 61°- 30' E
LOT #2
N 28°- 20' W
LOT #3
N 27°- 20' W
470
602
572
156
A
B
C
D
E
F
G
H
1
2
3
4
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Rhue grant. In the division, the heirs of Levi Batson, a son of Jesse W. Batson, were assigned lot No. 3. On 6 October 1964, in a deed containing no warranties, they conveyed lot No. 3 to C. H. Cutts, the plaintiff herein. Lot No. 3 of the Batson partition, as described in the report, begins at a stake in the edge of the ocean, the southwest corner of lot No. 2. This beginning point is 758 feet from the Rhue line and 2690.5 feet from the line A-B, William Sidberry's line, as established by Price. From the southwest corner of lot No. 2, lot No. 3 runs S. 56° 30′ W. with the edge of the ocean 156 feet to the southwest corner of lot No. 3; thence with that line N. 27° 20′ W. in the sound; thence northeasterly with the sound to the northeast corner of lot No. 2; thence with that line S. 28° 20′ E. to the beginning.

The area in dispute between plaintiff and defendants is the northeast portion of lot No. 3 of the Price division. Defendants claim a quadrangle measuring 80 X 280 X 180 X 80 feet, which is designated by the lines 3-6, 6-5, 5-2, and 2-3 on the court map.

[4] From plaintiff's evidence, it is quite clear that one of two surveying errors has been made — either the surveyor of New Hanover County made a mistake of 104 poles in 1858 when he measured the distance between the Sidberry and Rhue grants, the second call in the Batson grant, or Surveyor Price mislocated the northeast line of the William B. Sidberry grant (the line A-B) in May 1956 because lot No. 3 of the Batson division is more than 1765.5 feet (107 poles) from that line. If plaintiff establishes the line A-B as the Sidberry line the actual distance between it and Rhue's established line (fixed monuments) will control and not the distance of 107 poles called for in the grant. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519.

To summarize: Plaintiff claims record title to the land in dispute through the following instruments: (a) Grant from the State of North Carolina to Jesse W. Batson; (b) Division by special proceeding of the lands of Jesse W. Batson, deceased; (c) Deed from Batson heirs to Charles H. Cutts.

Defendants claim record title to the disputed area through the following instruments: (a) The Jesse W. Batson grant (the parties' common source); (b) Deed from Jesse W. Batson to Millie Bishop; (c) Partition deed, dated 4 March 1947, to Nancy I. Batts, Thelma Batts, Norman Batts, and J. P. Batts (heirs of Millie Bishop) from the remaining heirs of Millie Bishop, for lot No. 3 (8.9 acres) of the "Division of the Millie Bishop Estate" as shown by the plat recorded in Plat Book 3, page 36, Pender County Registry, defendants' Exhibit 3; (d) and (e) Two deeds, dated 21 February 1956

and 3 December 1956 respectively, from the grantees (or their heirs) in Link (c) above to defendant, Martha B. Casey, to lot No. 1 of the subdivision of lot No. 3 of the Millie Bishop division.

Defendants contend they have sufficiently established their claim to the disputed area if they can show that Rhue's southwest line and Bishop's northeast line were the same.

The division shown on defendants' Exhibit 3, which defendants assert was of the Millie Bishop tract, was made in December 1946 by Koontz, surveyor, upon the assumption that the northeastern line of the Millie Bishop tract (lot No. 1) was the southwestern line of the Rhue grant. Defendants' Exhibit 3 shows this line to begin at an iron pipe on Cockle Creek Landing and to run S. 32° 1000 feet to the Atlantic Ocean. Plaintiff stipulated that this line was the Rhue line. From the terminus of this line Koontz ran S. 57° 30′ W. 955.8 feet with the ocean and then turned N. 70° W. 1871 feet to Topsail Sound; thence northeasterly to the beginning. The map shows that 51.32 acres were divided into six lots.

According to the Koontz map the southeastern corner of lot No. 3, measured along the ocean, is 318.6 feet from the Rhue line; the southwest corner, 477.9 feet. The northeast line runs N. 46° 15′ W. 1550 feet from the ocean to the sound; the southwest line, N. 52° 30′ W. 1540 feet. The ocean frontage between the two lines is shown to be 159.3 feet. The court map, prepared by J. W. Blanchard in December 1956 to illustrate the contentions of the parties, shows the southeast corner of lot No. 3 to be 470 feet from the old Rhue line.

In June 1954, William W. Blanchard, a surveyor, basing his work entirely on the Koontz map, divided lot No. 3 into three lots. The map of this subdivision is defendants' Exhibit No. 10 (not reproduced herein). Lot No. 1, to which defendant Martha B. Casey claims record title, is the southernmost lot of this subdivision. The subdivision map shows a frontage of 57.23 feet on the ocean. The call in one of her deeds is for "about 50 feet" along the ocean; the description in the other is merely "Lot No. 1 as shown by the W. W. Blanchard map of the Mrs. Nan Batts Heirs Subdivision." The southwest line of lot No. 1 of the Batts Heirs Subdivision, also the southwest line of original lot No. 3 of the Millie Bishop Division, runs N. 52° 30′ W. from the ocean to the sound; the northeast line runs N. 50° 31′ W. Blanchard testified that this lot No. 1 is contained within the bounds of lot No. 3 of the Koontz division. He also testified that no call in the deed to Bishop from Batson (1879) could conform to the Koontz division (1946), with the possible exception

of the ocean frontage, and that the third call in the deed bears no relation to the Rhue line.

In answer to a question based upon the assumption that the line A-B on the court map and the line C-D on plaintiff's Exhibit F (the southwestern line of the Rhue grant) was the third call in the Millie Bishop deed, and that the first call in that deed was parallel to the third call, W. W. Blanchard testified that in his opinion the disputed area was within the boundaries of the Millie Bishop deed as well as all of lot No. 3, except a small triangle in the southeast portion.

The Bishop deed does not refer to the Rhue line (S. 35° E. 92 poles), which defendants contend to be the third call in the Bishop deed (N. 25° W. 88 poles to the sound). Although the Bishop deed calls for Vashti Atkinson's corner as its beginning point, defendants offered no evidence tending to locate this point.

The testimony of defendants' witness W. H. Utley, a registered surveyor, stipulated to be an expert in surveying and forestry, tended to show:

In March 1957 he surveyed the Sidberry, Batson, and Rhue grants and made the map introduced in evidence as defendants' Exhibit 12. As a result of information he obtained from three elderly gentlemen of the vicinage, Daniel Justice, aged 80, Raleigh Clayton, 78, and Roland Batts, 60 (all of whom are now deceased), he located the beginning point in the Rhue grant at the iron (stake) on Cockle Creek Landing (Point E on Exhibit 12), and he also located Horse Hammock. The line E-D on Exhibit 12 is the line C-D on plaintiff's Exhibit F. On the east end of Horse Hammock at Point A he found a large cedar stump approximately three feet across at the root collar. This was the largest remains of a tree anywhere in the locality, and it was about 75 feet from the end of the hammock and the pond, which terminates Cockle Creek. There were a number of cedar stumps of varying sizes 30-50 feet away. The three elderly gentlemen also told Utley that the end of the hammock near Point A existed today as it always had.

Using the cedar stump as the beginning point of the William B. Sidberry grant he ran its first call 50 poles, or approximately 825 feet, to Point B. He then turned and ran the line B-F, the third call in the Sidberry grant 4290 feet. At Point F he turned N. 18° 45′ W. (the 1957 bearing for the third call) and ran 2640 feet to Point G, which is the sound.

Utley next ran the Batson grant. Beginning at Point A he con-

tinued the line A-B to the present beach erosion line and then turned to run the second call in the Batson grant, to the Rhue line, E-D. He found that distance to be 1912 feet instead of the 1765.5 feet, or 107 poles called for in the grant, a discrepancy of 146.5 feet. Based upon information he received from the three old residents, his examination of the area, his survey of the lines in the Sidberry and Batson grants, the location of the cedar stump (the largest in the area) at the east end of a hammock near the end of Cockle Creek Pond, he was satisfied that Point A on Exhibit 12 was the only possible beginning point of the Batson grant.

When he made his survey in 1957, Utley found in the salt marsh the lightwood knot (which he called a large cedar limb) from which Price began his survey of the Batson grant. This point, A on plaintiff's Exhibit F, is designated (1) on defendants' Exhibit 12. When Utley pulled up the cedar limb for examination he found that it had "been sharpened off." It was his opinion that the tool marks on the tip were not more than six months old and that the matted marsh grass beneath the pole was the previous year's growth. It had not rotted or deteriorated. From the cedar limb he ran the line 1-2, the line shown on the Price map (Exhibit F) as A-B. In doing so, he followed the line which had been cut not more than two years before. From line 1-2 to the southwest edge of Cockle Creek Pond was approximately 2000 feet; from his Point A in the line A-C, it was about 75 feet.

Utley identified the line E-D on his map as being the northeast line of the Millie Bishop division as shown on defendants' Exhibit 3. In his opinion, lot No. 3 of that division lies within the bounds of the tracts A-C-D-E shown on his map (Exhibit 12). At the time he made his survey, one of his informants, Mr. Justice, told him that the land southwest of the Rhue line had always been known to him as the Millie Bishop land, but he did not know who the present owners were. Utley obtained no information as to the whereabouts of Vashti Atkinson's corner.

Several of the Millie Bishop descendants testified that 35-55 years ago an ancestor had told them that the Millie Bishop lands adjoined Rhue on the northeast. None had any information whatever as to the location of Vashti Atkinson's corner, the Sidberry lands, or the Batson grant. They knew only "where our property is," its location having been "determined by a registered surveyor."

From the evidence offered it appears that if Bishop's northeast line (the third call in her deed) was the Rhue line, the disputed land lies within the area covered by the deed under which defend-

ants' claim, and plaintiff cannot win. In this event, however, it would seem that other portions of the Millie Bishop division south of lot 3 would overlap land retained by Batson.

If Bishop's southwest line was the northeast line of the Sidberry grant, line A-B-C as shown on Exhibit F and line 1-2 as shown on Exhibit 12, defendants' land lies outside the boundaries described in the deed from Batson to Bishop, and plaintiff must win.

There remains the possibility that Bishop's southwest line was the Sidberry line but that its correct location is the line A-B-C as shown on defendants' Exhibit 12 and that the Bishop lands are shown by the lines A-B-C, C-X, X-Y, and Y-A. Neither party tried the case upon this theory. However, it cannot be disregarded since there is substantial evidence tending to show that Point A on the Utley map is the beginning point of the Batson grant. If the Bishop lands do lie within the lines specified above, it is not clear to us from the evidence whether any part of lot No. 3 as laid off by Price encroaches upon the Bishop tract. It is certain, however, that many of the other lots shown on Exhibit F would.

From the foregoing it is clear that the judge's statement made at the conclusion of the evidence afforded no basis for a decision of the case. He did not indicate where he was locating the line from which he would measure the 53 poles called for in the deed from Batson to Bishop. Nor did he indicate the course the line would run from the ocean to the sound. There being no line in the Bishop deed which would correspond to the Koontz division of the Bishop lands except the one along the ocean, the courses of the other lines are important.

The interpretation which counsel for plaintiff gave Judge Bundy's pronouncement is disclosed by their tendered judgment which contained in substance the following: (1) Batson conveyed the southern portion of his grant to Bishop, described with reference to the Utley map as being within the lines A-B-C, C-X, X-Y, and Y-A. (2) Batson died intestate owning the balance of his grant, a tract fronting 891 feet on the ocean and lying between the Rhue line (D-E) and the northeast line of the Bishop lands (X-Y). (3) The heirs of Millie Bishop attempted to divide the entire Batson grant as shown by the Utley map instead of the southern portion measured 53 poles (874.5 feet) from the Sidberry line as shown by Utley. (4) The heirs of Batson have attempted to locate the Bishop lands by measuring 53 poles from the line 1-2 on the Utley map and then to divide the lands between there and the Rhue line (E-D). They did not own the land lying between the line 1-2 and the line A-B-C on

that map. (5) Plaintiff owns all of lot 3 as shown on the court map except a strip approximately 23 feet wide described with reference to the court map as lying between the line F-G and a line running from Point 3 S. 27° 20′ E. to the ocean, and it is not clear who owns this strip. Upon these findings plaintiff tendered judgment that plaintiff owned all of lot 3 (Exhibit F) except that portion of lot No. 3 described above.

Obviously it cannot be demonstrated that the judgment which plaintiff tendered incorporated the finding which Judge Bundy said he intended to make or that it decreed the division he had in mind! The judgment which he signed is summarized as follows:

(1) Plaintiff and defendants claim title from a common source, the Batson grant.

(2) Batson conveyed to Bishop "the lands purported to be contained within the Millie Bishop division and reflected on map in Map Book 3 at page 36, Pender County Registry."

(3) The Batson grant was bounded on the northeast by the Rhue grant, on the southwest by the Sidberry grant.

(4) Plaintiff has failed to show title either by record or possession to the land described in the complaint or to any part of the lands described in the answer.

(5) Defendants are the owners and entitled to the possession of the lands described in the answer.

(6) There is no evidence that either party sustained any damage as the result of trespass by the other.

Upon the facts he adjudged that defendants are the owners of the lands and premises described in the answer.

[5] The foregoing facts are not sufficient to support the conclusions Judge Bundy reached. It is quite true — as the court found in (2) — that the heirs of Millie Bishop *purported* to divide the lands described in her deed. The question is whether they *did* divide the land Batson conveyed to her. It is also quite true that the Batson grant was bounded by the Atlantic Ocean, Topsail Sound, the Rhue grant and the Sidberry grant. All the boundaries are known except the Sidberry line, which the judge did not specifically locate. The deed to Bishop did not convey the entire Batson grant to her. Therefore, both the northeast and the southwest lines of the Bishop lands must be located in order to determine the rights of the parties.

As stated, finding (4) amounts to a conclusion of law that plain-

tiff offered *no* evidence tending to establish his title to the lot described in the complaint. On the first appeal of this case, *Cutts v. Casey, supra,* in overruling the judgment of nonsuit, we held that there was some evidence from which the jury could find (1) that plaintiff acquired the land in controversy "through a connected chain of title," and (2) that the disputed area was a part of the land which descended to the Batson heirs. Of course, the credibility of the testimony of all the witnesses who testified was for the judge, who was sitting as a jury.

We deem it appropriate to note that the assignments of error question none of the court's rulings upon the competency of any evidence which was admitted.

The judgment of Bundy, J., is vacated and the case remanded to the Superior Court for a

New trial.

STATE OF NORTH CAROLINA v. MITCHELL GRANT WALTERS

No. 32

(Filed 19 November 1969)

1. Homicide § 15; Criminal Law § 73— relevancy of evidence — explanation of possession of pistol — hearsay

In a prosecution charging defendant, a policeman by occupation, with murder in the first degree committed by use of a pistol, defendant's testimony, offered in explanation of his possession of the pistol at a time when he was not on duty, that he was instructed at the Institute of Government with respect to the right of off-duty peace officers to be armed, *held* properly excluded as hearsay.

2. Homicide § 21— first-degree murder — premeditation and deliberation — sufficiency of evidence

In a prosecution for murder in the first degree, there was substantial evidence of premeditation and deliberation on the part of defendant to withstand motion for nonsuit, where the State offered testimony that on the day of the homicide the defendant, asserting that the deceased had been following his wife, sought the deceased at the latter's filling station and home; that the defendant stated to deceased's wife that he did not like deceased, that what deceased needed was a bullet in the right place and that he, the defendant, might be the one to do it; that later on the same day the defendant, finding deceased at the filling station, provoked an altercation with deceased, first by language, then by threatened assault with handcuffs; that the deceased picked up a tire tool; that

defendant then shot deceased in the leg with a pistol and, when deceased fell, shot him again in the chest; that defendant then turned to an observer and stated that "it was self-defense."

3. Criminal Law §§ 103, 104— functions of court and jury — consideration of evidence

What is evidence is a question of law for the court; what the evidence proves or fails to prove is a question of fact for the jury.

4. Homicide § 21— first-degree murder — motion to nonsuit — evidence of premeditation and deliberation

On motion to nonsuit in a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in the light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that defendant, after premeditation and deliberation. formed a fixed purpose to kill and thereafter accomplished the purpose.

5. Homicide § 4— first-degree murder — premeditation and deliberation — length of time

No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing.

6. Homicide § 18— premeditation and deliberation — proof by circumstantial evidence

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore suspectible of proof by circumstances from which the facts sought to be proved may be inferred.

7. Homicide § 18— premeditation and deliberation — proof — circumstances

In determining whether a killing was with premeditation and deliberation, the circumstances to be considered include: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; and (4) the dealing of lethal blows after deceased has been felled and rendered helpless.

APPEAL by defendant from *Hall, J.*, May, 1968 Regular Session, ROBESON Superior Court.

This criminal prosecution was based upon a Grand Jury indictment, proper in form, which charged the defendant, Mitchell Grant Walters, with the first degree murder of Horace Tillman Britt. The offense is alleged to have occurred on November 10, 1968. Upon arraignment, the defendant entered a plea of not guilty.

At the trial, the State introduced evidence which disclosed the following: On and prior to Sunday, November 10, 1968, the de-

ceased, Horace Tillman Britt, owned and operated a filling station in the Town of Lumberton. Robert Britt, brother of the deceased, testified that the defendant, a Lumberton police officer, off duty, came to the filling station about 1:30 p.m. while Horace was out for lunch. "He came in at one-thirty and wanted to know if my brother was there, and asked if my brother was drinking. I told him, no. I asked him why. He said my brother had been following his wife. I said, 'I don't believe it.' He asked if Horace was drinking. I told him, No. . . . (H)e said the s. o. b. would be better off if he was."

About 2:30 in the afternoon, the defendant, by telephone, called Mrs. Beulah Watts Britt, wife of the deceased. She testified: "The 'phone rang. I said, 'Hello.' He said, 'This is Mitchell'. He asked me if Horace was home. I said, No, he is not; might be at the station, and asked him if he had checked at the station. He said, 'Yes, I have already been down there.' He said, 'Beulah, is Horace drinking today?' I said, 'No, Mitchell, Horace doesn't drink; I said, 'Why?' He said: 'Barbara seems to think Horace has been following her down town and motioning like he wanted her to follow him off some place.' Then he said he was tired of Horace and Robert squealing tires up and down the street and something ought to be done about it. Robert is Horace's brother. He said he didn't like Horace anyway; what he needed was a bullet, in the right place; he said he may well be the one to do it."

The State's evidence further disclosed that Horace Britt was 40 years old, was 5'10-11" tall and weighed more than 200 pounds. Mrs. Britt testified: "On the tenth of November, 1968, he was partially paralyzed in his right side. His leg and I would say his whole right side was affected by that paralysis. He had a limitation or restriction of use of his right arm." He had been injured in a motorcycle accident. The evidence disclosed that on the day of the shooting Horace Britt worked at the filling station. He went home for lunch and for supper in the early evening, then returned to the station.

An eye witness, Melton Lowry, who was an employee of the deceased, testified: "I was there when Mr. Britt returned to the station about five o'clock. I saw Mr. Mitchell Walters at the service station after Mr. Britt returned. When Mr. Mitchell Walters came to the service station after Mr. Britt returned, Mr. Britt and I were both behind the counter. * * * When Mr. Britt and Mr. Walters were both at the cash register, Mr. Britt was behind the cash register and Mr. Walters in front of it; they were three or three and a half feet apart. At that time Mr. Walters was dressed in regular

civilian clothes and did not have on a coat. I heard a conversation between Mr. Britt and Mr. Walters. I can't remember who spoke first. . . . They greeted each other as near as I can recall, and Mr. Walters was first to speak. As close as I remember he was talking to Mr. Britt and said 'What did you mean following my wife around?' Mr. Britt said, I have not been following your wife around; have been to Fayetteville part of the day. Mr. Walters said, 'You are lying. My wife said you have been following her around.' . . . Mr. Britt had to walk behind me to get to the end of the counter; as he was walking toward the end of the counter . . . he said, 'You call me a liar; anybody that calls me a liar,' and was mumbling. When Mr. Britt started walking toward the end of the counter he moved up directly in front of me — Mr. Walters did. He pulled a pair of handcuffs and put them up to his shoulder. At the time he held the handcuffs up to his shoulder Horace Britt did not have any kind of weapon in his hand that I saw. * * * When Mr. Walters pulled his handcuffs and held them up in that manner Mr. Britt moved back like this, spread out his right foot to pick up a tire tool. The tool was two yards from the southeast corner of the building. When Mr. Britt reached to pick up the tire tool Mr. Walters moved up to the end of the counter on the front side of the bread rack. At the end of the counter at the bread rack Mr. Walters was within hand reach to the front door. I saw Mr. Britt pick up the tire tool and he swung his right leg around, with a large swing, still in a stooped position, slightly stooped. * * * He had the tire tool in his right hand. When Mr. Britt picked up the tire tool and swung around all my attention was on Mr. Walters; and just as he turned around with the tire tool, I heard two shots back of me. When the first shot was fired Mr. Britt faltered, slumped over and then fell over on his side. Less than a second elapsed between the two shots. When Mr. Walters walked out to the end of the counter just as Mr. Britt was picking up the tire tool, Mr. Walters took a step and a half forward. . . . Mr. Walters was right in front of me. The step or more was in a forward direction and that is in the direction that Mr. Britt was picking up the tire tool. * * * At the time of the shooting there was no one between Mr. Walters and the front door. From the time Mr. Britt picked up the tire tool until after the shooting Mr. Walters was not more than an arm's reach from the door. After the first shot was fired Mr. Britt did not move in any direction other than falling; stopped and fell over. I saw where he fell."

The State introduced the testimony of a medical expert who stated he examined the body of the deceased at the hospital, found

a gunshot wound had passed through his right leg, and another entered between the 4th and 5th ribs near the heart and lodged under the skin below the hip bone. The last shot, in the opinion of the doctor, caused death.

At the close of the State's evidence, the defendant moved for a directed verdict of not guilty on the capital felony charged in the indictment. The motion was overruled. The defendant excepted.

The defendant introduced the evidence of a witness who testified she was entering the filling station at the time of the shooting. She testified that Horace Britt was moving toward the defendant; that two shots were fired but the deceased did not fall until after the second shot; that the witness saw a tire tool at or near the deceased after he fell. The defendant also introduced a number of witnesses who testified that Horace Britt had the reputation of being a violent and dangerous man.

The defendant's wife, Mrs. Barbara Walters, testified: "When I passed the station the middle of the day on which he was killed I saw Horace pull out of the station as I went by. He waved and I waved back, usual greeting. . . . When I drove through town he stayed behind me. He was doing like this; he was moving his hand from the front over to the right. It was his left hand. He would blow the horn and would do this. I do not know what he was saying. I did not know if he was trying to take me off, but he had no business doing it. I did not see the purpose of keeping blowing the horn. * * * I came to the conclusion I didn't know why he was doing that and I was frightened. . . . I turned to the left at Fifth Street and when I got to the stoplight, it was red. He stopped behind me and blew the horn for me to turn left. I turned left and when I got to Walnut and Sixth I do not remember stopping — the light was green. . . . He was still following and motioning left when I got to the jail. I thought that meant for me to turn. * * * When I got to Elm and Elizabethtown Road I do not remember stopping at that light; it must have been green. . . . I stopped at Pine and Elizabethtown Road and Eleventh Street and he stopped and blew his horn and motioned for me to turn left. I did not turn left there, but turned right. He turned left and went on down the street . . ." The defendant and the deceased lived within two blocks of each other.

The defendant testified that when his wife returned from the drugstore with the paper, she was upset. "As to my wife's condition, she was frightened. She did relate to me what had happened. . . . As a result of what she told me I went to the kitchen and made a

telephone call to Mrs. Beulah Britt, the wife of Horace Britt. . . . * * * When I called Mrs. Britt she answered the telephone. . . . I asked her if Horace was home. She said, No. I asked her if she knew where he was; she said, No. I then asked her if Horace was drinking. She said, not that she knew of, but he could be. She wanted to know why — I told her Horace had followed my wife, had blown the horn at her and made these gestures as he followed her; had my wife upset and afraid. * * * I told her I didn't like what Horace had done. I told her that he and Robert did a lot of fast driving and spinning tires; that I had never indicted them for I didn't want any trouble out of them, that they were neighbors. . . . (S)he said she didn't want us to have any trouble. I assured her there wouldn't be any trouble, the worst thing that could happen between us, I might slap his face." The witness denied making any threat or suggestion of shooting. The defendant admitted going to the filling station and having a conversation with Robert Britt about 1:30 p.m. "I told him that Horace had frightened my wife. . . . * * * I did not make any statement about the brother of Robert Britt being an s. o. b. and there was no profane language in the conversation. . . ."

The defendant testified that later on he drove by the service station, saw Horace Britt's car and stopped. "When I went in he said, 'Hello, Mitchell.' I said, 'Hello, Horace.' He then asked what he could do for me. I asked Horace, 'What do you mean by following my wife?' He said, 'I have not followed your wife.' I said: 'My wife says you have.' He said, 'Your wife is a damn liar.' I said: 'You are a damn liar.' He then became very angry and rushed from behind a counter and as he walked rapidly, started trying to get a blue jacket off him. At that time I did not have anything in my hands. Horace was well over six feet tall. . . . (A)s he came around the counter and stood in front of the counter, facing me, I took handcuffs out and held them down by my side. I had the handcuffs and a weapon with me then — the weapon was in the right front pocket of my trousers. * * * When he put his jacket back across his shoulders he weaved around rapidly, took several steps toward the southeast corner of the service station. I was not doing anything at the time. * * * When he went rapidly toward the southeast corner of the station, it took him a split second or two to pick up the tire tool, a very short time. When he picked up the tire tool he wheeled back around and had it in his right hand, drawn back like this. I don't know how far he was from me when he turned back toward me. I would have to guess. Approximately twelve or thirteen feet, I don't know. After he turned back to me, he rushed very

rapidly toward me. * * * (A)s he rushed rapidly toward me, I put my handcuffs up and took out my revolver. At that time I shouted, 'Horace, stop' or 'Horace, don't,' one of the two. When he continued to advance I had my revolver in my hand; I pointed my revolver toward his right thigh, right leg, and pulled the trigger. The gun did fire and Horace continued on toward me. I then raised by revolver higher and fired another shot. At the time I fired the first shot he still had the revolver [sic] drawn back in his right hand. At the time I fired the second shot it was still in his right hand lifted up. After the second shot Horace fell to the floor."

By way of explaining the possession of a pistol on Sunday, and while he was off duty, the defendant testified: "I did not take my weapon with me primarily because I was afraid of him. I took it for several reasons. I had not anticipated any trouble. I took my pistol because as a police officer, I was allowed and advised to carry a gun off duty. I did it also as a form of self protection and it had become a habit. It was customary for me to take the revolver with me when I left the premises and my house. I was a policeman off duty and felt if I should observe the commission of some felony or unlawful act, if in civilian clothes it was my duty to try to make an arrest or intervene to prevent possible injury. I discussed that with the Chief of Police, Mr. Lovette. I think he knew I was going to do it. I did not discuss directly with Mr. Lovette carrying my weapon while I was off duty. He is chief of police and was my immediate superior at the time. He has told me that I was allowed by law to take it when off duty and has told several more when I have been in the group when the chief said it. * * * I was permitted to carry a weapon when off duty and was instructed in school. That is part of the reason I carried a gun or pistol, that I was allowed by law to carry it. Plain clothes officers, deputy sheriffs and highway patrolmen also carry guns off duty. One reason I carried it was to be prepared in case of a felony that was committed in my presence. I was conscientious as a police officer."

A number of witnesses testifying for the defense said that Horace Britt had a bad reputation for violence and was considered dangerous. The Chief of Police of Lumberton testified that according to the rules of the police department, a policeman is on duty at all times, subject to call. When not on duty, the members of the force are permitted to carry their weapons. However, it is optional and not mandatory.

In rebuttal, Mrs. Britt testified that the defendant, in his telephone conversation with her, stated he knew Horace had a gun and he had one, too.

The jury returned as its verdict "guilty of the charge of murder in the first degree, with recommendation of life imprisonment." A poll of the jury verified the verdict. From the judgment of imprisonment for life, the defendant appealed.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; Andrew A. Vanore, Jr., Staff Attorney; Burley B. Mitchell, Jr., Staff Attorney, for the State.

Joe Hill Barrington; Nance, Collier, Singleton, Kirkman & Herndon by James R. Nance, for the defendant.

HIGGINS, J.

The tragedy described by the evidence may have had its inception in the misconduct of the deceased in making improper advances to the defendant's wife by following her automobile, blowing his horn, and making signs which she construed as an invitation for her "to follow him off some place". On the other hand, Mrs. Walters may have misconstrued the conduct of the deceased. As she passed his filling station on her way home from the drugstore, the deceased left the station and entered the street behind her as she drove by. She was on her way home. He probably was on his way home for lunch. They lived within two blocks of each other. His way home, and hers, would naturally be the same except for the last few blocks. That Mrs. Walters may have misconstrued the conduct of the deceased would not necessarily affect the defendant's reaction to it. She was frightened and upset. Her conclusions were that the intentions of the deceased were improper. However, if his actions and intentions were misconstrued, his reaction would not be concilliatory when accused by the armed husband, and upon his denial, called a liar. The deceased's side of the story must remain untold.

[1] The defendant contends the court, in the trial, committed errors in the exclusion of evidence which were sufficiently prejudicial to entitle him to a new trial. By way of explaining his possession of the pistol on Sunday, and while he was out of uniform and off duty, he called the Chief of Police who testified that police officers were subject to call at all times and while off duty were permitted, but not required, to carry their arms. The defendant testified it was his habit to carry his arms at all times. He undertook to testify as to the teachings of the Institute of Government with respect to the right of peace officers to be armed while off duty. The trial court excluded the evidence apparently on the ground it vio-

lated the hearsay rule. *State v. Lassiter,* 191 N.C. 210; *State v. Reid,* 178 N.C. 745. What the defendant understood to be the teachings of some unidentified instructor could add little, if anything, to the rules of the Lumberton Police Department, of which he was a member. The defendant had the benefit of the rule which permitted him to go armed when off duty, at his option.

As to the right of the defendant to be armed, we may assume that Judge Hall instructed the jury fully and correctly. The court's charge is not a part of the case on appeal. The defendant's counsel omitted it from our view. At the time of the difficulty, the defendant did not claim to be acting as an officer, but as he said, "one citizen to another". The exclusion of teachings at the Institute of Government cannot be held to be prejudicial error. The other assignments of error based on the admission or exclusion of evidence have been examined and have been found to be without merit. Likewise without merit is the objection the court permitted the State to offer rebuttal evidence after the defense had rested.

[2, 3] The main thrust of the defendant's objection to the trial is directed to the court's action in submitting to the jury the issue of murder in the first degree. Specifically, the defendant contends the evidence was insufficient to show premeditation and deliberation and the court should have withdrawn the capital charge from the jury. What is evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury. The court decides competency; the jury decides weight. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431, and many cases cited.

[4, 5] In order properly to fulfill its duty, the trial court must determine the preliminary question whether the evidence, in its light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. "No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing." Strong's N. C. Index, 2d Ed., Vol. 4, p. 196 (see Homicide, Murder in the First Degree, Premeditated and Deliberate).

[6, 7] Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred. *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540; *State v. Evans,* 198

N.C. 82. "Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. *State v. Matheson,* 225 N.C. 109, 111, 33 S.E. 2d 590; *State v. Hammonds,* 216 N.C. 67, 75, 3 S.E. 2d 439; *State v. Buffkin,* 209 N.C. 117, 126, 183 S.E. 543. The conduct of defendant before and after the killing. *State v. Lamm,* 232 N.C. 402, 406, 61 S.E. 2d 188; *State v. Chavis,* 231 N.C. 307, 311, 56 S.E. 2d 678; *State v. Harris,* 223 N.C. 697, 701, 28 S.E. 2d 232. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. *State v. Dockery,* 238 N.C. 222, 224, 77 S.E. 2d 664; *State v. Hudson,* 218 N.C. 219, 230, 10 S.E. 2d 730; *State v. Hawkins,* 214 N.C. 326, 331, 199 S.E. 284; *State v. Bowser, supra* (214 N.C. 249, 199 S.E. 31). The dealing of lethal blows after deceased has been felled and rendered helpless. *State v. Artis,* 227 N.C. 371, 373, 42 S.E. 2d 409; *State v. Taylor,* 213 N.C. 521, 523, 196 S.E. 832." *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769.

[2] The question of law before the trial judge and now before us on appeal is this: Was the evidence sufficient to permit a legitimate inference the defendant, after premeditation and deliberation, intentionally shot and killed Horace Britt? On this subject, Robert Britt testified that about 1:30 on the fatal day the defendant came to the filling station. "He said my brother had been following his wife. He asked if Horace was there and whether he was drinking. I told him no. He said the s. o. b. would be better off if he was." Mrs. Britt testified that between 2:30 and 3:00 the defendant called her over the phone and asked her if Horace was there. On being told that he might be at the filling station, the defendant said he had already been there. The defendant stated "Barbara thinks Horace has been following her and motioning like he wanted her to follow him off some place". He said he did not like Horace anyway; that what he needed was a bullet in the right place; that he may well be the one to do it. Later the same day, after 5:00, the defendant came to the filling station where the witness Lowry and the deceased were checking their accounts. The defendant provked an altercation first by language, then by threatened assault with a pair of handcuffs, whereupon the deceased reacted by picking up a tire tool. The defendant then shot him first in the leg and when he fell fired the fatal shot while he was down. The course of the bullet corroborates Lowry's evidence.

The defense, by its evidence, featured the size, as well as the violent and dangerous character of the deceased. The defendant,

on cross examination with respect to the threats, said he did not precisely say that he might get mad enough to slap Horace in the face. He said there would not be any trouble between them as the worst possible thing he could do was to slap his face. When an armed and angry man enters the place of business where the owner, a dangerous and violent man, is at work and calls him a liar, he may expect some unfavorable reaction. Does not the defendant's attitude, together with his threats and efforts to come to grips with the deceased, permit a legitimate inference the defendant planned to provoke the deceased into some aggressive action and then shoot him down before he could defend himself? After the two shots were fired and Horace Britt was down, according to the witness Lowry, the first thing he remembers Walters saying was "It was self-defense". Lowry testified, "The first thing I remember, Mr. Walters said, it was self-defense, looked at me and said, 'You saw it.' I said, yes; you drew the handcuffs first."

The evidence makes out an aggravated case of murder in the second degree. There was enough evidence, however, of murder in the first degree to require the court to submit that issue to the jury and to sustain its verdict. The "self-defense" proclaimed by the defendant, while the smoking pistol was still in his hand, may have caused the jury to believe self-defense was a part of the plan from the beginning of the controversy. The evidence permits the inference the defendant was the aggressor and advanced to the attack at all stages of the controversy. According to the evidence, the defendant, beginning before two o'clock, was seeking the confrontation until it culminated at five o'clock in the fatal shooting.

The trial court concluded as a matter of law that the evidence of premeditation and deliberation was sufficient to take the case to the jury and to sustain the verdict. In the trial and judgment we find

No error.

STATE OF NORTH CAROLINA v. ARTHUR S. GATLING AND CLARENCE B. BANKS

No. 30

(Filed 19 November 1969)

1. Criminal Law § 66— in-court identification — previous identification at jail — right to counsel — totality of circumstances

Where a robbery victim promptly recognized defendants and identified them as his assailants as they entered the county jail in custody of police officers some four hours after the robbery, defendants and the car

in which they were found when arrested fit descriptions the victim had previously given officers, defendants were wearing the same clothes they had worn during the robbery, the victim's wallet was found in defendants' car where he said he had hidden it, and a straight razor similar to the one used in the robbery was found in the pocket of one defendant, the trial court properly allowed the victim to testify as to the out-of-court identification and to make an in-court identification of defendants, notwithstanding defendants were not represented by counsel at the out-of-court identification, the decisions of *Wade* and *Gilbert* relating to police identification lineups being inapplicable, the identification at the jail not having taken place under circumstances "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process, and the in-court identification being based on the victim's observation of defendants while their captive rather than on the harmless "confrontation" at the jail.

2. Criminal Law § 168— instructions — contextual construction

A charge will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct.

3. Criminal Law § 168— instructions — mere technical error

Technical errors in the charge which are not substantial and which could not have affected the result will not be held prejudicial.

4. Criminal Law § 168— instructions — harmless and prejudicial error

In this armed robbery prosecution, portion of the charge with respect to Daylight Saving and Eastern Standard Time is not prejudicial when considered in context.

APPEAL by defendants from decision of the Court of Appeals upholding judgment of *Burgwyn, E.J.*, at the 2 December 1968 Criminal Session, ONSLOW County Superior Court.

Defendants were tried upon a bill of indictment charging them with common-law robbery of Milton J. Russell, Jr., on 24 October 1968.

The State's evidence tended to show that on 24 October 1968 Milton J. Russell, Jr. (Russell), a member of the United States Coast Guard, was hitchhiking from Morehead City to Jacksonville to buy a car. He was picked up around 3:00-3:30 p.m. near the main gate of Camp Lejeune Marine Base by two colored men wearing marine utility clothes and driving an old model, white, two-door Pontiac. Russell sat in the rear seat and, replying to questions, told the men he was going to look at some cars. They let Russell out near his destination and he walked a short distance to Cars Incorporated where he made a down payment on a car. The car dealer drove him back to a point near the main gate of the Marine Base and put him out around 4:15-4:30 p.m. About five minutes later

the same two men in the same car, but this time wearing civilian clothes, picked him up again. As they rode along the men asked Russell if he had any loose change as they needed some gas money. Russell got a quarter from his pocket and one of them took it. The car turned off the Morehead City highway and took a road that led to a housing development. Russell asked to get out, saying he had to get back to his ship at Morehead City. The men stated they would let him out in a minute. Russell realized they did not intend to stop and that something was wrong. When circumstances permitted, he removed his wallet containing $105.00 from his pocket and slipped it beneath the passenger side of the front seat.

The car continued on a circuitous route and finally stopped in a secluded spot on a back road. Russell told the men he was scared. They replied that they needed money and wanted what he had. Russell said he had only loose change and held out 80¢ in his hand to show them. They took the 80¢ and threw it in the front seat area of the car. Then one of them pulled a straight razor from his pocket and they passed it back and forth while questioning Russell about his prejudices and about money. Russell pulled out his pockets and even took down his socks to show them he had no money. The driver demanded and took Russell's Timex watch valued at $25.00. Then they struck him in the face and side and told him to get out of the car. He left the car and ran into the woods with the driver chasing him. The driver then abandoned the chase, ran back to the car, and drove rapidly away. Russell ran toward the car to verify its make, year and model, if possible, and to check its color and get the license number. It was a white car with a Virginia tag. He got only the first letters and digits of the license number before the car went out of sight.

Russell started walking up the road and hailed a passing State Highway Patrol car. Telling the patrolman he had been robbed, he related facts substantially as above set out. He had bruise marks on his face and was visibly upset. He gave the officer a description of the car and gave him "A-157" which was all of the license number he was able to get. They rode around the area for a few minutes and the patrolman took Russell to the Sheriff's Office at the jail where he told the Sheriff what had happened. He remained there until about 8:30 p.m.

Later the same day an employee of the Merchant Patrol, who had received information of the robbery and a description of the car, called the Sheriff's Office by radio and stated he had found a car fitting the description. In response to that call, Kenneth Gray

Midgette and Arthur Marshburn, deputy sheriffs, went to the Van Nessa Club on Bell Fork Road. There they found a two-door 1961 model Pontiac, white or beige with brown top, bearing Virginia license A-157993. Defendant Gatling was seated under the wheel. Defendant Banks was beside him on the front seat. A Marine named J. F. Thompson was seated in the back seat and got out when the officers first arrived. He was not detained because defendants stated he had not been with them that day. Officer Midgette asked Gatling for his driver's license and ascertained from it that the car was registered in Gatling's name. He asked permission to search the car and Gatling replied, "Sure, go right ahead." The officer felt under the driver's seat and found nothing. He then got in the back seat on his knees and on the right side underneath the front seat found a wallet containing $105.00 together with Russell's Government driver's license, a Government Motor Vehicle Identification card, and a picture of Russell's girl friend. Officer Marshburn got defendant Banks out of the car on the other side, and the two defendants were thereupon informed that they were under arrest for armed robbery.

Upon arrival at the jail, defendants were searched by officers who discovered a straight razor in Banks' right rear pocket. Russell's watch was not found at that time. In the presence of these officers, Russell looked at the car parked in front of the jail and positively identified it as the car in which he was riding at the time he was robbed. He also positively identified Gatling and Banks as the men who robbed him. It was then about 8:30 p.m. and three to four hours had elapsed since Russell watched them drive away following the robbery. Defendants were dressed in the same clothes they were wearing when Russell last saw them that afternoon.

Defendants were driven from the Van Nessa Club to the jail in Officer Marshburn's car. They were seated in the back seat. A search of defendants at the jail failed to reveal Russell's watch. Two days later G. L. Maddox, a bondsman, found the watch in the back seat of Marshburn's automobile and handed it to Officer Marshburn. Maddox picked the watch up off the floor. Several other people had been in the back seat during the two-day period. It was a Timex watch with a black face, and Russell identified it as the one he owned or one just like it. At the trial the watch, the wallet, and the straight razor were offered in evidence.

Evidence for the defendants consisted of the testimony of Arthur Gatling, J. F. Thompson and Reginald McEchin. Gatling testified that he and Banks were members of the United States Marine

Corps. On 24 October 1968 he worked under the gunnery sergeant at the armory from 1:00 p.m. to 4:25 p.m. when he quit, got defendant Banks, and "started walking to get a ride into town to get my car." He had been storing his car in Jacksonville and not on the Marine Base because he didn't have insurance. A sergeant picked them up and they arrived in Jacksonville "about five o'clock." They got his car and returned to the Marine Base for "field day" at six o'clock. After field day, where he stayed until eight o'clock, defendants and Pfc. J. F. Thompson went to Van Nessa's where defendants were arrested.

Defendant Gatling further testified that he did not rob Russell and had never seen him, his watch, or his wallet prior to being arrested. He further swore that the officers searched his car without permission and, in that connection, said: "There wasn't any wallet in my car. There couldn't have been one there. I think that the officer planted it there. He got the wrong persons, whoever he tried. The billfold was not in my car. Banks had the razor in his hip pocket. I had never seen the razor before. It was a straight razor. He was supposed to get it sharpened for a friend. . . . I had the keys to my car that evening. I had not let anyone else have them. No one else would have been driving my car at 4:00 o'clock or 4:30. I don't know about 3:00 o'clock. I was the only one who had the keys."

J. F. Thompson testified that he "had been with Gatling and Banks since we left field day around eight o'clock. We left the field day and went to a place behind the Van Nessa's and stayed there a few minutes and then the officers came up." He stated that he did not put the wallet under the seat.

Reginald McEchin testified that he was acting N.C.O. in charge of Headquarters Battalion on October 24; that Gatling was assigned to a working party along with several other persons and worked at the armory on that date from 1:00 to 4:00 p.m. "The armory is about six miles from the main gate. It would take from ten to fifteen minutes to get from the armory to the main gate. I don't remember seeing Banks on this date. I remember Gatling working from one-four o'clock. I don't know where he went when he left. . . . I don't remember if we were on Daylight Saving Time at that time."

Defendant Banks did not testify.

Officer Midgette, recalled in rebuttal, reiterated that he sought and was given permission by Gatling to search the car. He was corroborated in this respect by Officer Marshburn.

The jury returned a verdict of guilty and a prison sentence of six to ten years as to each defendant was imposed by the court. Defendants appealed to the Court of Appeals where the conviction and sentence was upheld, 5 N.C. App. 536, 169 S.E. 2d 60. The case is now before us on appeal, defendants alleging involvement of a substantial constitutional question.

John H. Harmon, Attorney for defendant appellants.

Robert Morgan, Attorney General, and (Mrs.) Christine Y. Denson, Staff Attorney, for the State.

HUSKINS, J.

[1] Within four hours after the victim was beaten and robbed, defendants were apprehended and brought to the county jail. The victim, already there, promptly recognized defendants and identified them as his assailants. He so testified at the trial and over objection made an in-court identification of the robbers. Defendants contend this violated their constitutional right under the Sixth and Fourteenth Amendments to the presence of counsel at such a "pretrial confrontation." Admission of this evidence is assigned as error, defendants relying on *United States 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; *Stovall v. Denno,* 388 U.S. 293, 18 L. ed 2d 1199, 87 S. Ct. 1967, and the decision of this Court in *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581. This requires an examination of the cases cited.

In *Wade* the facts were that more than seven months after the robbery of a bank and sixteen days after Wade had been charged with the crime and counsel had been appointed to represent him, a lineup was arranged by the police and conducted without notice to Wade or his counsel. Two bank employees observed the lineup composed of the accused and five or six other persons in which all were required, like the robber, to wear strips of tape on their faces and to say the words allegedly uttered by the robber. The two employees identified Wade as the robber and later at the trial identified him in court. It was held that the out-of-court identification at the police lineup was a "critical" stage of pretrial proceedings and that the Sixth Amendment required the presence of counsel unless knowingly and intelligently waived. The case was remanded for a voir dire hearing to determine whether the in-court identifications were based on other observations of Wade rather than on the lineup identification and to determine whether, in any event, the introduction of the lineup identification constituted harmless error.

In *Gilbert,* an Alhambra savings and loan association office was robbed on 3 January 1964. On 26 March 1964 after Gilbert had been indicted and after counsel had been appointed to represent him, a lineup was conducted by the police in an auditorium used for that purpose. "Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings. . . . Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify." *Gilbert v. California, supra* (388 U.S. 263, 270, footnote 2).

Gilbert's counsel was neither notified nor present at a lineup attended by approximately one hundred persons, purportedly eyewitnesses to one of many robberies with which Gilbert was charged. In addition to identifying Gilbert in court at the trial, three witnesses testified that they had observed and identified him as the Alhambra robber at the auditorium lineup. The Supreme Court of the United States held that such lineup procedures for identification purposes, conducted without notice to and in the absence of counsel, was a violation of Gilbert's constitutional right to counsel under the Sixth and Fourteenth Amendments and called into question the admissibility of the in-court identifications of Gilbert by the three lineup witnesses. The case was remanded for a determination of whether the in-court identification by the three lineup witnesses had an independent origin or was tainted by the illegal lineup and therefore incompetent.

In *Stovall,* about midnight on 23 August 1961 a doctor was murdered and his wife stabbed eleven times requiring major surgery to save her life. Two days later a Negro suspect was taken to her hospital room by five policemen and two members of the district attorney's staff. The suspect was afforded no time to consult or retain counsel. He was the only Negro in the room and was handcuffed

to one of the officers. At their direction he spoke a few words for voice identification. An officer asked her whether he "was the man" and she identified him from her hospital bed. At the trial she made an in-court identification and testified to her hospital room identification. Stovall was convicted and sentenced to death. After exhausting state remedies he petitioned the United States District Court for the Southern District of New York for habeas corpus. His petition was dismissed and the Circuit Court of Appeals for the Second Circuit affirmed (355 F. 2d 731). On certiorari the Supreme Court of the United States affirmed on the ground that the exclusionary rule enunciated in *Wade* and *Gilbert* was not retroactive and affected only confrontations conducted after 12 June 1967. Commenting upon pretrial confrontations the court said: "*Wade* and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel." Commenting further, the court said: "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. . . ."

In *State v. Wright, supra,* the victim was assaulted on the night of 22 July 1967 and a lineup was conducted on 20 August 1967. After being fully warned of his rights and with his oral consent and waiver of counsel, Wright was placed in a lineup of ten persons. The victim said she could not identify her assailant but would be able to do so if she could hear him talk and see him walk. Wright was thereupon taken to a small room, shown singly to the victim, and required to walk and talk in her presence. On the basis of this private confrontation, the victim identified Wright as her assailant. We held that the proceeding lost its character as a pretrial investigative procedure and became a critical stage requiring the presence of counsel. Such illegal out-of-court identification rendered her in-court identification incompetent unless it could be shown that it had an independent origin and did not result from the illegal out-of-court confrontation.

[1] By comparison, in the case before us there was no lineup; nor were defendants "shown singly" for identification purposes. They were taken to the jail for incarceration — not for identification. Russell's presence there was not prearranged by the officers. He had remained there of his own volition after reporting the robbery. He promptly, and without hesitation, identified defendants when they entered the room less than four hours after he had ridden and talked

with them. His memory was still fresh. Defendants were wearing the same clothes they wore when they robbed him. They fit the description he had previously given the officers, as did Gatling's car. Russell's wallet was found in the car exactly where he said he had hidden it. He had been intimidated with a straight razor — Banks had a straight razor in his pocket. This is a far cry from the facts in *Wade* and *Gilbert* and certainly is not the type of confrontation for identification purposes which those cases were designed to deter. In our view *Wade* and *Gilbert* do not encompass and have no application to the facts in this case. Furthermore, considering the totality of circumstances, we hold that the victim's identification of defendants at the jail did not take place under circumstances "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law under the Fourteenth Amendment. The principles expounded in *Stovall* are therefore unavailable to these defendants. See *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, where cases illustrating the suggestive, unfair type of lineup offensive to due process are cited and discussed.

It is difficult to imagine a set of facts and circumstances which would render the identification of an accused more definite and certain than those in this case. It is perfectly apparent that Russell's in-court identification was based on his observation of defendants while their captive rather than on the entirely harmless "confrontation" at the jail. This assignment of error is overruled.

[2-4] Defendants' remaining assignment of error relates to the charge with respect to Daylight Saving and Eastern Standard Time. When that portion of the charge is considered in context, however, we do not regard it as prejudicial. A charge will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169. "The charge of the court must be read as a whole . . .," *State v. Wilson,* 176 N.C. 751, 97 S.E. 496; and if it presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548. Technical errors which are not substantial and which could not have affected the result will not be held prejudicial. *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916. It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. *State v. Jones,* 67 N.C. 285.

Defendants were not prejudiced by the segregated portion of the charge to which they object. It had no prejudicial effect on the result of the trial and was therefore harmless. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774. This assignment of error is overruled.

The decision of the Court of Appeals upholding judgment of the trial court is

Affirmed.

MINNIE W. YATES v. JOSEPH B. BROWN AND WIFE LOUISE W. BROWN

No. 7

(Filed 19 November 1969)

1. Contracts § 12; Bills and Notes § 16— action on note — indorsement — question of law or fact

Where there was no dispute as to the contents or the genuineness of the writing on the back of a negotiable note, and no conflict in the evidence as to the circumstances under which it was signed, it was a question of law for the court whether the writing constituted a qualified or an unqualified indorsement, and submission of the question to the jury was erroneous.

2. Bills and Notes § 9— action on indorsement — construction of documents

In an action by the indorsee of a negotiable note to recover from the indorsers upon an alleged contract of indorsement contained on the back of the note and in a contemporaneously executed document entitled "Assignment and Transfer," the writing on the back of the note and the "Assignment and Transfer" in the separate document must be construed together in determining whether the defendants undertook a general or qualified indorsement.

3. Bills and Notes §§ 7, 9— action on note — whether indorsement was qualified or unqualified

The words "for valuable considerations, this note, together with the deed of trust securing it, is transferred and assigned to Y," appearing on the back of a note and signed by defendants, when considered with a contemporaneously executed instrument entitled "Assignment and Transfer" in which the defendants warranted to plaintiff that there were no prior liens on the property secured by the deed of trust, except for the first deed of trust, and that all of the stated indebtedness was outstanding except for payments to a savings and loan association, *are held* to constitute a qualified indorsement, the language of the entire contract and the circumstances surrounding the execution thereof being insufficient to support a finding that the defendants undertook the engagement of a general indorser to pay the plaintiff the amount of the note if it were

dishonored by nonpayment. Negotiable Instruments Law §§ 65, 66 [former G.S. 25-71, G.S. 25-72].

4. Contracts § 12— construction — consideration of entire contract

In determining what is the contract between the parties thereto, the entire contract, proved by competent evidence, or admitted, must be taken into account.

5. Bills and Notes § 7— indorsement — proof of contract between indorsee and indorser

Although any contract upon a negotiable instrument, including the contract of an indorser thereof, is a "courier without luggage" so as to preclude proof of a separate agreement inconsistent therewith, even though written, in a suit by a holder in due course, this does not preclude consideration of the entire agreement, proved by competent evidence or admitted, in a suit between an indorsee and his indorser upon the alleged contract of indorsement.

6. Contracts § 12— construction — contemporaneous instruments

All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.

7. Bills and Notes §§ 7, 19— construction of indorsement — proof of surrounding circumstances

In an action by the indorsee of a negotiable note to recover from the indorsers upon an alleged contract of indorsement contained on the back of the note and in a contemporaneously executed document entitled "Assignment and Transfer," undisputed circumstances surrounding the execution of the written documents may be considered by the court in construing the written contract, insofar as these circumstances cast light upon the intent of the parties as to the meaning of the written words.

8. Bills and Notes § 9— action on general indorsement — amount of recovery

The fact that the consideration paid by an indorsee for the transfer of notes was approximately 50 percent of the face value of the notes does not preclude the indorsee from recovering the full face value of one of the notes, where the indorsers undertook a contract of general indorsement.

9. Bills and Notes §§ 9, 20— indorsement prepared by plaintiff's attorney — presumptions — resolution of ambiguity

Where the contract of indorsement of a negotiable note was prepared by plaintiff's attorney, any ambiguity in the contract must be resolved, if reasonably possible, by construction favorable to the defendants; and the attorney must be assumed to have drafted the contract with the provisions of the Negotiable Instruments Law in mind.

10. Bills and Notes § 7— functions of an indorsement

An indorsement of a negotiable note has two independent aspects or functions: (1) it negotiates the paper, as contrasted with a mere assignment of it, so as to make the taker a "holder" and, if the other requisites

for such status are present, a "holder in due course;" (2) it is, itself, a contract separate and apart from the contract, or contracts, of prior parties so transferred to the new holder.

11. Bills and Notes § 7; Uniform Commercial Code § 3— indorsement — what law governs

A contract of indorsement, signed and delivered prior to the adoption of the Uniform Commercial Code, is not affected by any changes made by the Code in the rules of the Negotiable Instruments Law, which the Code superseded on 30 June 1967. G.S. 25-10-101.

ON certiorari to the Court of Appeals to review its decision in 4 N.C. App. 92.

The plaintiff is the holder of a negotiable note made by one Lutz and wife payable to the order of the defendants. The makers having failed to pay the note when due, the plaintiff sues the defendants, contending that they are liable to her as general indorsers. The defendants admit that they transferred this note and the second deed of trust securing it, together with ten other notes and second deeds of trust, but they contend their undertaking was that of a qualified indorser and, therefore, they are not liable to the plaintiff. The alleged indorsement upon the back of the note reads as follows:

> "For valuable considerations, this note, together with the deed of trust securing it, is transferred and assigned to Minnie W. Yates. This 18th day of October, 1963.
>
> Joseph B. Brown (Seal)
> Louise W. Brown (Seal)."

It is not contended that there is any infirmity in the note or that the makers have any defense thereto. Conversely, the defendants do not deny that the note is due and is unpaid. The prior encumbrance on the security has been foreclosed. The sole question is as to the nature and extent of the undertaking of the defendants.

The following facts are not in controversy and appear from the evidence offered by the plaintiff, or from admissions in her pleadings:

The entire transaction between the parties was handled for the plaintiff by her husband, an attorney in active practice. Mr. Brown approached Mr. Yates, stating that he had some notes which had several years to run and which he would like to sell at a discount and requesting Mr. Yates to endeavor to "sell them or handle them for him." Mr. Yates examined the notes and the properties described in the deeds of trust securing them. He then advised Mr. Brown that Mrs. Yates would purchase the notes.

Mr. Yates then caused the above quoted statement to be typed upon the back of each of the notes and also drafted a separate instrument, which is designated "ASSIGNMENT AND TRANSFER." This separate instrument, after reciting that the plaintiff "has this day purchased said notes and deeds of trust" and that for "Ten Dollars and other valuable considerations the parties of the first part [the Browns] do hereby transfer, assign, and convey the notes and deeds of trust hereinafter set forth," lists eleven notes and deeds of trust, including the note here in question, totaling $22,000 in face value, and provides:

> "And the parties of the first part do warrant that there are no liens and encumbrances against said property prior to the aforementioned deeds of trust, with the exception of a deed of trust to Randolph Savings and Loan Association on each of said tracts, and with the exception of 1963 County and Town, if any, taxes, and do warrant and agree that they will hold the party of the second part harmless in the event any liens of record should have become ahead of the aforementioned deeds of trust after the recording of the deeds of trust to the Randolph Savings and Loan Association and prior to the recording of the aforementioned deeds of trust.
>
> "And the said parties of the first part do further warrant that all of the indebtedness above set forth is outstanding with the exception of payments into the Randolph Savings and Loan Association on their account as shown on the Randolph Savings and Loan deposit books as of 9:00 A.M., October 18, 1963, and do further warrant that the parties of the first part have personally received no payments on said notes and indebtedness; that there are no counterclaims or set-offs against the parties of the first part and in favor of any of the owners of said property."

On 18 October 1963, the Browns went to Mr. Yates' office and signed the previously prepared statements on the backs of the several notes and the above quoted separate document entitled "ASSIGNMENT AND TRANSFER." For the transfer of the eleven notes and deeds of trust the Browns were paid $12,010. Nothing has been paid on the Lutz note and there is now due thereon $2,050 with interest from 20 August 1963. Demand for payment thereof was made upon Mr. and Mrs. Brown but no payment has been made by them.

Upon the conclusion of the plaintiff's evidence, the defendants moved for judgment of nonsuit, which was denied. The defendants

then introduced evidence which did not controvert any of the above stated facts appearing in the evidence offered by the plaintiff. At the conclusion of the defendants' evidence, the motion for judgment of nonsuit was renewed and was again denied.

The superior court sustained objections to questions propounded by the defendants to witnesses concerning oral statements by the defendants and Mr. Yates in the course of negotiations leading to the transfer of the notes and deeds of trust.

The superior court submitted to the jury one issue: "What amount, if any, is the plaintiff entitled to recover of the defendants?" The court instructed the jury at length concerning the negotiation and transfer of negotiable instruments and the different types of indorsements, leaving it to the jury to determine whether the alleged indorsement of the note in question was "unqualified." The jury answered the issue: "$2,050 plus interest from August 20, 1963." Judgment in accordance with the verdict was entered in favor of the plaintiff.

The defendants appealed to the Court of Appeals, assigning as error the denial of their motion for judgment of nonsuit, various rulings of the superior court excluding evidence offered by the defendants, and numerous portions of the charge to the jury. The Court of Appeals found no error in these rulings. It held that the alleged indorsement of the note in question was "an unqualified indorsement" and there was no error in refusing to permit the defendants to introduce parol evidence to show a contemporaneous agreement to the contrary.

Ottway Burton for defendant appellants.

Coltrane and Gavin and H. Wade Yates for plaintiff appellee.

LAKE, J.

[1] It was error for the trial court to submit to the jury the question of whether the writing and signatures upon the back of the note in suit constituted a qualified or an unqualified indorsement. There being no dispute as to the content or the genuineness of the writing and no conflict in the admitted evidence as to the circumstances under which it was signed, the effect of it was a question of law for the court. *Lowe v. Jackson,* 263 N.C. 634, 140 S.E. 2d 1; *Robbins v. Trading Post,* 253 N.C. 474, 117 S.E. 2d 438; *Evans v. Rockingham Homes, Inc.,* 220 N.C. 253, 17 S.E. 2d 125; *Dillard v. Mercantile Co.,* 190 N.C. 225, 129 S.E. 598; 11 Am. Jur. 2d, Bills and Notes, § 61.

[2] It was also error for the trial court, in instructing the jury concerning the construction of the writing upon the back of the note, to disregard or ignore the effect thereupon of the undisputed, contemporaneously executed, written instrument designated "Assignment and Transfer." This document is not mentioned in the court's charge to the jury except in the court's review of the evidence and of the contentions of the parties. The jury, having been erroneously saddled with the task of construing the writing upon the back of the note, was given no instruction as to the legal effect upon it of the separate but contemporaneously executed "Assignment and Transfer." In effect, the jury was instructed to disregard it.

By answering the issue submitted to it in favor of the plaintiff, the jury, necessarily, construed the writing and signature upon the back of the note as a general or unqualified indorsement. In affirming the judgment rendered in the superior court upon this verdict, the Court of Appeals held, as a matter of law, that the defendants made a general or unqualified indorsement of the note. If this were the correct construction of the contract made by the defendants, the jury having reached the conclusion so compelled by the law, the above mentioned errors of the superior court would be harmless and would not justify disturbance of its judgment. We turn, therefore, to the construction of the defendants' contract, shown by the evidence of the plaintiff and by the admission in her pleadings concerning the separate instrument designated "Assignment and Transfer." The latter document was not mentioned by the Court of Appeals except in a brief summary of the defendants' pleading and evidence in the court's statement of the facts.

[3] We are not here concerned with the rights of a holder in due course of a negotiable note against a party thereto who asserts a defense good as against an intermediate party to the instrument. This is a suit upon an alleged contract of indorsement by the alleged indorsee against the alleged indorser. The sole question is, What was their contract?

[4, 5] As between the immediate parties to it, the entire contract, proved by competent evidence, or admitted, must be taken into account in answering this question. *Robbins v. Trading Post, supra.* Although any contract upon a negotiable instrument, including the contract of an indorser thereof, is a "courier without luggage" (*Overton v. Tyler,* 3 Pa. 346), so as to preclude proof of a separate agreement inconsistent therewith, even though written, in a suit by a holder in due course (*Sykes v. Everett,* 167 N.C. 600, 83 S.E. 585; Stansbury, North Carolina Evidence, 2d Ed, § 256), this does not

preclude consideration of the entire agreement, proved by competent evidence or admitted, in a suit between the immediate parties thereto; i.e., a suit between an indorsee and his indorser upon the alleged contract of indorsement. 11 Am Jur 2d, Bills and Notes, § 619.

The Court of Appeals found no error in the rulings of the trial court sustaining objections to evidence offered by the defendants of oral statements made prior to, or contemporaneously with, the execution of the alleged indorsement and of the separate "Assignment and Transfer," the purpose of the evidence being to show that the writing upon the back of the note was intended by the parties to be an indorsement "without recourse"; that is, a qualified indorsement. In *Kindler v. Trust Co.*, 204 N.C. 198, 167 S.E. 811, it was held that one, who had indorsed a negotiable note in blank, could not introduce evidence of an oral agreement to the effect that the indorsee would rely solely upon the collateral securing the note and would under no circumstances call upon the indorser to pay it. There, the proposed oral evidence clearly contradicted the contract of indorsement. The court said: "The indorsement itself imports liability. When a contract is reduced to writing parol evidence will not be heard to contradict, vary, or add to the written instrument." In the *Kindler* case, however, the court recognized that "in proper cases" it may be shown by parol evidence that payment was to be made out of a particular fund or that the obligation was to be discharged in a certain way. Obviously, the effect of such evidence is to "add to" the written instrument. In *Sykes v. Everett, supra,* in a suit by one not a holder in due course, an indorser was permitted to show by parol evidence a contemporaneous agreement that he would not be called upon to pay the note until certain collateral had been exhausted. See also Stansbury, North Carolina Evidence, 2d Ed, § 256, for a discussion of the use of parol evidence to show the true contract between the immediate parties to a contract upon a negotiable instrument.

In the present case, we need not determine the correctness of the rulings of the trial judge in sustaining objections to parol evidence offered by the defendants for the reason that the written agreement proved or admitted by the plaintiff, considered in its entirety and construed in the light of circumstances shown by the plaintiff's own evidence, requires the conclusion that the defendants did not undertake the obligations of a general indorser.

[2, 6] All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken. *Combs*

v. Combs, 273 N.C. 462, 160 S.E. 2d 308; *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530. This is not varying the written contract. It is a construction of the written contract in its entirety. Thus, in the present case, the writing on the back of the note and the "Assignment and Transfer" in the separate document must be construed together in determining what the defendants undertook or contracted. 11 Am Jur 2d, Bills and Notes, §§ 70 and 619; Restatement of the Law, Contracts, § 235(c); Strong, North Carolina Index 2d, Contracts, § 13.

[7, 8] Undisputed circumstances surrounding the execution of the written documents may be considered by the court in construing the written contract, insofar as these circumstances cast light upon the intent of the parties as to the meaning of the written words. *Chew v. Leonard,* 228 N.C. 181, 44 S.E. 2d 869; *Jones v. Casstevens,* 222 N.C. 411, 23 S.E. 2d 303. The plaintiff's evidence shows that the consideration paid by her for the transfer of the entire lot of eleven notes and deeds of trust was approximately 50 per cent of the face value of the notes. Of course, this does not preclude the plaintiff from recovering the full face value of the note here in question if the defendants did, in fact, make the contract of a general indorser (11 Am Jur 2d, Bills and Notes, § 346), but it is a relevant fact to be considered in the construction of the written undertaking.

[9] It is undisputed that the entire written contract, both the statement upon the back of the note and the "Assignment and Transfer" upon the separate paper, was prepared by the plaintiff's attorney. This has no bearing upon the matter except that, for this reason, any ambiguity in the contract must be resolved, if reasonably possible, by construction favorable to the defendants (*Root v. Insurance Co.,* 272 N.C. 580, 158 S.E. 2d 829; *Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141; *Realty Co. v. Batson,* 256 N.C. 298, 123 S.E. 2d 744) and the draftsman, being an attorney familiar with the provisions of the Negotiable Instruments Law concerning the effect of the different types of indorsement, must be assumed to have drafted this agreement with those provisions in mind.

[3, 10] An indorsement of a negotiable note has two independent aspects or functions. *First,* it negotiates the paper, as contrasted with a mere assignment of it, so as to make the taker a "holder" (Negotiable Instruments Law, §§ 30 and 191, formerly G.S. 25-35 and G.S. 25-1) and, if the other requisites for such status are present, a "holder in due course." *Second,* it is, itself, a contract separate and apart from the contract, or contracts, of prior parties so transferred to the new holder. Admittedly, the writing upon the back of the in-

strument in this case, signed by the defendants, was an indorsement by which the plaintiff became the "holder" of the instrument. Britton, Bills and Notes 2d, § 58. This does not determine the scope of the contract between the defendant indorsers and the plaintiff indorsee for there is more than one kind of indorsement liability-wise. The question in this case is, Did the defendants undertake the "warranties" and the "engagement" of a general indorser or only the "warranties" of a qualified indorser? To determine this, we must look at their entire written agreement in the light of the circumstances above mentioned. We may not limit our consideration to the words written upon the back of the note itself.

[11] The contract of the defendants, having been signed and delivered prior to the adoption of the Uniform Commercial Code, the present G.S. Chapter 25, is not affected by any changes which may have been made by that Act in the rules laid down in the Negotiable Instruments Law, which the Code superseded on 30 June 1967. G.S. 25-10-101. Under the Negotiable Instruments Law, a general indorser warrants: (1) The instrument is genuine and in all respects what it purports to be; (2) he has a good title to it; (3) all prior parties had capacity to contract; and (4) the instrument is valid and subsisting. In addition to these warranties, the general indorser "engages" that the note will be paid when presented for payment and if it is dishonored by nonpayment and he is properly notified thereof, he will pay the amount of it to the holder. Negotiable Instruments Law, § 66, formerly G.S. 25-72.

Under the Negotiable Instruments Law, a qualified indorser makes the first three of the above warranties, but, in lieu of number 4, he warrants only that he knows of no fact which would impair the validity of the instrument or render it valueless, and he does not make the further "engagement" made by the general indorser or any "engagement" in lieu thereof. Negotiable Instruments Law, § 65, formerly G.S. 25-71.

[3] Here, there is no contention that there has been any breach by the defendants of any of the warranties of either a general or a qualified indorser. The plaintiff's case rests upon an alleged breach of the "engagement" of the general indorser. The question is, Taking the entire written contract into consideration, in light of the above mentioned circumstances surrounding its execution, did the defendants make that engagement? If so, there is no doubt about their breach of it, or about the amount recoverable therefor. The construction of that contract being a question of law for the court, either the plaintiff was entitled to a peremptory instruction that, if the jury believed the evi-

dence, it would answer the issue which was submitted, "$2,050, with interest thereon from August 20, 1963," or the defendants were entitled to a judgment of nonsuit or to a directed verdict in their favor.

In *Medlin v. Miles,* 201 N.C. 683, 161 S.E. 207, apparently the most recent consideration of the matter by this Court, the words "For value received I hereby sell, transfer and assign all my right, title and interest to within note to J. C. Medlin," appearing upon the back of a negotiable note and signed by the defendant, were held to constitute a qualified indorsement. To the same effect is a dictum by this Court in *Evans v. Freeman,* 142 N.C. 61, 54 S.E. 847. In the earlier case of *Davidson v. Powell,* 114 N.C. 575, 19 S.E. 601, the words "For value received I assign over the within note," appearing upon the back of a negotiable note and signed by the defendant, were held to be a general indorsement in absence of proof by the indorser of a different agreement. *Davidson v. Powell* was not cited in either *Medlin v. Miles* or *Evans v. Freeman.* While the language of the indorsement in *Medlin v. Miles* and in *Evans v. Freeman* is somewhat more akin to the terminology customarily found in a quitclaim deed, these cases cannot be satisfactorily distinguished from *Davidson v. Powell. Medlin v. Miles* being the later decision, it would control the decision in *Davidson v. Powell* to the extent of any inconsistency. As noted in *Medlin v. Miles,* there is respectable authority in other jurisdictions for and against the view that an assignment of the transferor's right, title and interest, written upon the back of a negotiable note and signed by him, is a general indorsement. See: Britton, Bills and Notes, 2d Ed, § 58, pp. 139-140; 11 Am Jur 2d, Bills and Notes, § 363; Annot., 44 A.L.R. 1353; 36 Mich. L. Rev. 483; 10 N.C. L. Rev. 306. The majority view in other jurisdictions is contrary to the decision in *Medlin v. Miles.*

It is not necessary in the present case to determine whether the statement appearing upon the back of the note in question and signed by the defendants, standing alone, would constitute a general indorsement as held by the Court of Appeals. A more extensive statement of the defendants' contract with the plaintiff appears when the separate "Assignment and Transfer" is taken into account. The plaintiff's attorney drafted that document and the statement upon the back of the note. An experienced and competent attorney, it must be assumed that he did not require the defendants to sign an instrument which added to the words which he had written on the back of the note nothing of value to his client. If, by signing the statement upon the back of the note, the defendants were deemed to be undertaking the "engagement" of a general indorser to pay the note if the maker did not do so, the warranties which were incorporated in

the "Assignment and Transfer" would be of no real consequence since the liability of the defendants would not be increased thereby. It seems obvious that, at the time this transaction was accomplished, the plaintiff's attorney, and so the plaintiff, did not regard the signing of the statement on the back of the note as a general indorsement.

Taking into account: (1) The language used in drafting both parts of the contract; (2) the fact that the draftsman was the plaintiff's attorney; and (3) the substantial discount reflected in the purchase price of the eleven notes, it seems clear that the parties did not, at the time of the contract, contemplate that it was to, or did, include the above mentioned "engagement" of a general indorser. Consequently, the superior court should have granted the motion of the defendants for a judgment of nonsuit. The decision of the Court of Appeals and the judgment of the superior court are, therefore,

Reversed.

STATE v. WILLIE SWANN

No. 26

(Filed 19 November 1969)

1. Criminal Law § 75— applicability of Miranda — retrials begun after 13 June 1966

Where a defendant originally tried as to guilt or innocence prior to 13 June 1966, the effective date of the *Miranda* decision, is granted a new trial on constitutional grounds or for error in other respects, the *Miranda* standards do not govern the admissibility of defendant's confession in a retrial conducted subsequent to 13 June 1966.

2. Criminal Law § 75— jury determination of competency to stand trial — trial as to guilt or innocence — retrials — applicability of Miranda

The determination by a jury prior to 13 June 1966 that defendant was then unable to plead and stand trial did not constitute a "trial" as used in the decisions relating to the applicability of *Miranda* to confessions offered in trials and retrials begun after 13 June 1966.

3. Criminal Law § 75— confession obtained prior to 13 June 1966 — trial held thereafter — applicability of Miranda

The *Miranda* standards are applicable to a confession obtained prior to 13 June 1966 when offered at the original trial of a defendant commenced after 13 June 1966 or any trial subsequent thereto, notwithstanding law enforcement officers complied with constitutional standards applicable when the confession was obtained.

APPEAL from the Court of Appeals under G.S. 7A-30(1).

Defendant was tried before Burgwyn, E.J., at January 27, 1969 Criminal Session of Durham Superior Court on a bill of indictment, which was returned at July 8, 1968 Criminal Session, charging that defendant, on May 20, 1964, murdered Bee James. Upon the jury's verdict of guilty of murder in the second degree, the court pronounced judgment imposing a prison sentence of not less than twenty-five nor more than twenty-eight years. The Court of Appeals found "No error." 5 N.C. App. 385, 168 S.E. 2d 429.

The only evidence was that offered by the State. It included testimony of Deputy Sheriff T. C. Leary, which was admitted over defendant's objections, as to incriminating statements made by defendant on May 22 and May 23, 1964, after his arrest and while in custody.

The sole question is stated in the brief filed by defendant in this Court as follows: "Whether *Miranda's* standards for determining the admissibility of in-custody statements apply in a case where the defendant is first arraigned and his guilt or innocence is presented to a jury for the first time after June 13, 1966, the date of that decision?"

A chronicle of events between defendant's arrest on May 22, 1964, and his trial at January 27, 1969 Criminal Session is narrated below.

A bill of indictment charging that defendant, on May 20, 1964, murdered Bee James, was returned at June 1964 Criminal Session. C. C. Malone, Jr., court-appointed counsel, first conferred with defendant in the Durham County Jail on June 2 or 3, 1964. On June 18, 1964, the court, on motion of Mr. Malone, entered an order committing defendant to Cherry Hospital for sixty days for observation. G.S. 122-91. On September 1, 1964, at the request of the superintendent, the court entered an order extending for sixty days the period for examination.

On October 12, 1964, the court was advised that, in the opinion of the examining physicians, defendant was not able to stand trial. At October 15, 1964 Criminal Session, a jury was impaneled to pass upon the competency of defendant to stand trial. The court submitted this issue: "Is the Defendant insane and without sufficient mental capacity to undertake his defense or to receive sentence in this case?" After hearing evidence, the jury answered the issue, "Yes." Thereupon, the court ordered that defendant be committed to Cherry Hospital for an indeterminate period.

Defendant was confined at Cherry Hospital from June 19, 1964, until October, 1966, at which time he was returned to Durham County as being competent to stand trial. G.S. 122-84 and 87.

At December 1966 Criminal Session, defendant pleaded not guilty to said murder indictment returned at June 1964 Criminal Session and was tried thereon. A mistrial was ordered on account of the jury's inability to agree on a verdict.

At February 1967 Criminal Session, defendant was again tried on said murder indictment returned at June 1964 Criminal Session. Defendant was found guilty of murder in the second degree and judgment, imposing a prison sentence of not less than twenty-eight nor more than thirty years, was pronounced. Upon defendant's appeal, this judgment was affirmed by the Supreme Court of North Carolina. *State v. Swann,* 272 N.C. 215, 158 S.E. 2d 80, decided December 13, 1967.

On March 15, 1968, defendant initiated post-conviction proceedings under G.S. 15-217 *et seq.* The court appointed Jerry L. Jarvis to represent defendant in said proceedings. At the June 3, 1968 Special Criminal Session of Durham Superior Court, J. William Copeland, the Presiding Judge, entered the following judgment: "IT IS ORDERED, ADJUDGED AND DECREED that the Judgment entered at the February, 1967 Criminal Session of the Durham County Superior Court in case No. 66-CrS-64 be, and the same is hereby, set aside; that the bill of indictment therein be, and the same is hereby, quashed; and that the commitment issued on January 3, 1968, at the January 2, 1968 Criminal Session of the Durham County Superior Court in that case be, and the same is hereby, withdrawn and declared to be void."

The quoted judgment was based on Judge Copeland's conclusion of law that the facts as found established "a prima facie case of systematic exclusion of Negroes because of race from service on the grand jury which returned the bill of indictment" against defendant at June 1964 Criminal Session, and that "the State had not overcome such prima facie case by a showing of competent evidence that the institution and management of the jury system in Durham County, prior to January, 1968, was not in fact discriminatory."

In the proceedings and trials prior to said post-conviction proceeding, defendant, represented by C. C. Malone, Jr., had not challenged the validity of the bill of indictment returned at June 1964 Criminal Session by motion to quash or otherwise.

Simultaneously with the entry of Judge Copeland's said judg-

ment, to wit, on June 14, 1968, defendant was arrested on a new warrant; and at July 8, 1968 Criminal Session, the grand jury returned a new bill of indictment. The warrant and bill of indictment charged that defendant, on May 20, 1964, murdered Bee James. The bill of indictment returned at June 1964 Criminal Session and that returned at July 8, 1968 Criminal Session contained identical provisions.

Defendant was *first* tried on the bill of indictment returned at July 8, 1968 Criminal Session at the August 26, 1968 Criminal Session. A mistrial was ordered on account of the jury's inability to agree on a verdict. In a *second* trial thereon, at December 5, 1968 Criminal Session, the presiding judge, under circumstances and for reasons not disclosed by the record before us, withdrew a juror and ordered a mistrial. The *third* trial thereon, at January 27, 1969 Criminal Session, resulted in the verdict and judgment directly involved in the present appeal.

Attorney General Morgan and Staff Attorney Vanore for the State.

Jerry L. Jarvis for defendant appellant.

BOBBITT, C.J.

Bee James, a colored male, aged 70, was killed in his rural home-store on Wednesday, May 20, 1964. Severe blows to his head caused immediate unconsciousness and death within a few minutes. When discovered, his lifeless body was lying on the porch. The body and building were partially burned by the perpetrator in an apparent effort to conceal the crime.

The circumstantial evidence offered to identify defendant, a colored male, aged 26, as the person who killed James, was substantially the same as that offered when defendant was tried and convicted before Carr, J., at February 1967 Criminal Session. This evidence was reviewed in detail by Parker, C.J., in *State v. Swann,* 272 N.C. 215, 158 S.E. 2d 80. The basis of decision on this appeal renders unnecessary a review of this circumstantial evidence.

No evidence as to statements made by defendant was admitted in the trial at February 1967 Criminal Session. The State's case was submitted solely on circumstantial evidence.

In the trial now under review, Leary was permitted to testify, over objections, as to incriminating statements made to him by defendant on Friday, May 22, 1964, and on Saturday, May 23, 1964.

These include statements by defendant that he had obtained hams from James on Wednesday, May 20, 1964; that, following argument as to price, James ordered him to leave; that he picked up a piece of iron and struck James when he thought James was going to get a gun; that he poured oil on the mattress in the bedroom and tried to set fire to it; and that, when he left, James was lying on the porch. They also include statements as to the names and addresses of persons to whom he had sold hams during the afternoon of May 20, 1964. The statements attributed to defendant in Leary's testimony are fully and precisely corroborated by and are in accordance with the circumstantial evidence.

The admissibility of Leary's said testimony was the subject of a *voir dire* examination in the absence of the jury. After hearing the evidence, Judge Burgwyn found that defendant's statements to Leary "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 as they then existed with reference to any statement he might make being used against him."

[3] On appeal, defendant does not challenge the sufficiency of the evidence to support Judge Burgwyn's findings or the sufficiency of the findings to establish that, before obtaining defendant's confession, the law enforcement officers had complied with and relied upon the constitutional standards declared and in force when the confession was made. He bases his appeal solely on the ground that Leary's testimony as to defendant's confession was inadmissible because the warnings given defendant 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. Specifically, defendant was not warned that he had a right to the presence of a retained or appointed attorney, if he so desired, prior to interrogation relating to the alleged crime.

[1] The confession under consideration was on May 23, 1964, more than two years prior to the decision in *Miranda.* Clearly, if defendant had been tried on a plea of not guilty prior to June 13, 1966, the confession of May 23, 1964, would have been admissible. *Johnson v. New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882, 86 S. Ct. 1772. If a new trial in such case had been ordered, on constitutional grounds or for error in other respects, the confession of May 23, 1964, would have been admissible in a retrial conducted subsequent to June 13, 1966. *Jenkins v. Delaware,* 395 U.S. 213, 23 L. ed. 2d 253, 89 S. Ct. 1677.

In *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177, this Court, after consideration in depth of the decisions and texts relating to the extent *Miranda* was to be applied retroactively, reached this conclusion: "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."

In the present case, the ruling of Judge Burgwyn and the decision of the Court of Appeals are in accord with our decision in *State v. Lewis, supra.*

When *State v. Lewis, supra,* was under consideration, 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, supra,* were in sharp conflict. The greater number held that a defendant's in-custody confession was not admissible in the absence of full compliance with *Miranda* when offered in trials or retrials begun after June 13, 1966. We took the view, expressed later by Mr. Chief Justice Warren in *Jenkins v. Delaware, supra,* that the question whether evidence as to confessions prior to June 13, 1966, absent full compliance with the *Miranda* warnings, would be applicable in retrials after June 13, 1966, of cases originally tried prior to June 13, 1966, was not considered in *Johnson.*

In *Jenkins,* Mr. Chief Justice Warren calls attention to the fact that in *Stovall v. Denno,* 388 U.S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967, and in *Desist v. United States,* 394 U.S. 244, 22 L. ed. 2d 248, 89 S. Ct. 1030, the Supreme Court of the United States had "selected the date on which the prohibited practice was engaged in, rather than the date the trial commenced, to determine the applicability of newly formulated constitutional standards. . . ." However, the opinion in *Jenkins* also states: "In *Johnson,* after considering the need to avoid unreasonably disrupting the administration of our criminal laws, we selected the commencement of trial as determinative. . . . (W)e could have adopted the approach we took in *Stovall* and *Desist* and made the point of initial reliance, the moment the defendant is interrogated, the operative event." We perceive no sound reason for one rule in respect of the applicability of newly formulated constitutional standards relating to admissibility of evidence as to confessions and a different rule in respect of evidence re-

lating to lineups (*Stovall*) and to electronic eavesdropping without a warrant (*Desist*).

It is also noted that the newly formulated constitutional standards enunciated in *Mapp v. Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933, relating to the admissibility of evidence obtained by search and seizure, have been held applicable in all cases except those in which final judgment was entered prior to *Mapp* and the time for direct review of such final judgment by appeal or *certiorari* had expired. *Mancusi v. DeForte,* 392 U.S. 364, 20 L. ed. 2d 1154, 88 S. Ct. 2120.

The primary reason stated in *Jenkins* for holding confession evidence admissible at a retrial subsequent to June 13, 1966, where the original trial was prior to June 13, 1966, was that the criminal investigation, which relied upon the admissibility of the confession evidence, had been completed prior to the first trial. This reasoning applies equally to the present case. The criminal investigation was conducted and completed in May, 1964, more than two years before *Miranda.*

The opinion in *Jenkins* does not relate definitely to the admissibility at an original trial commenced after June 13, 1966, of a confession obtained prior to June 13, 1966, in compliance with the constitutional standards then declared and in force. *Jenkins* holds "that *Miranda* does not apply to any retrial of a defendant whose first trial commenced prior to June 13, 1966." Were it not for *Orozco,* considered below, we would have reason to hope that the trend we perceived when *State v. Lewis, supra,* was decided, would not stop with *Jenkins.*

We are confronted by the decision of the Supreme Court of the United States in *Orozco v. Texas,* 394 U.S. 324, 22 L. ed. 2d 311, 89 S. Ct. 1095. Although *Orozco* was decided (March 25, 1969) before *Jenkins,* (June 2, 1969), the opinion of Mr. Chief Justice Warren in *Jenkins* makes no reference to *Orozco.* In a footnote to his dissenting opinion in *Jenkins,* Mr. Justice Harlan refers to his concurring opinion in *Orozco.*

In *Orozco,* the Court of Criminal Appeals of Texas upheld the conviction and judgment of imprisonment for murder with malice. *Orozco v. State,* 428 S.W. 2d 666. The Texas court held *Miranda* did not apply because the evidence as to statements made by the defendant was not obtained as the result of custodial interrogation. Both the majority opinion of Woodley, P.J., and the dissenting opinion of Morrison, J., assume *Miranda* would control if the evidence as to

the officer's inquiries and the defendant's responses were to be considered within the ambit of the *Miranda* ruling. In the Supreme Court of the United States, it was held that the evidence under consideration was within the scope of the *Miranda* decision.

The confession evidence involved in *Orozco* was obtained January 5, 1966. Orozco was tried in the Criminal District Court of Dallas County, Texas, after June 13, 1966. Without discussion, the opinion of Mr. Justice Black refers in a footnote to *Johnson v. New Jersey, supra,* and states that Orozco's trial was held "after the effective date" of *Miranda. Orozco applies Miranda* to a confession obtained before June 13, 1966, when offered at a first trial after June 13, 1966.

[2] We cannot accept the view on which the Court of Appeals based its decision, namely, that the determination by the jury at October 15, 1964 Criminal Session that defendant was then unable to plead and *stand trial,* constituted a *trial* in the sense used in the *Johnson* and *Jenkins* cases.

[3] *Orozco* compels us to hold the testimony of Leary as to statements made by defendant on May 22 and 23, 1964, was not admissible in the *first* trial of defendant as to guilt or innocence, which was at August 26, 1968 Criminal Session, or in any trial subsequent thereto, including the trial to which this appeal relates, to wit, the trial at January 27, 1969 Criminal Session.

For the reason stated, the verdict and judgment entered in the superior court at January 27, 1969 Criminal Session are vacated; the decision of the Court of Appeals is reversed; and the cause is remanded for the entry of an order remanding the case to the superior court for a new trial.

Reversed and remanded.

STATE v. MARGARET RUTH HORTON

No. 22

(Filed 19 November 1969)

1. Conspiracy § 3— criminal conspiracy defined

A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme, that is, the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means.

2. Conspiracy § 3— overt act — withdrawal of conspirator

Since the commission of an overt act is not an element of criminal conspiracy in this jurisdiction, an attempted withdrawal by one of the conspirators prior to an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy.

3. Conspiracy § 3— accomplishment of purpose — necessity

It is not necessary that the purpose of the conspiracy be accomplished in order for a verdict of guilty to stand.

4. Conspiracy § 3— union of wills — pretended acquiescence

There can be no conspiracy unless there is a union of wills; and if one person feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy.

5. Conspiracy § 3— conspiracy with self

One person cannot conspire with himself.

6. Conspiracy § 3— conspiracy of three or more — union of purpose between two

If three or more persons conspire to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of the two.

7. Conspiracy § 6— sufficiency of evidence — unsupported testimony of co-conspirator

The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution.

8. Conspiracy § 6— criminal conspiracy to murder husband of defendant — conflicting evidence of State — intent of co-conspirator

In a prosecution charging that femme defendant unlawfully conspired with two other persons to murder her husband, defendant's motions for judgment as of nonsuit were properly denied, notwithstanding that the co-conspirators, who were witnesses for the State, testified on cross-examination that they never intended to kill defendant's husband but intended only to trick defendant into giving them money, where the State's evidence was also to the effect that defendant asked one co-conspirator to procure someone to kill her husband, that the co-conspirator, with defendant's knowledge, purchased a quantity of bullets for his .38 pistol, that defendant and the co-conspirator went to an airport to meet the other co-conspirator who pretended to have arrived from New York, that defendant directed the co-conspirators to a farmhouse to which her husband went almost every day, that defendant furnished the co-conspirators with a description and some pictures of her husband, and that the co-conspirators accepted $2550 in cash from defendant, one co-conspirator testifying that he "received the money for doing just what we were talking about, to kill him."

9. Criminal Law § 90— impeachment of own witness

A party cannot introduce testimony to impeach or discredit the character of his witness.

10. Criminal Law § 106— defense established by State's evidence — nonsuit

When a complete defense is established by the State's evidence in a criminal action, a defendant may avail himself of such defense by a motion for judgment as of nonsuit.

11. Criminal Law § 90— testimony by State's witness as to exculpatory facts

If the witness for the State testifies to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness.

12. Criminal Law § 106— nonsuit — where State's evidence is both exculpatory and inculpatory

When the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to overrule a motion for judgment as of nonsuit.

13. Criminal Law § 106— conflict in testimony of the State — role of jury

Where the State vouched that its witnesses were worthy of belief as to all of their testimony, and there was conflict in the testimony, it was for the jury, as the trier of the facts, to believe all the testimony or to believe a part and reject a part, or to reject it all.

14. Conspiracy § 6— sufficiency of evidence — circumstantial evidence

A criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred.

ON certiorari to the North Carolina Court of Appeals to review its decision in 5 N.C. App. 141.

Defendant, Margaret Ruth Horton, was indicted by an Iredell County Grand Jury on the charge that she feloniously conspired with Robert Lee James and Carl Ruben Deal to murder one Lee Roy Horton, her now deceased husband. Defendant was tried at the October 1968 Criminal Session of Iredell. The jury returned a verdict of guilty as charged, and from judgment rendered on the verdict she appealed to the North Carolina Court of Appeals. The Court of Appeals found no error in the trial below. Defendant filed a petition for writ of certiorari to the North Carolina Court of Appeals to review its decision pursuant to G.S. 7A-31(c)(3) and G.S. 7A-30(1). The petition was allowed by order dated 11 July 1969.

The State's evidence is summarized as follows:

Robert Lee James testified that in the latter part of April, 1967, by prearrangement, he and defendant met on the "Charlotte Highway" and drove from there to a farmhouse which belonged to defendant. There they discussed certain difficulties defendant was al-

legedly having with her husband and arranged another meeting for the following night. The next day James met defendant at the restaurant where she worked and they talked. They met again that evening and discussed the possibility of hiring someone for the purpose of having something done to defendant's husband. During their discussion James asked defendant, "What do you want to get done to him? Do you want to get him beat up or roughed up or what do you want? She said, 'I want a little more than that.' I said, I don't know, I might know a man who might could do something like that for you. She said, 'What do you think it would cost me?' " James told her he didn't know how much it would cost but that he knew a man in New York who might do it. He asked defendant if she wanted him to contact the man and she answered in the affirmative. Pretending to telephone New York, James placed a call to Taylorsville, North Carolina, from a service station telephone, and spoke to Carl Deal about the matter in defendant's presence. Deal said he was interested but couldn't meet James for a couple of days.

The following day James telephoned defendant and told her that the man would be coming into the Charlotte Airport that Wednesday night and that the man was in New York City. On Wednesday James and defendant met on the "Charlotte Highway." James told defendant that his friend had instructed him to buy a quantity of .38 bullets, so they stopped at a hardware store in Charlotte for that purpose, then drove to the airport. Deal did not appear as arranged; therefore, James had himself paged over the public-address system so that defendant could hear, went back to the car and told her that the man would be there the following night. On the following night they returned to the Charlotte Airport. Defendant and James waited "out front" until it was announced that the flight from New York had arrived. James met Deal inside the terminal building and gave him a .38 pistol. He told Deal "everything was set," bought Deal a pair of sunglasses, which Deal put on, and together they walked back to the car where defendant was waiting. James introduced Deal to defendant as Joe Fratt. Thereafter the parties agreed on a price of $5,000 for Deals' and James' services.

The trio drove from the Charlotte Airport to defendant's farmhouse. During the drive James handed Deal the bullets and Deal loaded the pistol in full view of defendant. After they arrived at the farmhouse they went into an upstairs room. Defendant told James and Deal that her husband came to the farmhouse almost every day and that the windows in the upstairs room would provide a view of the road approaching the farmhouse. She told the men that her hus-

band would arrive in a pickup truck and described him to them. She also gave James some pictures of her husband.

Defendant paid Deal $1250 and arranged to meet James again the following night. The men were supposed to stay at the farmhouse to await Lee Roy Horton's arrival the following morning. Instead of waiting at the farmhouse, James testified that he drove Deal back to Taylorsville; that the next morning they met, divided the $1250, and went back to the farmhouse. They then proceeded to a rendezvous with defendant behind a furniture factory in Statesville where she paid Deal another $1300.

James said that he and Deal then returned to the farmhouse, placed cigarette butts around the upstairs window area, and left. He telephoned defendant the next day, reported that her husband had not appeared at the farmhouse, but said that he and Deal (Fratt) could be at the farmhouse the following night. James later telephoned defendant and told her that Deal had to leave town but would be back in a few days to "do what he was supposed to do." James then called Deal, told him to call defendant, represent himself as a "trusty" at the Wake County jail, and tell her that he was calling for Joe Fratt who was being held for carrying a concealed weapon. Deal was then to instruct defendant to contact James and to come to Raleigh to obtain Deal's release on bond.

James again met with defendant at the farmhouse, where she accused him and Deal of cheating her of $2500 and demanded her money back. James said he was through with the whole affair, and when defendant reached into a large purse, he pulled a gun on her and warned her to end it right there or he would tell her husband what she was trying to do.

James testified that when he called Deal on the day after the call made originally in defendant's presence, he told Deal, "I told him that there was a woman here in Statesville — a woman here in Statesville that wanted to get her husband killed."

On cross-examination James denied ever having had an intent to kill Mr. Horton, and said that Deal had declared he would never kill anyone. He said they were merely making false representations to Mrs. Horton in order to obtain money from her. He stated, however, that he received the money to kill Mr. Horton.

Arthur S. Beckham, Jr., testified as to threats that he had heard defendant make against her husband.

Carl Deal testified concerning his initial contact with Robert James, as follows:

"He called me on the phone and asked me when I would be at home, and I told him, so he come to my house. He said he knowed an old gal in Statesville that we could get a little piece of money off of, and said that she wanted to get something done to her husband, and he said that she wanted to go further than roughing him up, and I said that I wouldn't do nothing like that."

He substantiated the testimony of Robert James as to the events which took place concerning the meetings with defendant and corroborated James' testimony that the men had only intended to trick her into giving them money.

Several months later, after a bombing occurred in Statesville, James told police officers about his and Deal's transactions with defendant.

Defendant offered no evidence.

Attorney General Morgan, Deputy Attorney General Bullock, and Deputy Attorney General McGalliard for the State.

F. Lee Bailey (Boston Massachusetts) and Gardner & Wilson (By: Rossie G. Gardner and Jerry C. Wilson) for defendant.

BRANCH, J.

Defendant assigns as error the denial of her motions for judgment as of nonsuit and contends that she was denied due process and equal protection of the laws when the Court of Appeals failed to apply the rule that the State is bound by its uncontradicted evidence.

[1] In *State v. Gallimore,* 272 N.C. 528, 158 S.E. 2d 505, this Court defined a conspiracy as follows:

"'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme — the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases)' *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334; *State v. McCullough,* 244 N.C. 11, 92 S.E. 2d 389. A conspiracy to commit a felony is a felony. *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25. The crime is complete when the agreement is made. *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686; *State v. Whiteside,* 204 N.C. 710, 169 S.E. 711; *State v. Knotts,* 168 N.C. 173, 83 S.E. 972. Many jurisdictions follow the rule that one overt act must be committed before the

conspiracy becomes criminal. Our rule does not require an overt act."

[2-7] Since our rule does not require an overt act, an attempted withdrawal by one of the conspirators before an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy. 16 Am. Jur. 2d, Conspiracy, Sec. 29, at 142. Nor is it necessary for the purpose of the conspiracy to be accomplished in order for a verdict of guilty to stand. *Goldman v. United States,* 245 U.S. 474, 62 L. ed. 410. There can be no conspiracy unless there is a union of wills, and if only one person feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy. One person cannot conspire with himself. *State v. Tom,* 13 N.C. 569; 15A C.J.S., Conspiracy, § 37, p. 730. However, if three or more conspire to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of the two. 15A C.J.S., Conspiracy, § 37, p. 731. The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. *State v. Tilley,* 239 N.C. 245, 79 S.E. 2d 473.

The rule relating to sufficiency of evidence to carry a case to the jury is concisely stated in the case of *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431. We quote therefrom:

> " 'If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury. *S. v. Simpson, ante,* 325; *S. v. Duncan, ante,* 374; *S. v. Simmons, supra; S. v. Grainger,* 238 N.C. 739, 78 S.E. 2d 769; *S. v. Fulk,* 232 N.C. 118, 59 S.E. 2d 617; *S. v. Frye,* 229 N.C. 581, 50 S.E. 2d 895; *S. v. Strick-*

land, 229 N.C. 201, 49 S.E. 2d 469; *S. v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *S. v. Coffey,* 228 N.C. 119, 44 S.E. 2d 886; *S. v. Harvey,* 228 N.C. 62, 44 S.E. 2d 472; *S. v. Ewing,* 227 N.C. 535, 42 S.E. 2d 676; *S. v. Stiwinter,* 211 N.C. 278, 189 S.E. 868; *S. v. Johnson, supra.*"

[8] In the instant case the decision must stand or fall upon the testimony of two alleged co-conspirators who, in the course of their testimony when offered as State's witnesses, testified as to the circumstances surrounding the alleged conspiracy, and in their further testimony stated that they never intended to harm defendant's husband. Defendant contends that the State, offering them as its witnesses and worthy of belief, has made out a complete defense entitling defendant to nonsuit. The State, on the other hand, contends that the testimony of the alleged co-conspirators shows such circumstances and conduct as to carry the question of defendant's guilt to the jury.

[9-12] It is well established in this jurisdiction that a party cannot introduce testimony to impeach or discredit the character of his witness, and when in a criminal action a complete defense is established by the State's evidence, a defendant may avail himself of such defense by a motion for judgment as of nonsuit. Yet, if the witness testifies to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness. *State v. Jarrell,* 233 N.C. 741, 65 S.E. 2d 304; *State v. Todd,* 222 N.C. 346, 23 S.E. 2d 47; *State v. Cohoon,* 206 N.C. 388, 174 S.E. 91; *Smith v. R. R.,* 147 N.C. 603, 61 S.E. 575. It is equally well established that when the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to overrule a motion for judgment as of nonsuit. *State v. Mitchum,* 258 N.C. 337, 128 S.E. 2d 665; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39; *State v. Tolbert,* 240 N.C. 445, 82 S.E. 2d 201.

[13] It must be borne in mind that the State offered no evidence to impeach the testimony of its witnesses except for questions as to the past record of the witness James, which were asked and answered without objection. The State vouched that witnesses were worthy of belief as to *all of their testimony,* and where there was conflict in the testimony, it was for the jury to believe all the testimony or to believe a part and reject a part, or to reject it all, because it is the trier of the facts. *Brown v. Brown,* 264 N.C. 485, 141 S.E. 2d 875; *State v. Mangum, supra; State v. Henderson,* 180 N.C. 735, 105 S.E.

339; *State v. Ellis,* 97 N.C. 447, 2 S.E. 525; *State v. Overton,* 75 N.C. 200.

In the case of *Smith v. R. R., supra,* we find the following:

> "While it is accepted doctrine that one who offers a witness 'presents him as worthy of belief,' and except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds . . . a party will not be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show that the facts are otherwise than as testified to by his witness. . . . *And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the res gestæ.*" (Emphasis ours)

The above was quoted with approval in the case of *State v. Cohoon, supra.* See also *Worth Co. v. Feed Co.,* 172 N.C. 335, 90 S.E. 295.

Defendant relies on the case of *Odneal v. State,* 117 Tex. Cr. App. 97, 34 S.W. 2d 595, where an accomplice testified on direct examination that he had entered into a conspiracy with the defendant and testified on cross-examination that he never intended to carry out the agreement. The court submitted this case to the jury on the basis of conflict in the testimony requiring the jury to decide whether the witness intended to carry out the conspiracy.

[14] Defendant contends that *Odneal v. State, supra,* is distinguishable from the instant case because here witnesses only testified as to what they were paid to do on direct examination, and testified on cross-examination that they never intended to do it. The fallacy in defendant's argument is that a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred. *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477. The validity of the type of evidence here relied upon by the State was recognized in the case of *State v. Whiteside,* 204 N.C. 710, 169 S.E. 711. There, the defendants Whiteside and Cannon were charged with conspiracy to rob the Imperial Theatre in Asheville, North Carolina. Defendant Whiteside pleaded guilty; defendant Cannon pleaded not guilty. The State offered evidence which tended to show that defendant Whiteside was caught in the act of robbing the theatre, together with evidence that defendants had been acquainted for over a year and had "bummed" their way into Asheville on a train; that they both spent the night at the Salvation

Army and on the next day saw State's witness McDuffie. McDuffie testified that Cannon asked him if the Imperial was a good place to rob. Whiteside testified that Cannon had nothing to do with the robbery and that he did not even know Cannon. He further testified that State's witness McDuffie suggested to him that the Imperial Theatre was a good place to rob and that he (McDuffie) would help commit the robbery. The jury returned a verdict of guilty as to Cannon, who appealed. This Court, in holding that there was sufficient evidence to overrule defendant's motion as of nonsuit, stated:

> "Direct proof of the charge (conspiracy) is not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. *S. v. Wrenn, supra.* When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists. 5 RCL, 1088.
>
> "So, in the instant case, notwithstanding the positive testimony of Whiteside to the contrary, and the rather 'broken reed' upon which the State is compelled to rely, we think the evidence is sufficient to carry the case to the jury. Its credibility was for the twelve."

Thus, the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences deducible therefrom, may furnish ample proof of conspiracy even in the face of positive testimony to the contrary.

Defendant also contends that the case of *Woodworth v. The State*, 20 Tex. Cr. App., 375, supports her position. There, the witness Hunt testified that he intended to trap defendant Woodworth in the act of committing a burglary. He agreed with Hunt on a specific time when he would help him commit the burglary, but as soon as the plan was made Hunt dispatched a note advising the Sheriff of the plan so that he could be on hand at the proper time and place

and make the arrest. The Sheriff testified that he received the note and acted accordingly. This case is clearly distinguishable from the instant case because there the surrounding circumstances and the testimony of the witnesses, without contradiction or conflicting inferences, showed no unity of purpose to commit an unlawful act.

[8] Defendant seriously argues that in addition to the statement of the alleged co-conspirators that they did not intend to harm her husband, certain acts, such as giving Deal a false identity, and the scattering of cigarette butts in the farmhouse to make it appear that they had lain in wait for her husband, tended to negate any union of purpose to do an unlawful act. In this connection the witness James, referring to Deal, testified: "He is a friend of mine and he is from out of town. I wanted to get somebody she didn't know . . . If it was someone around here that would kill him, she might have known about it." The witness' interest in further concealing the identity of a friend about to be asked to engage in an unlawful act is understandable. The other acts which defendant contends tend to negate the alleged conspiracy cannot be related to the night that James agreed to obtain someone to do "a little more than beat up or rough up" defendant's husband. One of the strongest indications of an unlawful agreement is found in the testimony of the witness Deal. Deal testified that *after* the telephone call from James (which must have been during the third meeting between James and defendant and in defendant's presence), James came to his home in Taylorsville and at that time stated to him that "He knowed an old gal in Statesville that we could get a little piece of money off of, and said that she wanted to get something done to her husband, and he said that she wanted to go further than roughing him up, and I said that I wouldn't do anything like that." This testimony permits a strong inference that up until the very moment that Deal refused to go along with the plan to murder defendant's husband, the alleged co-conspirator James still steadily pursued the unlawful object of obtaining someone to murder defendant's husband. Without attempting to review all of the indicia of conspiracy found in the State's evidence, we note that $2550 in cash was accepted by James and Deal from defendant, and James explained the purpose of the payment by testifying, "I received the money for doing just what we were talking about, to kill him." The testimony here referred to and the other facts found in the State's evidence are all colored by a delay of several months before either of the alleged co-conspirators talked with the police.

Surely, without the statement of the alleged co-conspirators that they never intended to harm defendant's husband, there was suffi-

cient evidence to raise an inference of intent to form a conspiracy between James and defendant — and probably between defendant, James and Deal. The denial of intent by both of the alleged conspirators created a conflict in the State's evidence which, upon a consideration of the evidence in a light most favorable to the State, presented a question for the jury.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JOE FREEMAN

No. 14

(Filed 19 November 1969)

1. Homicide §§ 24, 28— instructions — burden of proving mitigation or self-defense — satisfaction of jury — greater weight of evidence

In this homicide prosecution wherein the State's evidence of an intentional killing with a deadly weapon raised presumptions that the killing was unlawful and with malice, defendant was not prejudiced by the trial court's erroneous instruction that the burden on defendant to prove to the satisfaction of the jury circumstances which would reduce second-degree murder to manslaughter or establish self-defense required a higher degree of proof than proof by the greater weight of the evidence, where the jury, by returning a verdict of first-degree murder, established that defendant killed deceased with malice, premeditation and deliberation, and the evidence did not entitle defendant to an instruction upon mitigation or self-defense.

2. Homicide §§ 24, 28— instructions — burden of proving mitigation or self-defense — satisfaction of jury

Where there is evidence sufficient to establish an affirmative defense or to rebut the presumptions which arise against a defendant when a killing results from his intentional use of a deadly weapon, the court should instruct the jury that defendant has the burden of proving his defense or mitigation to the satisfaction of the jury — not by the greater weight of the evidence or beyond a reasonable doubt — but simply to the satisfaction of the jury.

3. Homicide § 27— instructions — error in charge on manslaughter — verdict of first-degree murder

Ordinarily, when the jury is instructed that it may find defendant guilty of first-degree murder, second-degree murder, manslaughter or not guilty, and the verdict is guilty of second-degree murder, an error in the charge on manslaughter will require a new trial since it cannot be known whether the verdict would have been manslaughter if the jury had been properly instructed; but where the jury was properly instructed as to

both degrees of murder and yet found defendant guilty of first-degree murder, error in the charge on manslaughter was harmless.

4. Homicide § 30— failure to instruct on involuntary manslaughter

In this homicide prosecution, defendant's evidence did not entitle him to an instruction on involuntary manslaughter where it showed that defendant had become and remained the aggressor when he shot deceased, and that he intentionally discharged his pistol when it was pointed in deceased's direction.

APPEAL by defendant from *Gambill, J.*, 3 February 1969 Criminal Session of GUILFORD.

Defendant, indicted, tried, and convicted for the first-degree murder of James Sawyer, appeals from the judgment of life imprisonment imposed in accordance with the jury's verdict.

Evidence for the State tends to establish these facts: James Sawyer (Sawyer) and his wife, Virginia, were living in a state of separation. Sawyer "stayed with a rooming lady." Virginia and defendant were "just friends." He lived in the back room of the house which she occupied with her child by Sawyer. On 22 July 1967 Sawyer came to his wife's home to see their child. According to Virginia he had no weapon. He and defendant exchanged some words, and Virginia told Sawyer to get out because she "didn't want to hear it." A neighbor called him to start a lawnmower, and he went across the street. Defendant got his gun, followed Sawyer, and kicked him. Virginia "hollered across the street," telling defendant to leave Sayyer alone. Instead, defendant shot at Sawyer, saying to him, "I will kill you, you so and so." Sawyer fled into Carolyn Whitworth's house and shut the door. Defendant pursued him, kicked open the door, and went in. Carolyn, who was asleep in her front bedroom, awoke to find defendant on one side of her bed and Sawyer on the other. Sawyer was pleading, "Joe, don't do it." Defendant shot across at Sawyer, who had nothing in his hand, and Carolyn saw him bleeding from the left arm and left chest. Sawyer ran into the living room and fell on his side at the front door. A police officer found him there about 7:30 p.m. Sawyer was carried to Cone Hospital, where a five-hour operation was performed upon him. A bullet, which entered his left chest, had penetrated his diaphragm, ruptured his spleen, pancreas, both walls of his stomach, the aorta, and the inferior vena cava. He died early in the morning of 23 July 1967 from irreversible shock caused by severe hemorrhaging.

Defendant's evidence, consisting entirely of his own testimony, tended to show: He lived in the home of Virginia Sawyer and "bought the fuel and the groceries and stuff like that." On 22 July 1967, Vir-

ginia's eleven-year-old niece told defendant that Sawyer was going to kill him because Virginia was mad at him about the woman next door, and Virginia said that her niece was "doggone right." Thereafter, Sawyer came to the house. An argument ensued between him and Virginia over their child, and she called defendant inside from the porch, where he had been sitting. Defendant had his gun in his belt, where he carried it to prevent Virginia from taking it. When he entered, Sawyer started at him saying, "I believe you will shoot me, but I will cut you." When defendant "offered to fight him fair fist," Virginia ordered them both out of the house. Defendant went across the street to the porch of Jake Brown. Sawyer followed him there and renewed the argument. Finally, he started to walk off but, after taking six or seven steps, he came toward defendant, shaking one finger in his face and threatening to get him. The other hand was in his pocket. Defendant saw no knife, but he pulled his gun from his belt. When he did so, Sawyer turned and ran toward Carolyn Whitworth's house. Defendant ran after him and, as Sawyer was going in the door, defendant shot at him. At that time, Sawyer's back was turned to defendant, and he was running away. Defendant followed him into the house. His account of what then transpired is as follows: ". . . I didn't see him nowhere. I looked through the back door and I didn't see him nowhere, and I started back out. . . . [W]hen I turned around to come back out he was coming from behind the door where I done pushed open, with his hand in his pocket then. And I jumped back off him and shot again. And so I don't know where I hit him or not but he — that is when he took his hand out of his pocket and went and layed (sic) down in the doorway."

In response to his counsel's question, "Did you intend to kill him?" defendant said, "No Sir. No, Sir. . . . [T]he gun went off when I jumped back. It shot all at the same time when I jumped back off him. . . . I was afraid of him. And I was trying to keep him off until I got a chance to get away from there. . . . James Sawyer had been threatening to kill me for over a year. . . . I didn't aim or nothing. I jumped back off of him and the gun went off all at the same time, like that. . . . He was coming out from behind that door. . . . [H]e was coming toward me and I jumped back, and shot him. . . . When I shot him he was still coming at me and when I jumped back off him and shot him, he took his hand out of his pocket and went and laid down in that door. . . . He laid down and I went back out."

Defendant testified that he left Greensboro immediately and went to Newark, N. J., because "they said" Sawyer's cousins were out to kill him. Nine months later, when the F. B. I. "got behind

him," he went to Philadelphia, where he was arrested. He also testified that deceased had the general reputation of being a dangerous fighting man.

The court charged the jury that they might return one of the following verdicts: Guilty of murder in the first degree, guilty of murder in the first degree with the recommendation of life imprisonment; guilty of murder in the second degree; guilty of manslaughter; or not guilty. The verdict was guilty of murder in the first degree with recommendation that his sentence be life imprisonment. From the life sentence, defendant appeals.

Robert Morgan, Attorney General; Ralph Moody, Deputy Attorney General; and Andrew A. Vanore, Jr., Staff Attorney, for the State.

Henderson & Henderson and William A. Vaden for defendant appellant.

SHARP, J.

[1] Defendant asserts, *inter alia,* that he is entitled to a new trial because (1) the judge erred in his charge with reference to the *quantum* of proof required of defendant in order to reduce murder in the second degree to manslaughter or to establish the defense of self-defense and (2) the judge failed to submit to the jury the issue of defendant's guilt of involuntary manslaughter.

The judge explained to the jury that if defendant intentionally shot Sawyer with a pistol and thereby caused his death, the law presumed that the killing was unlawful and done with malice and, nothing else appearing, defendant would be guilty of murder in the second degree; that if defendant would rebut the presumptions arising from such a killing he must establish to the satisfaction of the jury the legal provocation which would take from the crime the element of malice and thus reduce it to manslaughter or excuse the killing altogether on the grounds of self-defense. The judge then contrasted the State's burden, proof beyond a reasonable doubt, with defendant's burden, proof to the satisfaction of the jury. After explaining that proof beyond a reasonable doubt is the highest *quantum* of proof known to our law and that such intensity is not required of a defendant, the judge charged:

"But the defendant does not meet the requirements of law when he satisfies the jury merely by the greater weight of the evidence of the truth of the facts he relies on in mitigation, justification or ex-

cuse. By the greater weight of the evidence means simply evidence that, when compared with other evidence, is more convincing or evidence that carries greater assurance than that which is offered in opposition. And when the term 'to the satisfaction of the jury,' is used it is considered to bear a stronger intent of proof than by the greater weight of the evidence or preponderance of the evidence.

"So to prove facts to the satisfaction of the jury requires a higher degree of proof and signifies something more than belief founded on the greater weight of the evidence but does not require as high a degree or as strong, intensive proof as beyond a reasonable doubt."

Defendant excepted to the foregoing portion of the charge, which is clearly erroneous. Instructions in practically identical language have been held to be prejudicial error in *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731; *State v. Matthews,* 263 N.C. 95, 138 S.E. 2d 819; *State v. Prince,* 223 N.C. 392, 26 S.E. 2d 875, and also in *State v. Calloway,* 1 N.C. App. 150, 160 S.E. 2d 501. These cases enunciate and reiterate the rule — established in our law for over one hundred years, *State v. Willis,* 63 N.C. 26 (1868) — that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury — not by the greater weight of the evidence nor beyond a reasonable doubt — *but simply to the satisfaction of the jury.* Even proof by the greater weight of the evidence — a bare preponderance of the proof — may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied. *State v. Prince, supra.*

[2] If there be evidence sufficient to establish an affirmative defense or to rebut the presumptions which arise against the defendant when a killing results from his intentional use of a deadly weapon, "[T]he accepted formula *and the one that should be used if risk of error is to be avoided,* is that the defendant has the burden of proving his defense (or mitigation) 'to the satisfaction of the jury — not by the greater weight of the evidence nor beyond a reasonable doubt — but simply to the satisfaction of the jury.' " Stansbury, N. C. Evidence § 214 (2d Ed. 1963). (Emphasis added.)

[1, 3] Erroneous though the challenged instruction was, it does not entitle defendant to a new trial for, demonstrably, it was harmless. First, the verdict of murder in the first degree established that defendant had unlawfully killed sawyer with malice, premeditation, and deliberation. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652. Defendant assigns no error in the charge as it related to murder in the

first or second degree. The error related to the *quantum* of proof required to reduce second-degree murder to manslaughter or to excuse the killing on the ground of self-defense. "Prejudice could not come from such a charge, if erroneous, unless defendant had been convicted of murder in the second degree and there had been evidence of facts or circumstances in mitigation or excuse of the killing." *State v. Lipscomb,* 134 N.C. 689, 697, 47 S.E. 44, 46. Ordinarily, when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. In such event it cannot be known whether the verdict would have been manslaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter was harmless. In *State v. Munn,* 134 N.C. 680, 47 S.E. 15, the jury found "that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately and with premeditation, and was guilty of murder in the first degree. The State (had) thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the (intentional) killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error." *Id.* at 682, 47 S.E. at 16. Similarly, when the jury in this case became convinced beyond a reasonable doubt that defendant, after having decided to take Sawyer's life, intentionally and unlawfully shot and killed him, the *quantum* of proof by which a defendant is required to rebut the presumption of malice which arises when death results from the intentional use of a deadly weapon becomes academic and irrelevant.

[1] Second, defendant was not entitled to an instruction upon self-defense or mitigation. In *State v. Utley,* 132 N.C. 1022, 43 S.E. 820, the defendant was convicted of murder in the second degree. The judge charged the jury that the defendant was required to prove mitigating circumstances beyond a reasonable doubt. The court said that, unless it was harmless, this error would require a new trial and it was not harmless *if* "in any aspect of the case the jury could have rendered a verdict of manslaughter under the law." *Id.* at 1024, 43 S.E. at 821. Looking at the evidence in the light most favorable to the defendant, the court held there was no such evidence and affirmed the verdict.

In this case the evidence is insufficient to show that defendant

slew Sawyer in the heat of passion engendered by provocation which the law deems adequate to depose reason. *State v. Merrick,* 171 N.C. 788, 88 S.E. 501; *State v. Merrick,* 172 N.C. 870, 90 S.E. 257. Indeed, defendant does not make that contention. He now asserts that the killing was either unintentional or in self-defense. However, his testimony does not invoke the doctrine of self-defense, *State v. Davis,* 225 N.C. 117, 33 S.E. 2d 623; *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620, or tend to show accident, *State v. Phillips,* 264 N.C. 508, 142 S.E. 2d 337; *State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769.

[4] The remaining question is, did defendant's evidence entitle him to have the issue of his guilt of involuntary manslaughter submitted to the jury? There are well-considered cases from other jurisdictions which hold that in a prosecution for homicide, where the court correctly instructed as to murder in the first and second degrees and the jury found the defendant guilty of murder in the first degree, any error in refusing to instruct as to manslaughter was harmless. The exposition is this: A verdict of murder in the second degree would have supported the claim that the jury might have found the defendant guilty of a still lower degree of homicide had they been given the opportunity under proper instructions. "All such speculations are dissipated, however, by the fact that the defendant was found guilty of murder in the first degree. When the jury excluded from the case the alternative of murder in the second degree, all lower degrees were necessarily eliminated by the same rule." *People v. Brown,* 203 N.Y. 44, 51, 96 N.E. 367, 369. A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant. *People v. Granger,* 187 N.Y. 67, 79 N.E. 833; *State v. Lantzer,* 55 Wyo. 230, 99 P. 2d 73; *State v. Metcalf,* 203 Kan. 63, 452 P. 2d 842; *State v. Loveless,* 62 Nev. 17, 150 P. 2d 1015; *Tarrence v. Commonwealth,* 265 S.W. 2d 40 (Ky. 1953); *Brown v. State,* 219 Ark. 647, 243 S.W. 2d 938; *State v. Clokey,* 83 Idaho 322, 364 P. 2d 159; *State v. Drosos,* 253 Iowa 1152, 114 N.W. 2d 526; 24B C. J. S. *Criminal Law* § 1923(3) (1962). See the dissenting opinion in *People v. Modesto,* 31 Cal. Rptr. 225, 382 P. 2d 33, 41-55.

The foregoing is the rationale of this Court in *State v. Lipscomb, supra,* and *State v. Munn, supra,* and the rationale by which we conclude that the error in the charge (Assignment No. 1) was harmless. However, in cases where there was evidence tending to sup-

port a lesser degree of the crime charged in the bill of indictment, and the trial judge *failed* to submit the issue, the decision has been that the defendant is entitled to have all the different views presented to the jury. In these situations the holding is that the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill — even though the conviction could have been of an intermediate offense. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652; *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733; *State v. Lee,* 206 N.C. 472, 174 S.E. 288; *State v. Williams,* 185 N.C. 685, 116 S.E. 736; *State v. Merrick,* 171 N.C. 788, 88 S.E. 501. The opinions in these cases did not specifically discuss the rationale contained in *Lipscomb* and *Munn* and the cases cited herein from other jurisdictions. Nor is it now necessary to consider whether there is any justification for making a distinction between the situation in *Lipscomb* and *Munn* and that in *State v. Moore, State v. McNeill, State v. Merrick,* and the other cases cited above, for we hold that the evidence did not justify a charge upon involuntary manslaughter.

By his own statement defendant pursued the fleeing Sawyer, who had displayed no weapon and had none insofar as the evidence discloses. Defendant attempted to shoot him in the back as, seeking sanctuary, he ran through the door of Carolyn Whitworth's house. In hot pursuit, with pistol in hand, defendant invaded her home. As soon as he saw Sawyer coming from behind the door defendant had pushed open, defendant "jumped back off him and shot him again."

Whatever may have transpired before Sawyer left Jake Brown's porch, when defendant pursued him across the street into Carolyn Whitworth's home after he had attempted to shoot him in the back, it is quite clear that defendant had become *and remained* the aggressor. Defendant's own recitation of his actions belie his disavowal of an intent to kill. In any event, however, the mere absence of a specific intent to kill Sawyer would not require the submission of the issue of defendant's guilt of involuntary manslaughter. Considering defendant's testimony in its entirety, it is quite clear that he intentionally discharged his pistol when it was pointed in Sawyer's direction. He says it was because he was afraid of Sawyer. The jury, however, thought otherwise.

Although defendant was not entitled to either instruction, the judge gave him the full benefit of his plea of self-defense and of the law relating to a killing in the heat of passion. Notwithstanding the error discussed earlier herein, the overall effect of the judge's charge

was in defendant's favor. All the evidence tends to establish defendant's guilt of murder in the first degree. He has had a trial free of prejudicial error, and we see no reason to disturb the verdict.

No error.

STATE OF NORTH CAROLINA v. WAYNE DARNELL BUMPER

No. 31

(Filed 19 November 1969)

1. **Criminal Law § 88; Constitutional Law § 31— right of cross-examination — impeachment — restriction on repetitious questions**

Where defendant's cross-examination of the prosecuting witness for impeachment purposes repeatedly elicited the answer that the witness had testified in a former trial that he believed the defendant was holding card number six in a police identification lineup, action of the trial court in precluding further examination on this point did not deprive defendant of his right of cross-examination, the court having the right to restrict repetitious and argumentative inquiry.

2. **Constitutional Law § 31— right of cross-examination — common law — constitutional guarantees**

The right of cross-examination is a common law right and is guaranteed by the N. C. Constitution, Art. I, § 11, and also by the Sixth Amendment to the U. S. Constitution, which is made applicable to the states by the Fourteenth Amendment.

3. **Constitutional Law § 31; Criminal Law § 88— right of cross-examination — common law rule**

The right to confront affirms the common law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath.

4. **Criminal Law § 88— cross-examination on the examination-in-chief**

The defendant is entitled to a full and fair cross-examination upon the subject of the witness' examination-in-chief, and this is an absolute right rather than a privilege.

5. **Criminal Law § 88— cross-examination — impeachment — repetitious questions — restrictions**

When cross-examination is made for the purpose of impeaching the credibility of a witness, the method and duration of the cross-examination for this purpose rest largely in the discretion of the trial court, which may properly exclude such cross-examination when it becomes merely repetitious or argumentative.

6. **Constitutional Law § 1— power of states to make rules of evidence — U. S. Supreme Court**

The United States Supreme Court will not encroach upon the powers of

the states to make their own rules of evidence in their own courts as long as they serve a legitimate state purpose not prohibited by the U. S. Constitution.

7. Constitutional Law § 31— cross-examination — impeachment — repetitious questions — discretion of trial court

The rule allowing the trial judge to exercise his discretion to limit cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate any provision of the U. S. Constitution, it appearing that the rule is for a legitimate and fair state purpose and does not contravene due process.

APPEAL by defendant from *Bowman, S.J.*, January 1969 Criminal Session of ALAMANCE County Superior Court.

Defendant, Wayne Darnell Bumper, was heretofore tried for the rape of Loretta Nelson and for the felonious assault of Loretta Nelson and Monty Jones. He was found guilty on all counts, was sentenced to life on the rape charge upon recommendation of the trial jury, and was sentenced to consecutive terms of ten years on each of the felonious assault charges. He appealed to the North Carolina Supreme Court, which found no error in the trial below. *State v. Bumpers,* 270 N.C. 521, 155 S.E. 2d 173. On certiorari, the United States Supreme Court reversed the North Carolina Supreme Court and remanded for further proceedings, holding that defendant's constitutional rights were violated at his trial by the introduction of evidence obtained by an unlawful search and seizure. *Bumper v. North Carolina,* 391 U.S. 543, 20 L. ed. 2d 797.

At the January 1969 Criminal Session of Alamance, Wayne Darnell Bumper was charged in three bills of indictment with: (1) felonious assault of one Monty Jones with a 22 rifle with intent to kill; (2) felonious assault of one Loretta Nelson with a 22 rifle with intent to kill; and (3) armed robbery of Monty Jones and Loretta Nelson. These indictments were consolidated for trial and defendant was tried at the January 1969 Criminal Session of Alamance. The jury returned verdicts of guilty as to each charge, and from judgments of imprisonment for terms of not less than twenty nor more than thirty years (for armed robbery), not less than nine nor more than ten years (for felonious assault), and not less than nine nor more than ten years (for felonious assault), the three sentences to run consecutively, defendant appealed to the North Carolina Court of Appeals. The Court of Appeals found no error in the trial below. Defendant appeals to this Court pursuant to G.S. 7A-30(1).

We deem it unnecessary to recite lengthy facts, since all facts pertinent to this appeal center on testimony concerning the identi-

fication of defendant at two line-ups held at Alamance County jail on 16 August 1966. A full and accurate statement of the facts may be found in the opinion of the North Carolina Court of Appeals reported at 5 N.C. App. 528.

The State offered evidence which tended to show that defendant at secluded spots in Alamance County raped Loretta Nelson twice, robbed both Loretta Nelson and Monty Jones, and shot both of them while they were bound to trees. Prior to the line-ups and while confined in separate hospitals, Loretta Nelson and Monty Jones had each identified a photograph of Wayne Darnell Bumper as the person who assaulted and robbed them.

Two line-ups were conducted, in which defendant appeared with nine other Negro males. At the first line-up defendant held a card bearing the number 7, and in the second line-up he held a card bearing the number 2. The attorney then representing Wayne Darnell Bumper was present at the line-ups.

Loretta Nelson, among other things, testified that at the first line-up she was afraid to look at the men but that she saw a card with No. 6 on it. "As to whether I told the Sheriff and other officers I identified the person who attacked me and Mr. Jones on July 31st as No. 6, no, sir, I said No. 6. I don't remember how he asked, he asked something and I said No. 6." At the second line-up she recognized defendant Bumper as her assailant and gave this information to Sheriff Stockard.

The testimony of Monty Jones was, in substance, the same as that of Loretta Nelson concerning the events of 31 July 1966. His testimony concerning the line-ups will be hereinafter considered.

John H. Stockard, Sheriff of Alamance County, testified concerning the line-ups and stated that when Loretta Nelson made her first identification he believed that she had given him the number 6. The Sheriff then testified that he sent Monty Jones in to view the line-up and that "At that time while I talked to her (Loretta Nelson) we had Mr. Jones go in by himself. We gave him the same instructions to walk by, look at the individuals and come back and tell me if he recognized anyone and what number it was. He came back and reported to me that it was No. 7, I believe."

On redirect examination the Sheriff stated that the reason for the second line-up was that Loretta Nelson had told him that she did not look at the faces of the men in the first line-up.

Defendant took the stand in his own behalf and testified that he had been in the general area in question on the night of 31 July

1966, but that he had not attacked or robbed the complaining witnesses Monty Jones or Loretta Nelson. He offered other evidence in the nature of an alibi.

Attorney General Morgan and Trial Attorney Eugene A. Smith for the State.

Clarence Ross for defendant.

BRANCH, J.

[1] The sole question for decision is whether the trial court erred in restricting defendant's cross-examination of State's witness, Monty Jones, on the question of his identification of defendant in the line-ups held on 16 August 1966.

Monty Jones stated on direct examination that he went into a room at the jail on two separate occasions and on each occasion he observed ten or fifteen colored men standing in line. On each occasion he went back and told Sheriff Stockard the number being held by the man who attacked him.

On cross-examination he testified:

"Yes, sir, I looked at each and every face the first time of the men in the line-up. Yes, sir, that included everyone in the line-up. Yes sir, after I looked at each one of the men, *I came back to the Sheriff and said I believed it was 6.;* it was the right one. I forgot the number I told him the first time. *No, sir, I didn't tell him No. 6. I said I believed No. 6. I said I believed No. 6,* but I got the right one in the line-up. I got the numbers mixed up. I got the numbers mixed up when I got in court. When I was at the line-up I got the right number, when up here I got the numbers mixed up. *When I testified at a previous hearing I said I believed No. 6.*

"Q. Were you asked the question at the trial: You recall what number he was carrying and you answered No. 6?"

Before Jones could answer, Mr. Cooper, the District Solicitor, asked the Judge to remove the jury. The jury was sent to the juryroom and Mr. Cooper, Mr. Dodge (defendant's attorney) and the Court engaged in the following colloquy:

"MR. COOPER: Mr. Dodge is purporting to read from a transcript of this boy's testimony, he deliberately left out a word.

THE COURT: What word?

MR. COOPER: I believe.

MR. DODGE: Page 7 I am reading from.

THE COURT: Is that on Page 7, Mr. Cooper?

MR. DODGE: 11 and 12. This is cross examination, I wasn't deliberately omitting anything.

THE COURT: Let's don't pursue that particular line of question any further about the number 6.

MR. DODGE: Except to the ruling of the Court."

The jury returned to the courtroom and no further mention was made of whether Monty Jones had testified on the first trial that he *believed* that his attacker was No. 6 or that his attacker *was* No. 6.

At the time defendant's attorney elicited the above quoted evidence, he was conducting his cross-examination by use of a transcript of the former trial. We note that, although defendant offered evidence, he did not favor the jury with the introduction of the transcript which would have shown with great finality and credence the statements made by the witness Jones at the first trial.

[2, 3] The right of cross-examination is a common law right and is guaranteed by the North Carolina Constitution, Article I, Sec. 11. The right to confront affirms the common law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath. *State v. Perry,* 210 N.C. 796, 188 S.E. 639; *State v. Breece,* 206 N.C. 92, 173 S.E. 9; *State v. Hightower,* 187 N.C. 300, 121 S.E. 616. The right to confront witnesses and cross-examine is also guaranteed by the Sixth Amendment to the United States Constitution, which is made applicable to the states by the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 13 L. ed. 2d 923; *State v. Jackson,* 270 N.C. 773, 155 S.E. 2d 236.

[4, 5] The defendant is entitled to a full and fair cross-examination upon the subject of the witness' examination-in-chief, and this is an absolute right rather than a privilege. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.,* 129 Fed. 668; *State v. Hightower, supra.* However, when cross-examination is made for the purpose of impeaching the credibility of a witness, the method and duration of the cross-examination for these purposes rest largely in the discretion of the trial court, and the trial court may properly exclude such cross-examination when it becomes merely repetitious or argumentative. *State v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *McCorkle v. Beatty,* 226 N.C. 338, 38 S.E. 2d 102; *State v. Wall,* 218 N.C. 566, 11 S.E. 2d 880; *State v. Beal,* 199 N.C. 278, 154 S.E. 604.

[6, 7] The United States Supreme Court will not encroach upon the powers of the states to make their own rules of evidence in their own courts as long as they serve a legitimate state purpose not prohibited by the provisions of the United States Constitution. *Spencer v. Texas,* 385 U.S. 554, 17 L. ed. 2d 606. The rule allowing the trial judge to exercise his discretion to limit cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate any provision of the United States Constitution. We would quickly destroy the orderly administration of justice in our courts should the trial judge be forced to allow counsel to cross-examine on such matters ad infinitum. It is obvious that the rule is for a legitimate and fair state purpose and does not contravene due process.

[1] Here, the real question before the jury was the identity of the assailant and not the number on the card held by defendant. The witness had testified as to the identity of his assailant. Therefore the question asked by defendant's attorney and upon which he bases his assignment of error was clearly for the purpose of impeachment by showing prior statements inconsistent with his testimony. An examination of the record shows that Monty Jones had responded to a battery of questions concerning his testimony at the first trial as related to his identification of defendant in the police line-ups. The witness had several times substantially answered the question propounded, and it therefore became a repetitious inquiry calculated to bring out matter already testified to by the witness.

We find no abuse of discretion on the part of the trial judge in halting the repetitious and argumentative questions which sought to impeach the witness Monty Jones.

The decision of the Court of Appeals is

Affirmed.

BENVENUE PARENT-TEACHER ASSOCIATION AND CHARLES L. JOHNSON v. THE NASH COUNTY BOARD OF EDUCATION AND NASH COUNTY

No. 16

(Filed 19 November 1969)

1. Appeal and Error § 9— moot and academic questions

When, pending an appeal to the Supreme Court, a development occurs by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason

that the Supreme Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

2. Appeal and Error § 9— moot and academic questions — dismissal of appeal

In this action to enjoin a county board of education from diverting a school building from use in the education of elementary school pupils to use by a county technical institute for vocational education of adults, and from expending county tax funds for the maintenance of that building when so used, plaintiff's appeal to the Supreme Court upon constitutional grounds from a decision of the Court of Appeals which affirmed judgment of nonsuit entered in the superior court is dismissed as moot, where all activities of the technical institute at the school building in question have ceased since the decision of the Court of Appeals was rendered, and the school building is now being used exclusively for the education of elementary public school pupils.

APPEAL by plaintiffs from the decision of the Court of Appeals in 4 N.C. App. 617.

The plaintiff Association is an unincorporated association of parents and teachers of children attending the Benvenue Public School in Nash County. The plaintiff Johnson is a resident and taxpayer of the county and the parent of children assigned to that school. They filed suit in 1966 against the Nash County Board of Education, seeking both temporary and permanent injunctive relief. In 1968, upon motion of the original defendant, Nash County was made a defendant.

In their complaint, the plaintiffs prayed for a permanent injunction restraining the Board of Education from: (1) Taking further action pursuant to its plan to divert the building formerly used for the high school classes at Benvenue School "from use as a public school facility for the exclusive use of Nash County Public School pupils"; (2) making the said building available to the Department of Community Colleges of the State Board of Education "for use as a technical or vocational training school, or otherwise"; and (3) expending tax funds of Nash County "for the operation, maintenance or upkeep of the Nash Technical Institute facility," without a vote of the people.

The plaintiffs also sought a temporary restraining order to prevent the Board of Education from: (1) Making any assignments or reassignments of pupils to or from Benvenue School; (2) converting the said building "from a public school facility to a vocational school facility"; (3) making repairs to or "rejuvenating" or making additional classroom space available in other buildings at the Benvenue

School; and (4) taking any action which would tend to effect or facilitate the conversion of the high school building "into a vocational school facility" or otherwise making it unavailable "for public school use by pupils assigned to Benvenue School."

The complaint, as amended three times, alleges in substance: Pursuant to the recommendation of a Citizens Committee, appointed by it in 1961, the County Board of Education, after a public hearing, determined upon a comprehensive program for the reorganization and consolidation of the public schools of Nash County. Prior to that time, the Benvenue Public School was a union school, composed of elementary and high school facilities. The proposed plan of reorganization included the construction of a new consolidated high school facility at another point in the county, the transfer thereto of all senior high school students from the Benvenue School, the transfer to the Benvenue School from certain other schools of pupils in the seventh and eighth grades and the conversion of the Benvenue High School facility into an industrial education center. In furtherance of this plan, the Board of Education took action to make the high school building at the Benvenue School available to the Department of Community Colleges of the State Board of Education and requested that department to establish therein the proposed industrial education center. Thereafter, one of the other buildings at the Benvenue School was condemned. To alleviate the overcrowding of pupils resulting from this loss of classroom space and from the proposed use of the building formerly used for the high school, the Board of Education reassigned some of the pupils in the seventh and eighth grades to other public schools and commenced alterations of the condemned building and another so as to provide classrooms for the Benvenue Public School. Such alterations will involve the expenditure of a substantial amount of tax funds. The reassignment of the seventh and eighth grade pupils from the Benvenue School would not be necessary if the building formerly used for high school purposes were available for their use. Nash Technical Institute has been formed as part of the Department of Community Colleges. The Board of Education has turned over to the Institute, for its use in operating a technical institute and the teaching of classes in general adult education, the former high school building at Benvenue School and has agreed with the Institute to use tax funds of Nash County to finance the maintenance of the said building and the upkeep of the grounds thereof. Pursuant to that agreement, tax funds of Nash County have been and are being so expended without a vote of the people, in violation of Art. VII, § 6, of the Constitution of North Carolina. The diversion of public school property and revenues to

the operation of the Institute is contrary to Art. IX, § 5, of the Constitution of North Carolina.

A temporary restraining order in accordance with the prayer of the complaint was issued but was dissolved following a hearing thereon. By consent, the matter was then heard by the judge without a jury. It was stipulated that, at the time of the hearing in the superior court, the Nash Technical Institute was operating, in the building formerly used for high school purposes at the Benvenue School, an adult educational unit providing vocational, technical and general adult training, the building having been modified for that purpose by the Board of Education and made available by it to the trustees of the Institute for such use. It was also stipulated that the County Board of Commissioners, without a vote of the people, has appropriated $21,370 "for the Nash County Board of Education for use by Nash Technical Institute Extension Unit" in the 1968-1969 county budget, of which sum $16,870 represents "current operating expense," and $4,500 a "capital outlay." It is further stipulated that, for the year 1968-1969, $269,000 was provided by the State for the operating expenses of the Institute with the approval of the Advisory Budget Commission and of the Governor.

At the close of all the evidence, the superior court, upon the motion by the defendants, dismissed the action as to the Benvenue Parent-Teacher Association and entered a judgment of nonsuit. The plaintiffs appealed to the Court of Appeals, assigning as error the granting of these motions and certain rulings of the superior court with reference to the admission of evidence. The Court of Appeals affirmed the judgment of the superior court.

The plaintiffs then appealed to the Supreme Court on the grounds that: (1) The diversion of the high school building to use as a unit of the Department of Community Colleges for training adults violated Art. IX, § 5, of the Constitution of North Carolina; and (2) the appropriation and expenditure of county tax funds for the purpose of maintaining and operating Nash Technical Institute, without a vote of the people, violated Art. VII, § 6, of the Constitution of North Carolina.

After the appeal was docketed in the Supreme Court, the defendants moved to dismiss the appeal as moot for the reason that, as shown by affidavit, on 2 September 1969, following the appeal to the Supreme Court, Nash Technical Institute moved its operations from the building at the Benvenue School to a building formerly used as a public school known as Stony Creek School, and the Benvenue School is now in use as an elementary public school.

The plaintiffs do not deny these facts, but assert that the appeal is not thereby rendered moot since the lawfulness of the use of tax funds to assist in the operation of a technical institute for adults, without a vote of the people of the county, is not affected by these developments.

Don Evans for plaintiff appellants.

I. T. Valentine, Jr., for Nash County Board of Education.

James W. Keel, Jr., for Nash County.

LAKE, J.

[1] When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court. *Kendrick v. Cain,* 272 N.C. 719, 159 S.E. 2d 33; *In re Assignment of School Children,* 242 N.C. 500, 87 S.E. 2d 911; *Savage v. Kinston,* 238 N.C. 551, 78 S.E. 2d 318; *Cochran v. Rowe,* 225 N.C. 645, 36 S.E. 2d 75; *Glenn v. Culbreth,* 197 N.C. 675, 150 S.E. 332; *Reid v. R. R.,* 162 N.C. 355, 78 S.E. 306; *Wallace v. North Wilkesboro,* 151 N.C. 614, 66 S.E. 657; *Wikel v. Commissioners,* 120 N.C. 451, 27 S.E. 117; *Russell v. Campbell,* 112 N.C. 404, 17 S.E. 149; Strong, N. C. Index 2d, Appeal and Error, § 9. Such a situation may arise where there has been a settlement and release of the plaintiff's claim following the judgment in the lower court (*Kendrick v. Cain, supra*), or where, by the repeal of a statute, an administrative board is deprived entirely of a power which the plaintiff sought to restrain it from exercising in alleged disregard of procedural requirements in effect when the judgment below was rendered (*In re Assignment of School Children, supra*), or where, pending his appeal from a judgment denying restitution to him of certain personal property, the appellant has come into its possession (*Russell v. Campbell, supra*), or a temporary restraining order having been dissolved, the transaction which the plaintiff sought to enjoin is completed pending the appeal (*Wallace v. North Wilkesboro, supra*).

In the present action, the plaintiffs complained of and sought to enjoin the defendant Board of Education from doing two things: (1) Diverting a specific building at the Benvenue School from use in the education of pupils in grades 1 through 8 to use by the Nash Technical Institute for vocational education of adults; (2) the ex-

penditure of county tax funds for the maintenance and upkeep of that building when so used. While the prayer of the complaint for injunctive relief against expenditures is stated in terms broad enough to include any expenditures for the operation of the "Nash Technical Institute facility," the only such facility to which reference is made in the complaint is that alleged to have been in operation in the said building at the Benvenue School and the only expenditures alleged in the complaint are those made "for the maintenance and upkeep of the said high school building."

[2] Since the decision of the Court of Appeals was rendered, all activities of the Nash Technical Institute at the Benvenue School have ceased, the Institute has moved to a new location and the building in question has been reallocated by the Board of Education to, and is being used by it exclusively for, the education of elementary public school pupils. Consequently, though the plaintiffs did not prevail in the lower courts, the acts and proposed acts against which they sought injunctive relief have now been discontinued. It is not suggested that a renewal of them, or any of them, is contemplated. Thus, the controversies which were the subject matter of this action have ceased to exist and questions raised by the appeal are moot.

In *Wikel v. Commissioners, supra,* this Court refused to consider an appeal raising grave questions of constitutional law where, pending the appeal to it, the cause of action had been destroyed so that the questions had become moot. Similarly, we decline in this action to pass upon the constitutional questions which were brought to us by this appeal but which have now become abstract questions of law.

We, therefore, neither approve nor disapprove the rulings of the Court of Appeals or those of the superior court in the present action. The authority of the defendants, or either of them, to permit the use by the Nash Technical Institute of any properties at the Stony Creek School or to appropriate or expend any tax funds for the aid of the Institute in any operation by it at the Stony Creek School is not before us in the present matter.

Appeal dismissed.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ADAMS-MILLIS CORPORATION v. TOWN OF KERNERSVILLE

No. 71 PC.

Case below: 6 N.C. App. 78.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

BRITT v. SMITH

No. 73 PC.

Case below: 6 N.C. App. 117.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

CHEMICAL CO. v. PLASTICS CORP.

No. 80 PC.

Case below: 6 N.C. App. 439.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

CURRY v. STALEY

No. 72 PC.

Case below: 6 N.C. App. 165.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

HILL v. SHANKS

No. 81 PC.

Case below: 6 N.C. App. 255.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

HODGE v. FIRST ATLANTIC CORP.

No. 85 PC.

Case below: 6 N.C. App. 353.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

HUFFINES v. WESTMORELAND

No. 68 PC.

Case below: 6 N.C. App. 142.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

McEACHERN v. MILLER

No. 64 PC.

Case below: 6 N.C. App. 42.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

STATE v. ALSTON

No. 84 PC.

Case below: 6 N.C. App. 200.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

STATE v. ENGLE

No. 74 PC.

Case below: 5 N.C. App. 101.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

STATE v. WALL

No. 86 PC.

Case below: 6 N.C. App. 422.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

STATE BAR v. TEMPLE

No. 91 PC.

Case below: 6 N.C. App. 437.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 2 December 1969.

STATESVILLE v. BOWLES

No. 69 PC.

Case below: 6 N.C. App. 124.

Petition for writ of *certiorari* to North Carolina Court of Appeals denied 18 November 1969.

ADVISORY OPINION IN RE SALES-TAX ELECTION OF 1969

(Filed 25 September 1969)

Elections § 1— general or special election — sales-tax election — submission of constitutional amendments

The sales-tax election to be held in each county on 4 November 1969 under the provisions of Session Laws of 1969, Ch. 1228, is not a general election within the meaning of N. C. Constitution, Art. XIII, § 2; consequently, the constitutional amendments proposed by the 1969 General Assembly should not be submitted to the voters at this election.

HIGGINS and LAKE, JJ., express no opinion.

STATE OF NORTH CAROLINA
GOVERNOR'S OFFICE
RALEIGH 27602

ROBERT W. SCOTT
GOVERNOR

26 August 1969

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA.

Chapter 1228 (S.B. 178) was enacted by the General Assembly of 1969 and is entitled:

"AN ACT ENABLING EACH OF THE COUNTIES OF THE STATE TO HOLD A SPECIAL ELECTION FOR THE PURPOSE OF CONSIDERING WHETHER A COUNTY SHALL OR SHALL NOT IMPOSE AND LEVY A SALES AND USE TAX OF ONE PER CENT (1%) UPON CERTAIN TAXABLE TRANSACTIONS."

The election provision of this Act contains the following:

"The board of elections of each county shall call and conduct a special election on Tuesday, November 4, 1969, for the purpose of submitting to the voters of each such county the question of whether a one per cent (1%) sales and use tax as hereinafter provided will be levied."

The board of elections of each county conducts the election and "The board of elections of each county shall prepare ballots for the special election . . ." The Act refers to this election in some two or three places as a "special election."

The General Assembly of 1969 enacted several acts by which constitutional amendments are to be submitted to the voters of the

State. A list of these proposed constitutional amendments appears in a letter of the Attorney General to me and a copy of this letter is hereto attached for reference to these proposed constitutional amendments.

One of the amendments is a lengthy proposal which represents a revision of the Constitution of North Carolina which is to be submitted as an amendment. Each of these proposed constitutional amendments contains language stating that the amendment "shall be submitted to the qualified voters of the State at the next general election. That election shall be conducted under the laws then governing elections in this State."

The question, therefore, arises whether the sales tax election above referred to is a general election which would require the constitutional amendments to be submitted to the voters of the State on Tuesday, November 4, 1969, or whether it is a special election and the constitutional amendments would, therefore, be submitted to the people at the general election to be held in November 1970. You will note that none of these proposed constitutional amendments provide for any other type of election other than "the next general election."

Article XIII, Section 2, of the Constitution of North Carolina provides as to amendments to the Constitution as follows:

> "And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law."

The Attorney General advises me that he does not think that the sales tax election is a general election but that there may be some doubt about the matter.

The question is, however, of such great importance that I feel justified in seeking an opinion of the Supreme Court. Hence, I respectfully request, if in keeping with the proprieties and functions of the Court, an advisory opinion on the following question:

> "Is the sales tax election to be held in each county on November 1969, under the provisions of S. L. 1969, Chapter 1228, a general election within the meaning of North Carolina Constitution Article XIII, Section 2, so that the constitutional amendments proposed by the 1969 General Assembly must be submitted to the voters at that time?"

Your opinion on this question will be highly appreciated and will guide the State officers on this highly important question as to when

these proposed amendments to the Constitution of this State should be submitted.

I shall await your response.

Sincerely and respectfully,
ROBERT W. SCOTT

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
P. O. BOX 629
RALEIGH
27602

ROBERT MORGAN
ATTORNEY GENERAL

26 August 1969

HONORABLE ROBERT W. SCOTT
GOVERNOR OF NORTH CAROLINA
STATE CAPITOL
RALEIGH, NORTH CAROLINA

DEAR GOVERNOR SCOTT:

Chapter 1228 of the Session Laws of 1969 (S.B. 178) enacted a statute which required each of the counties of the State to hold a special election for the purpose of considering whether a county shall or shall not impose and levy a sales and use tax of one per cent (1%) upon certain taxable transactions. Actually, the counties are voting *for* or *against* a local sales tax for each county in which the election is held. The Act provides as follows:

> "The board of elections of each county shall call and conduct a special election on Tuesday, November 4, 1969, for the purpose of submitting to the voters of each such county the question of whether a one per cent (1%) sales and use tax as hereinafter provided will be levied."

Chapter 1258 of the Session Laws of 1969 (H.B. 231) is an Act to revise and amend the Constitution of North Carolina. This is a revision of the Constitution of the State but it is to be submitted to the voters as a constitutional amendment.

Chapter 1200 of the Session Laws of 1969 (H.B. 331) is an Act to amend the Constitution of North Carolina to revise Article V concerning State and local finance. This too is a lengthy amendment to be submitted to the people.

Chapter 1004 (H.B. 327) is an Act to Amend Article VI of the

North Carolina Constitution relating to the qualifications of individuals to register and vote in elections in North Carolina.

Chapter 872 of the Session Laws of 1969 (H.B. 465) is an Act to amend the Constitution of North Carolina to authorize the General Assembly to fix the personal exemptions for income tax purposes.

Chapter 827 of the Session Laws of 1969 (H.B. 562) is an Act to amend the Constitution of North Carolina to provide for a reassignment of escheats.

Chapter 932 of the Session Laws of 1969 (H.B. 568) is an Act to amend the Constitution of North Carolina to require the General Assembly to reduce the State Administrative Departments to 25 and to authorize the Governor to reorganize the Administrative Departments subject to legislative approval.

Chapter 1270 of the Session Laws of 1969 (S.B. 362) is an Act to amend the Constitution of North Carolina to require convening of extra Sessions of the General Assembly upon request of three-fifths of the members of each House.

All of these constitutional amendments, including the large one which represents a revision of the Constitution, contain the following language:

> "The amendment set out in Section 1 of this Act (or Sections 1 and 2 of this Act, as the case may be) shall be submitted to the qualified voters of the State at the next general election. That election shall be conducted under the laws then governing elections in this State."

The question, therefore, arises as to whether or not the election to be held under Chapter 1228 of the Session Laws of 1969 whereby each county is required to vote on the question of the sales tax is or is not a general election. If it is a general election, then the constitutional amendments above referred to would have to be submitted for a vote of the people of the State as to their approval or disapproval. If it is not a general election, then such amendments would not be submitted at the sales tax election which is to be held on Tuesday, November 4, 1969, but would be submitted at the general election to be held in 1970.

It is important, therefore, to know whether the sales tax election is a general election or not. I am of the opinion that the sales tax election is not a general election. The Act calls the election a "special election." It is held in each county by the board of elections of each county and counties may approve or reject the sales tax issue for each respective county according to the county vote.

It does not involve a single, unitary question submitted to the voters of the State at large by the State Board of Elections. There is, however, some doubt about the matter and the question as to the nature of this sales tax election should be resolved in an authoritative manner so we will know the correct legal procedure in submitting the constitutional amendments.

I suggest, therefore, that you ask the Supreme Court of North Carolina for an advisory opinion on this question. As you know, there is ample legal precedent for the Governor of North Carolina to request the Supreme Court for an advisory opinion on pressing matters of this nature.

With all good wishes and kind regards, I am

Sincerely,
ROBERT MORGAN

THE HONORABLE ROBERT W. SCOTT
GOVERNOR OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

September 8, 1969

MY DEAR GOVERNOR SCOTT:

Your communication of 26 August 1969 requested an advisory opinion from the members of the Supreme Court of North Carolina on the following question: Is the sales-tax election to be held in each county on 4 November 1969, under the provisions of S. L. 1969, ch. 1228, a general election within the meaning of N. C. Const. Art. 13, § 2, so that the constitutional amendments proposed by the 1969 General Assembly must be submitted to the voters at that time?

The undersigned, each for himself and herself, expresses the opinion, after careful consideration and study, that the answer to the foregoing question is in the negative.

Respectfully,
R. HUNT PARKER,
Chief Justice
WILLIAM H. BOBBITT,
Associate Justice
SUSIE SHARP,
Associate Justice
JOSEPH BRANCH,
Associate Justice
J. FRANK HUSKINS,
Associate Justice

ADVISORY OPINION IN RE SALES-TAX ELECTION OF 1969

September 8, 1969

HONORABLE ROBERT W. SCOTT
GOVERNOR OF NORTH CAROLINA
STATE CAPITOL
RALEIGH, NORTH CAROLINA

DEAR GOVERNOR SCOTT:

It is our opinion that we, as Associate Justices of the Supreme Court of North Carolina, should not express our views concerning the law of the State governing any specific issue until that issue is presented to the Court for decision in an appropriate judicial proceeding between adversary parties to a justiciable controversy. Otherwise, as justices, when subsequently called upon to determine the same issue in such a proceeding, we may find ourselves embarrassed by an advisory opinion given without the benefit of argument and briefs. In that event, the litigant who takes a contrary view of the law might feel his case has been prejudged, thus denying him the benefit of his day in court.

Consequently, we reluctantly abstain from expressing our opinions concerning the interesting question propounded in your letter of August 24, 1969. Our failure to join in the response to your inquiry made by our associates upon the Court is not to be deemed an indication either of agreement or disagreement with any opinion expressed therein.

Respectfully yours,

CARLISLE W. HIGGINS,
I. BEVERLY LAKE,
Associate Justices

APPENDIXES

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RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS OF NORTH CAROLINA

The following Rules Governing Admission to the Practice of Law in the State of North Carolina have been promulgated and adopted by the Board of Law Examiners and recommended to the Council of The North Carolina State Bar, and the Council of The North Carolina State Bar at a regular quarterly meeting did adopt the same and when these Rules become effective, all prior Rules adopted by the Board of Law Examiners and approved by the Council and the Supreme Court of North Carolina shall become null and void and these Rules shall be the only Rules and are as follows.

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

RULE I

Compliance Necessary

Section 1. No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the State.

RULE II

Definitions

Section 1. The term "Board" as herein used refers to the "Board of Law Examiners of North Carolina".

Section 2. The term "Secretary" as herein used refers to the Secretary of the Board of Law Examiners of North Carolina.

RULE III

Applicants

Section 1. For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants". To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule VI hereof. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule VII hereof.

Section 2. As soon as possible after the filing date for applications, the Secretary shall make public a list of both general and comity applicants for the ensuing examination.

RULE IV

Registration

Section 1. Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register,

by filing with the Secretary, upon forms prescribed by the Board.

Section 2. Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the Board.

Section 3. Registrations shall be filed with the Secretary at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

Section 4. Each registration by a resident of the State of North Carolina must be accompanied by a fee of $10.00 and each registration by a non-resident shall be accompanied by a fee of $25.00. An additional fee of $25.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the Board. No part of a registration fee shall be refunded for any reason whatsoever.

RULE V

Applications of General Applicants

Section 1. After complying with the registration provisions of Rule IV, applications for admission to an examination must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application.

Section 2. Applications must be received and filed with the Secretary not later than 12:00 o'clock noon, Eastern Standard Time, on the 1st day of March in the year the applicant applies to take the bar examination.

Section 3. Every application by a general applicant shall be accompanied by a fee of $65.00 payable to the Board.

Section 4. No part of the fee required by Section 3 of this Rule V shall be refunded to the applicant unless the applicant shall file with the Secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the Board.

RULE VI

Requirements for General Applicants

Section 1. Before being certified (licensed) by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) Be of good moral character and have satisfied the requirements of Rule VIII hereof;

(2) Have registered as a general applicant in accordance with the provisions of Rule IV hereof;

(3) Possess the legal educational qualifications as prescribed in Rule IX hereof;

(4) Be a citizen of the United States;

(5) Be of the age of at least twenty-one (21) years;

(6) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least twelve (12) months prior to the date of his bar examination, or be and continuously have been a non-resident student attending a law school, approved by the board, in the State of North Carolina for a full and complete academic year commencing at least ten (10) months immediately prior to the examination date set forth in Section 2 of Rule XI. All non-resident students shall file with the Board a declaration of the applicant's intent, in the form prescribed by the Board, in good faith, to become a citizen and resident of the State of North Carolina;

(7) Have filed formal application as a general applicant in accordance with Rule V hereof;

(8) Stand and pass a written bar examination as prescribed in Rule XI hereof.

RULE VII

Requirements for Comity Applicants

Section 1. Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application, may be certified (licensed) by the Board to practice law in the State of North Carolina, without written examination, in the discretion of the Board, provided each such applicant shall:

(1) Be a citizen of the United States;

(2) File written application with the Secretary upon such form as may be prescribed by the Board. All such forms must be complete in every detail and every supporting document required of the applicant by the form must be submitted with the written application;

(3) Pay to the Board with each written application a fee of $250.00, not more than $125.00 of which may be refunded to the applicant in the discretion of the Board, if admission to practice law in the State of North Carolina is denied;

(4) Be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least twelve (12) months immediately prior to the approval of his application to practice law in the State of North Carolina;

(5) Proved to the satisfaction of the Board that he has been actively and substantially engaged in the practice of law in the state or states of his former residence during at least five (5) years out of the last eight (8) years immediately preceding the filing of his application with the Secretary. Serving as a judge of a court of record or as a full time teacher in a law school approved by the Board may be deemed practicing law within the meaning of this rule. Time spent in active military service of the United States, not to exceed five (5) years, may be excluded in computing the eight (8) year period referred to hereinabove;

(6) Satisfy the Board that the state or states of the applicant's former residence in which he practiced law will admit attorneys, to the practice of law in said states, who are licensed to practice law in the State of North Carolina without a written examination;

(7) Be in good professional standing in the state of his former residence;

(8) Furnish to the Board such evidence as may be necessary to satisfy the Board of his good moral character.

(9) Applicants admitted to the practice of law in another state after August 1971 must meet the educational requirements of Rule IX as hereinafter set out.

Section 2. Every person filing an application under this rule for admission by comity shall be bound by the actions and decisions of the Board, which actions and decisions shall be in the sole discretion of the Board, and the Board's actions on such applications under this rule shall be final.

Section 3. No license shall be issued to any applicant for admission under this Rule VII except at the time of the annual examination of the general applicants, provided the Board, when in

session at any other time, may in its discretion grant an interim permission to such comity applicants to practice law until license shall be issued.

RULE VIII

Moral Character

Section 1. Every applicant shall be of good moral character, and the applicant shall have the burden of proving that he is possessed of good moral character, or removing any and all reasonable suspicion of moral unfitness; and that he is entitled to the high regard and confidence of the public.

Section 2. All information furnished to the Board by an applicant, and all answers and questions upon forms furnished by the Board, shall be deemed material and such forms and information shall be and become a permanent record of the Board.

Section 3. No one shall be certified (licensed) to practice law in this State by examination or comity:

(1) Who fails to disclose fully to the Board whether requested to do so or not the facts relating to any disciplinary proceedings or charges, as to his professional conduct, whether same have been terminated or not, in this or any other state, or any Federal Court or other jurisdiction, or

(2) Who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges, or investigations, whether the same have been terminated or not in this or any other state or in any of the Federal Courts or other jurisdictions.

Section 4. Every applicant shall appear before a Bar Candidate Committee appointed by the Chairman of the Board in the Judicial District in which he resides, or in such other judicial district as the Board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the Committee as may be required on such forms as may be provided by the Board. A Bar Candidate Committee may require the applicant to make more than one appearance before the Committee and to furnish to the Committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be certified (licensed) to practice law in North Carolina. Each applicant will be advised by the Secretary or the Chairman of such Committee of the time and place of the applicant's appearance before the Bar Candidate Committee.

Section 5. All investigations in reference to the moral character of an applicant may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor any other technical rule of evidence need be observed.

Section 6. Every applicant may be required to appear before the Board to be examined about any matter pertaining to his moral character.

Section 7. No new application, or petition for reconsideration of a previous application, from an applicant who has been denied permission to take the bar examination by the Board on the grounds of failure to prove good moral character shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for reapplication or petition for a reconsideration is granted by the Board at the time of such denial. If, after consideration of the new application or a petition for reconsideration, the decision of the Board again is adverse, no further applications or petitions from such applicant shall be considered by the Board more often than once in any twelve (12) month period.

RULE IX

Educational Requirements

Section 1. General Education. — Each applicant, to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to ¾ of the work required for a bachelor's degree at the university of the State in which the college is located. With his application he shall file an affidavit from such college furnishing all information that the Board shall require.

Section 2. Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a certificate (license) to practice law, commencing with the examination in August 1971, shall file with the Secretary a certificate from the President, Dean or other proper official of the Law School approved by the Council of The North Carolina State Bar, a list of which is available in the office of the Secretary, or shall otherwise show to the satisfaction of the Board of Law Examiners that the applicant has received a law degree or that the applicant has successfully completed the courses required by the Council of The North Carolina State Bar, being the same courses as those set out in Rule XI, Sec. 3, hereof.

Section 3. The educational requirement in effect immediately prior to the adoption of this Rule IX as set forth in Appendix A, shall

apply to all who seek admission to the practice of law in the State of North Carolina, as a general applicant up to and including the examination required by Rule XI in August, 1970.

RULE X

Protest

Section 1. Any person may protest the application of any applicant to be admitted to the practice of law either by examination or as a matter of comity.

Section 2. Such protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the Secretary prior to the date on which the applicant is to be examined.

Section 3. The Secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

Section 4. In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the Board at a time and place to be designated by the Board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no certificate (license) to practice law shall be issued to him as provided by Rule XII until final disposition of the protest in favor of the applicant.

Section 5. Nothing herein contained shall prevent the Board on its own motion from withholding its certificate (license) to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Rule VIII.

RULE XI

Examinations

Section 1. One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

Section 2. The examination shall be held in the City of Raleigh and shall commence on the first Tuesday in August.

Section 3. The examination shall deal with the following subjects: Business Associations (including agency, corporations, and part-

nerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

Section 4. The Board shall determine what shall constitute the passing of an examination.

Section 5. No person shall be permitted to take the examination more than five (5) times within any ten (10) year period.

RULE XII

Certificate or License

Section 1. Upon compliance with the rules of the Board, and all orders of the Board, the Secretary, upon order of the Board shall issue a certificate (license) to practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

RULE XIII

Appeals

Section 1. Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination. After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his certificate (license) to practice law from him.

Section 2. Any appealing applicant within ten (10) days after notice of such ruling or determination, shall give notice of appeal in writing and file with the Secretary his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

Section 3. The record on appeal to the Superior Court shall consist of the following:

(a) The papers filed by the applicant with the Board under its rules.

(b) A certified copy of the evidence taken by the Board upon the question or questions appealed.

(c) The rulings and determinations of the Board.

(d) The notice of appeal.

(e) The exceptions.

Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary shall certify such record at the expense of the applicant.

Section 4. Such appeal shall lie to the Superior Court of Wake County and shall be heard by the Presiding Judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Such appeal shall operate as a supersedeas. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

Section 5. The said applicant or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court.

APPENDIX A

TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

All persons who seek admission to the practice of law in the State of North Carolina and who make application to take the written examination required for admission in August 1970, or in any year prior thereto, shall satisfy the Board of Law Examiners that they have fully complied with the rules relating to both general and legal education as said rules existed immediately prior to the adoption of the rules of which this Appendix is a part, and may be allowed to take the written examination in August 1970 or in any year prior thereto, and may be certified (licensed) to practice law in the State of North Carolina, provided they shall have fully complied with all other rules relating to admission to the practice of law in North Carolina. A copy of said rules as they existed at the time of the adoption of the present rules may be obtained from the Secretary of the Board of Law Examiners.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Assistant Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules of The Board of Law Examiners and Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the seal of The North Carolina State Bar, this the 17th day of July, 1967.

B. E. JAMES, *Assistant Secretary*
The North Carolina State Bar

After examining the foregoing amendments to the Rules of the Board of Law Examiners 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 22nd day of February, 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 of the Board of Law Examiners and 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 22nd day of February, 1968.

J. FRANK HUSKINS
For the Court

AMENDMENTS TO BAR RULES

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.

Article X of the Certificate of Organization of The North Carolina State Bar is amended by rewriting Canon 34 as appears in 212 N.C. at 851 as follows:

CANON 34

No division of fees for legal services is proper, except with another lawyer based upon a division of services or responsibility. This Canon, however, shall not preclude a law firm, by written agreement among its members, from providing for the sale by one partner of his interest, including good will, in the partnership, to the remaining members of the firm; and/or by written agreement may provide for retirement pay to a retiring partner upon such terms as to the remaining members of the firm may seem just and proper, and in such contract may provide for death benefits to his widow or to his estate, or both.

Article X of the Certificate of Organization of The North Carolina State Bar is amended by rewriting Canon A as appears in 212 N.C. at 853 as follows:

CANON A

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the Judge or Assistant Judge of any court inferior to the Superior Court to practice criminal law in any criminal court of the State.

Article X of the Certificate of Organization of The North Carolina State Bar is amended by rewriting Canon B as appears in 212 N.C. at 853 as follows:

CANON B

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the Solicitor, Assistant Solicitor or Substitute Solicitor of any court to practice criminal law in any criminal court of the State.

Article X of the Certificate of Organization of The North Carolina State Bar is amended by adding thereto following Canon B as appears in 212 N.C. at 853 the following section:

CANON B-1

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar who is the partner or the associate or who occupies office space, or who shares office expenses with any judge or assistant judge to practice criminal

law in any criminal court of any such judge or assistant judge or in any criminal court of the judicial district in which such judge or assistant judge holds his judicial office, or for any member of The North Carolina State Bar who is the partner or the associate or who occupies office space, or who shares office expenses, with any solicitor, assistant solicitor or substitute solicitor of any criminal court of the State to practice criminal law in any criminal court of such solicitor, assistant solicitor or substitute solicitor or in any criminal court of the solicitorial district in which such solicitor, assistant solicitor or substitute solicitor holds his solicitorial office.

Article X of the Certificate of Organization of The North Carolina State Bar is amended by adding thereto following Canon I as appears in 253 N.C. at 819 the following sections:

CANON J

Hereafter it shall be improper for an attorney to have his name printed in any directory in bold-face type.

CANON K

From and after April 16, 1965, it shall be deemed improper and unethical for any attorney or his partners or associates to represent a party in a civil action whose interest is adverse to that of a person or parties for whom he or any of them appeared in a criminal action when the said civil action involves the same transactions or occurrences as those involved in the criminal action, provided this Canon shall not affect pending litigation.

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 resolution, 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 22nd day of April, 1968.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing amendments to the Canons of Ethics 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 30th day of April, 1968.

R. HUNT PARKER
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Canons of Ethics 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 30th day of April, 1968.

HUSKINS, J.
For the Court

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Section 2 of Article II of the Certificate of Organization of The North Carolina State Bar is amended by adding a new paragraph to said Section as appears in 221 N.C. 583 as follows:

Article II.

Membership — Annual Membership Fees.

"2. Annual Membership Fees; When Due —

"Par. 4. From and after April 18, 1969 any attorney who has been suspended for the non-payment of dues be reinstated only upon the payment of all past dues, plus interest and costs, plus $25.00 reinstatement fee."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment 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 25th day of June, 1969.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 11 day of July, 1969.

R. HUNT PARKER
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendment 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 11 day of July, 1969.

HUSKINS, J.
For the Court

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Article V, Section 4, of the Certificate of Organization of the Rules and Regulations of The North Carolina State Bar as shown amended in 243 N.C. 795 is stricken, and the following is substituted therefor:

"Sec. 4. *Quorum.* At all annual and special meetings of The North Carolina State Bar those active members of The North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar, and that said Council did by resolution at a regular quarterly meeting unanimously adopt said amendment 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 2nd day of September, 1969.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 5th day of September, 1969.

R. HUNT PARKER
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 5th day of September, 1969.

HUSKINS, J.
For the Court

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.

The Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants pursuant to Chapter 1080 of the Session Laws of 1963 as appears in 259 N.C. 742, are repealed and the same are written in accordance with the provisions of Section 7A-509, Chapter 1013, of the Session Laws of 1969, as follows:

REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS AS PROVIDED BY 7A-501 OF CHAPTER 1013 OF THE SESSION LAWS OF 1969

Article I. Authority

Section 1.1. These Rules and Regulations are issued pursuant to the authority contained in Section 7A-509, Chapter 1013 of the Session Laws of 1969.

Article II. Determination of Indigency

Section 2.1. Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2. Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3. The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4. Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

Article III. Waiver of Counsel

Section 3.1. Any defendant desiring to waive the right to counsel as provided in Section 7A-507 shall complete and sign under oath a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the Court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2. Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3. The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

Article IV. Appointment of Counsel

Section 4.1. Any district bar as provided in G.S. 84-18, provided this shall not apply to the Twelfth and Eighteenth Judicial Districts, shall adopt a plan for the naming and designation of the attorneys to serve as assigned counsel. Such plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

Section 4.2. Such plan or plans as adopted by the district bar, shall be certified to the Clerk of Superior Court of each county to which each plan is applicable and shall constitute the method by which counsel shall be selected in said district for appointment as counsel to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge in the exercise of his sound discretion deems it proper in furtherance of justice to appoint as a counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, he is authorized to appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

Section 4.3. No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4. No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5. The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the district bar in which such county is located.

Section 4.6. The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan

applicable to said county as certified to him by the district bar and a permanent record of the appointments made under said plan.

Section 4.7. Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

Article V. Withdrawal by Counsel

Section 5.1. At any time during or pending the trial or re-trial of a case, the trial Judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2. At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3. Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

Article VI. Procedure for Payment Compensation

Section 6.1. Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in Section 7A-508.

Section 6.2. Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3. Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4. Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5. Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the 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 resolution, 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 12th day of October, 1969.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing Regulations Relating to the Appointment of Counsel for Indigent Defendants, it is my opinion that the same complies with a permissible interpretation of Chapter 1013 of the Session Laws of 1969 and Chapter 84 of the General Statutes incorporating The North Carolina State Bar.

This the 16th day of September, 1969.

R. HUNT PARKER
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing Regulations Relating to the Appointment of Counsel for Indigent Defendants 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 16th day of September, 1969.

HUSKINS, J.
For the Court

The following amendment to the Rules and Regulations of The North Carolina State Bar was duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

Article X of the Certificate of Organization of The North Carolina State Bar be and the same is hereby amended by rewriting Canon D as appears in 261 N.C. 784 as follows:

CANON D

The Solicitor of any inferior court may appear in the Superior Court of that District on behalf of the State and at the request of the District Solicitor and a Solicitor of the Superior Court may appear on behalf of the State in an inferior court in the district upon the request of the Solicitor of the inferior court.

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 resolution, at a regular quarterly meeting unanimously adopt said amendment 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 18th day of December, 1969.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing amendment to the Canons of Ethics 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 6th day of January, 1970.

WILLIAM H. BOBBITT
Chief Justice
Supreme Court of North Carolina

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Canons 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 6th day of January, 1970.

J. FRANK HUSKINS
For the Court

HISTORY OF THE NORTH CAROLINA SUPREME COURT LIBRARY

(July 1, 1969)

By RAYMOND M. TAYLOR

Marshal of the Supreme Court and Librarian of the Supreme Court Library

If government is to be "of laws and not of men,"[1] its laws must be recorded and preserved in an orderly manner that will make them accessible to all who are concerned with government.

It could have been such a realization in 1812 that caused the General Assembly of North Carolina then to adopt the law that resulted in the establishment of what today is the 66,000-volume North Carolina Supreme Court Library.

The law was ratified on Christmas Day of that year, and the law library that it established became and has remained especially important because of being North Carolina's only official repository of the printed legislative acts, codes, and court decisions of the Federal government and the governments of each of the individual states of the United States.

Although relatively few people other than lawyers and State officials ever have heard of the Supreme Court Library, the results of its users' work have great influence upon the lives of all citizens of North Carolina.

Foremost among the users of the Library are the Chief Justice and the six Associate Justices of the Supreme Court of North Carolina.[2] Their chambers and courtroom, like the Supreme Court Library, are in the Justice Building facing Capitol Square in Raleigh.

Other official users include the Judges and staff of the Court of Appeals, the Governor and his staff, members of the General Assembly and their staffs, the Attorney General and his staff, and representatives of many other areas of State government.

Although full utilization of the Library's facilities is difficult for persons not trained in the use of lawbooks, the Library frequently is used by students, newsmen, and laymen who are interested in various aspects of the law.

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[1] MASS. CONST., DECLARATION OF RIGHTS art. 30 (1780).

[2] They are Chief Justice R. Hunt Parker and Associate Justices William H. Bobbitt, Carlisle W. Higgins, Susie Sharp, I. Beverly Lake, Joseph Branch, and J. Frank Huskins.

It is remarkable that the Library has survived through the almost 157 years of its history, because it has been moved several times, had its custody passed around among a variety of officials, had no formally-trained librarian on its staff except during the last four years, and had no more than a minimum budget and staff at any time.

Establishing Legislation

Both the present Supreme Court Library and the present North Carolina State Library had their beginning with the 1812 law that placed upon the Secretary of State the duty to collect the books and documents received from the executive and the Congress of the United States and the executives and legislatures of the several states, and to bind, catalog, and keep those documents "for the use of the members of the General Assembly, heads of departments and judges of the supreme courts only."[3]

Responsibility for that library collection from 1812 to 1871 was held at various times by the Secretary of State, the Supreme Court Clerk, and a Librarian.[4] By at least 1843 the lawbooks had been separated from the non-law materials,[5] and in 1866 a *Catalogue of the North Carolina Law Library, Supreme Court Room* was published.[6] The *Catalogue* was prepared by O. H. Perry, State Librarian, and it lists approximately 2,000 books.

February 15, 1871, marks the formal separation of the lawbooks from the non-law materials, the law collection being called the "law library of the supreme court" and the remainder of the collection being called the "state library."[7]

The State's total library collection had been known by several names. The 1812 law gave it no name at all; by 1817 it was referred to as the "Library of the State;"[8] it sometimes was referred to as

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[3] 2 Rev. Laws of N.C., ch. 838 (Potter 1821).

[4] *See* R. Bradley, Catalogue of the Supreme Court Library 3 (1914); 2 Rev. Laws of N.C., ch. 838 (Potter 1821); Res., N.C. Laws 1817, p. 75; Res., N.C. Laws 1831-32, p. 141; N.C. Laws 1840-41, ch. 46; N.C. Pub. Laws 1842-43, ch. 54, § 1; N.C. Pub. Laws 1870-71, ch. 70.

[5] A law ratified January 26, 1843, provided that certain rooms in the Capitol "be fitted up for the use of the Supreme Court, Clerk's office, and Library belonging to said court," and it directed that "all that portion of the State Library, purchased for the use of the Supreme Court . . . shall be kept in said rooms, under the superintendence of the Clerk of said court." N.C. Pub. Laws 1842-43, ch. 54, § 1.

[6] The *Catalogue* was printed in Raleigh by "Nichols, Gorman & Neathery, Book and Job Printers."

[7] *See* N.C. Pub. Laws 1870-71, ch. 70.

[8] Res., N.C. Laws 1817, p. 75.

the "Public Library;"[9] and it also was called the "State Library."[10]

Perry's 1866 *Catalogue* refers to the law collection as the "North Carolina Law Library," the 1871 law calls it the "law library of the supreme court,"[11] and an 1872 law calls it the "supreme court library."[12]

That 1872 law directed that library funds be divided between the two libraries, appointed "the governor and judges of the supreme court" trustees of the "supreme court library," and appointed "the governor, superintendent of public instruction and the secretary of state" trustees of the "public library."

Locations

The Supreme Court Library then was located in the Capitol where the Court had been assigned quarters upon that building's completion in 1840. Although initially housed on the "[t]hird, or attic story" of the new Capitol,[13] legislation enacted in 1843 provided for the Court and its Library to move to rooms then occupied by the Comptroller,[14] on the "[f]irst, the lower story."[15] Also housed in that building were the State government's executive department, which now has exclusive occupancy of the Capitol, and the legislative department, which remained in the Capitol until the completion of the State Legislative Building in 1963.

March 5, 1888, the Supreme Court was assigned its own building.[16] It was the present Labor Building on the northeast corner of Edenton Street and Salisbury Street in Raleigh. Known as the "Supreme Court Building,"[17] that structure housed the Supreme Court, the Supreme Court Library, the Attorney General, the Superintendent of Public Instruction, and the non-law collection that by then was known as the State Library.[18]

The Supreme Court Library had a substantial collection to move

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[9] Res., N.C. Laws 1825, p. 90; N.C. Laws 1840-41, ch. 46.

[10] Res., N.C. Laws 1840-41, p. 110; N.C. Laws 1844-45, ch. 62.

[11] N.C. Pub. Laws 1870-71, ch. 70, § 3.

[12] N.C. Pub. Laws 1871-72, ch. 169, § 1.

[13] Paton, *Description of the Capitol*, N.C. Manual 22, 23 (1967).

[14] N.C. Pub. Laws 1842-43, ch. 54, § 1.

[15] Paton, *supra* note 13, at 22.

[16] *Dedication of New Supreme Court Building*, 99 N.C. 601 (1888); [Feb. 1888] N.C. Sup. Ct. Minute Docket 261.

[17] H. Jones, For History's Sake 115 (1966).

[18] *Id.*

to that new building. The volume count was approximately 4,000 in 1883[19] and "nearly" 10,000 in 1892.[20]

By 1900 the count exceeded 13,000,[21] and by 1914 the Supreme Court Library had more than 20,000 volumes.[22] It was at about the time of that latter count that the Library moved again, that time to the "Administration Building."[23] That structure now houses the Court of Appeals and the Utilities Commission. It is on the south side of Morgan Street, between Salisbury Street and Fayetteville Street, facing the Capitol, and its dedication ceremonies were held February 1, 1914.[24]

Finally, in July, 1940,[25] the Supreme Court moved into its present home, the six-story Justice Building on the south side of Morgan Street, between Fayetteville Street and Wilmington Street, facing the Capitol. The Supreme Court Library then consisted of approximately 39,000 volumes,[26] and most of them were shelved on the Justice Building's fifth floor where the Library offices were and are located.

In its Justice Building home the Library has grown by an average of almost 1,000 volumes per year,[27] and the count as of June 30, 1969, was 66,071.

The Library occupies approximately two miles of shelving spread over the entire fifth floor and located also in approximately 20 rooms on four other floors of the Justice Building. These rooms include the Justices' chambers, offices of the Court's officers, the courtroom and conference room of the Supreme Court, and the ground floor area that was assigned to the Library in 1966.

Holdings

The collection is especially valuable not only because of the near completeness of its holdings of original state and Federal session

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[19] R. Bradley, *supra* note 4, at 4.

[20] R. Bradley, Catalogue of the Supreme Court Library III (1892).

[21] R. Bradley, Catalog of the Supreme Court Library 5 (1900).

[22] R. Bradley, Catalogue of the Supreme Court Library 5 (1914).

[23] *Id. See* N.C. Pub. Laws 1911, ch. 66, § 4. The building was known also as the "Supreme Court Building." *Compare* Addresses at the Unveiling and Presentation of the Bust of William Gaston 50 (1915) *with, e.g.*, Memoirs and Speeches of Locke Craig 192 (M. Jones ed. 1923), and [Spring 1931] N.C. Sup. Ct. Minute Docket 1. A sign reading "Ruffin Building" was affixed to this structure in February, 1969.

[24] R. Bradley, *supra* note 22.

[25] *See* Explanations (Code of 1943), ch. 7, § 1427(a).

[26] *See* [Feb. 1940-Feb. 1941] N.C. Sup. Ct. Librarian Rep. 1.

[27] *See* [1967-1968] N.C. Sup. Ct. Marshal and Librarian Ann. Rep. 17.

laws, codes, and reported cases, but also because of the unique nature of many of its books.

Oldest among the volumes is a copy of Brooke's *Abridgment* "Imprinted at London in Fletestrete, within Temple Barre at the signe of the hande and starre by Richarde Tottyl the xii of October Anno. Domini 1576," almost four centuries ago. It is an abridgment of the Year Books, "the Law Reports of the Middle Ages" that "are by far the most important source of, and authority for, the medieval common law."[28]

Another edition of Brooke's *Abridgment* in the Library's collection is popular with school children because it was printed in 1586, one year before Virginia Dare was born to a family of Sir Walter Raleigh's colony on Roanoke Island. It is entitled *La Graunde Abridgement, Collecte & escrie, per le Iudge tresreuerend Sir Robert Brooke Chiualer, nadgairs chiefe Iustice del common Banke.*

Also of interest to visitors to the Library is *A Booke of Entries* by Sir Edward Coke.[29] This collection of pleadings was printed in 1614, the year before its author became Chief Justice of England.[30]

Although the first three books printed in North Carolina were the *Journals* of the House of Burgesses for 1749, 1750, and 1751, no copies of these books are known to be in North Carolina today, and the first book to be printed in North Carolina and still to be found in the state is *A Collection of All the Public Acts of Assembly, of The Province of North-Carolina: Now in Force and Use.* It was printed in New Bern by James Davis, who also printed the early *Journals*.[31]

The Supreme Court Library does not have a copy of the first edition of the *Collection* that was published in 1751, but it has two copies bearing the date 1752 and containing the laws included in the 1751 edition plus laws passed "At a General ASSEMBLY, held at *Bath*-Town, the Thirty First Day of *March*, in the Year of our Lord One Thousand Seven Hundred and Fifty Two."

Not only does the Supreme Court Library have hundreds of

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[28] 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 525, (3d ed. 1923); *see generally id.* 543-545.

[29] *See* 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 460-461 (1924).

[30] 1 J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 387-388 (1894).

[31] Powell, *Introduction* to THE JOURNAL OF THE HOUSE OF BURGESSES OF THE PROVINCE OF NORTH-CAROLINA (1749) vii, x-xi (1949). This *Collection* is known as "Swann's *Revisal*," and Powell states: "Only one copy — in the Public Record Office, London — is known of each of the *Journals* which preceded the *Revisal*." *Id.* at xi.

books more than a century old, but new books arrive daily. The Library receives the latest cases and laws from the state and national capitals and from private publishers as soon as they are printed.

In addition, the Library maintains a collection of the codes of ordinances of approximately 50 North Carolina municipalities, complete sets of approximately 140 legal periodicals such as *The North Carolina Law Review* and the *International Society of Barristers Quarterly,* partial sets of approximately 50 legal periodicals, and several thousand treatises, textbooks, encyclopedias, dictionaries, and digests pertaining to the law generally or to special phases of it such as torts, trusts, criminal law, agency, constitutional law, medical jurisprudence, and negligence.

Librarians

Since February 15, 1871, when the "law library" and the "state library" formally were separated the Supreme Court Library has been in the charge of an officer of the Supreme Court.

The 1871 law made it "the duty of the clerk of the supreme court to take charge of the law library of the supreme court, under such rules and regulations as the justices of said court may prescribe."[32] Thus, William Henry Bagley, who then was Clerk of the Supreme Court, became responsible for the Library. He was a former newspaper editor, State Senator, and Confederate officer who served as Supreme Court Clerk from January 18, 1869, to February 21, 1886.[33]

Bagley, at the Court's direction, employed a deputy to act as Librarian,[34] and he was relieved of his Library responsibilities February 9, 1883, when Robert Henry Bradley, who had been Supreme Court Marshal since 1879, became Librarian.[35] Bradley's election to the Librarian's position was by authority of an 1883 law that made the Justices alone the trustees of the Library and had the effect of removing the Governor as a trustee.[36] Bradley was the first person to hold the formal title of Supreme Court Librarian as well as the first to be both Marshal and Librarian.[37]

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[32] N.C. Pub. Laws 1870-71, ch. 70, § 3.

[33] *See* Haywood, *The Officers of the Court, 1819-1919*, 176 N.C. 800, 806-809 (1919).

[34] R. Bradley, *supra* note 4, at 4.

[35] [Feb. 1883] N.C. Sup. Ct. Minute Docket 583; *see generally* Haywood, *supra* note 33, at 819-820.

[36] N.C. Pub. Laws 1883, ch. 100. *See also* N.C. Pub. Laws 1871-72, ch. 169, § 1.

[37] Haywood, *supra* note 33, at 819.

Bradley twice moved the Supreme Court Library, first from the Capitol to the present Labor Building, and from there to the building that now houses the Court of Appeals and the Utilities Commission. While in his charge the Library grew from what he called "a mere skeleton of a library, with about four thousand volumes,"[38] to a collection that by 1914 contained "more than twenty thousand volumes."[39] In 1885, early in Bradley's period of service, the Court adopted the rule that existed until 1967 relative to the borrowing of books from the Supreme Court Library.[40]

Bradley's service was terminated by his death May 17, 1918, and his successor as Marshal and Librarian effective May 21, 1918, was Marshall DeLancey Haywood, whose early career had included service as Assistant State Librarian and Assistant Supreme Court Librarian.[41]

Haywood is remembered particularly for his historical writings, having written *Governor William Tryon, and His Administration in the Province of North Carolina, 1765-1771* (1903), *Lives of the Bishops of North Carolina* (1910), *Ballads of Courageous Carolinians* (1914), and *Builders of the Old North State* (1968). He served as Marshal and Librarian until his resignation November 15, 1930, "on account of ill health,"[42] and he died September 20, 1933.[43]

A former newspaperman, John Alexander Livingstone, was elected Librarian effective November 15, 1930.[44] He had been an editor of newspapers in Gastonia and Wilmington and had worked as state news editor, legislative reporter, editorial writer, and Washington

[38] R. BRADLEY, *supra* note 4, at 4.

[39] *Id.* at 5.

[40] *Id.* at 4. The rule was as follows: "No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned." N.C. SUP. CT. R. 41(2), 4A N.C. GEN. STAT. (1955). The Supreme Court repealed that rule December 7, 1967. Annot., N.C. SUP. CT. R. 41, 4A N.C. GEN. STAT. (Supp. 1967).

[41] *See* [Spring 1918] N.C. SUP. CT. MINUTE DOCKET 209; *see generally* 17 WHO'S WHO IN AMERICA 1084 (1932).

[42] [Fall 1930] N.C. SUP. CT. MINUTE DOCKET 56.

[43] 1 WHO WAS WHO IN AMERICA 541 (1943).

[44] [Fall 1930] N.C. SUP. CT. MINUTE DOCKET 56.

correspondent for *The News and Observer* prior to beginning his service with the Court.[45]

Livingstone was associate editor of the *Commercial Law Journal* during part of his tenure as Supreme Court Librarian, and he also maintained a private law office while serving as Librarian.

Although the Supreme Court on June 30, 1936, "ordered" that Livingstone "be given the duties of Marshal of the Supreme Court in addition to the duties of Librarian,"[46] there is evidence that Livingstone, unlike all of the Librarians who preceded and succeeded him, never served as Marshal. Edward Murray, who had been Assistant Librarian under Haywood, was elected Marshal when Livingstone was elected Librarian,[47] and Murray continued to perform the Marshal's duties, but not to use the title, even after he became Clerk of the Supreme Court and until Livingstone died May 26, 1937.[48]

The 31-year-old scholar-lawyer who was appointed June 30, 1937, to succeed Livingstone was Dillard Scott Gardner, who had practiced law three years and served four years as Associate Director of the Institute of Government immediately before becoming Marshal and Librarian of the Supreme Court.[49]

Gardner, who served in the dual positions until his death April 15, 1964, had the unenviable task of moving the Library to the Justice Building in 1940, and the arrangement of shelving and books still is substantially as he planned it.

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[45] *See generally* 17 WHO'S WHO IN AMERICA 1432 (1932); 1 WHO WAS WHO IN AMERICA 737 (1943).

[46] [Fall 1936] N.C. SUP. CT. MINUTE DOCKET 230.

[47] [Fall 1930] N.C. SUP. CT. MINUTE DOCKET 56. Murray's election as Marshal was effective November 15, 1930, "with additional duties as Assistant Librarian to be assigned by the Court . . . ." *Id.*

[48] This information was given to the writer October 13, 1966, by John Samuel White, Mrs. Lena Hicks Rucker, and Miss Maude Etheridge Westbrook, three Supreme Court employees who also were employed by the Court during the time that Livingstone was Librarian. The North Carolina Reports do not list a Marshal for those years. *See* 203 N.C. iii (1933); 204 N.C. iii (1933); 205 N.C. iii (1934); 206 N.C. iii (1934); 207 N.C. iii (1935); 208 N.C. iii (1936); 209 N.C. iii (1936); 210 N.C. iii (1937); 211 N.C. iii (1937); 212 N.C. iii (1938). Murray was designated Acting Clerk effective July 13, 1932. [Fall 1932] N.C. SUP. CT. MINUTE DOCKET 5. He was appointed Clerk effective June 28, 1933. [Spring 1933] N.C. SUP. CT. MINUTE DOCKET 120. Livingstone's widow, Mrs. Rosalie Preston Turner Livingstone, told the writer March 14, 1969, that her husband never served as Marshal, and that Chief Justice Walker Parker Stacy told her that her husband resigned his position with the Court on the morning of May 26, 1937, the day that he suffered a heart attack and died.

[49] [Spring 1937] N.C. SUP. CT. MINUTE DOCKET 266; *see generally* 32 WHO'S WHO IN AMERICA 1105 (1962).

During his tenure the collection grew from approximately 35,530 volumes[50] to more than 60,000 volumes,[51] and he became recognized as a writer and authority in several areas of law including evidence, jurisprudence, and the North Carolina Constitution.

Gardner's eminence as a law librarian is indicated by his service from 1956 to 1957 as President of the American Association of Law Libraries.[52]

Recent Developments

June 3, 1964, the writer of this article was elected Marshal of the Supreme Court and Librarian of the Supreme Court Library effective July 1 of that year.[53] Several subsequent developments in the Supreme Court Library's history have been as follows:

1. *Increased Appropriation* — Although the Library's appropriation for books and binding for the 1964-1965 fiscal year was only $9,000, a $14,165 allotment from the State's Contingency and Emergency Fund in November, 1964, made a total of $23,165 available for books and binding in that fiscal year.[54] The appropriation was $15,458 for 1965-1966;[55] $15,073 for 1966-1967;[56] $21,500 for 1967-1968;[57] and $25,000 for 1968-1969. Thus, the Library in recent years has been able to make far greater progress than before had been possible, the average annual appropriation for the preceding 14 years, 1950-1964, having been only $6,342.[58]

2. *Code Collection* — By use of a large portion of the November, 1964, allotment from the State's Contingency and Emergency Fund the best available annotated code of each state of the United States has been acquired, some of the new codes replacing small unannotated ones.[59] Also, municipal codes have been given to the Library by approximately 50 North Carolina municipalities.[60]

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[50] *See* [Feb. 1937-Feb. 1938] N.C. Sup. Ct. Librarian Rep. 3.

[51] [Feb. 1963-Feb. 1964] N.C. Sup. Ct. Librarian Rep. 3.

[52] *See generally* Brandis, *Memorial to Dillard Scott Gardner*, 11 N.C. Bar 43 (1964); and Oliver, *In Memory of Dillard S. Gardner*, 57 L. Lib. J. 242 (1964); 4 Who Was Who in America 345 (1968).

[53] [Spring 1964] N.C. Sup. Ct. Minute Docket 2-3; *see generally* 35 Who's Who in America 2161 (1968); 11 Who's Who in the South and Southwest 1000 (1969).

[54] [1964] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 23.

[55] [1965] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 16-18.

[56] *Id.*

[57] [1967-1968] N.C. Sup. Ct. Marshal and Librarian Ann. Rep. 24.

[58] *See* [1964] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 23.

[59] *See* [1964] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 15-17; [1965] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 12-13.

[60] *See* [1964] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 17; [1965] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 3.

3. *Textbooks* — The Library's treatise and textbook section has been updated by the purchase of later editions and the latest supplements of books already in the collection and by the addition of new volumes in important areas of the law.[61]

4. *Tax Service* — The Library's first complete loose-leaf tax service was acquired in 1965.[62]

5. *Special Collection Room* — The preparation of a room for the proper storage of the Library's most rare and valuable books has been a goal of the present Librarian since 1964. Although difficulties have been encountered, it is anticipated that work on the room will proceed toward satisfactory completion in 1969 and that special equipment thereafter will keep the room's temperature and humidity at constant and desirable levels at all times.[63]

6. *Ground Floor Addition* — December 12, 1966, the first books were moved into the Library's new ground floor addition in which extensive remodeling and the installation of new shelving in quarters formerly occupied by the Board of Paroles provided space for the storage of approximately 10,000 books.[64]

7. *Professional Librarian* — October 1, 1965, Miss Alice Cameron Reaves began work as Assistant Librarian succeeding Mrs. Mary Champion Broughton, who retired March 31, 1965, after having been employed in the Library since March 16, 1948.[65] Miss Reaves received her degree of Master of Science in Library Science from The University of North Carolina at Chapel Hill and has the distinction of being the first formally-trained librarian to be a member of the Supreme Court Library staff.[66]

8. *Staff Additions* — A Contingency and Emergency Fund allotment in September, 1964, and a legislative appropriation in 1965 made possible the employment of a Secretary to the Marshal and Librarian. This was the first addition to the Library staff in perhaps half a century, and the first person to hold the position was

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[61] *See* [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 14; [1966] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 7-8.

[62] *See* [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 14.

[63] *See* [1964] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 19; [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 13-14; [1966] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 7; [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 8.

[64] *See* [1966] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 6-7; [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 9.

[65] *See* [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 8-10.

[66] [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 10-11.

Miss Diane June Jackson.[67] A Library Assistant's position was added in 1967 and the vacancy resulting from the transfer of William Lee Person, Janitor and Messenger, in 1967 was filled with a second Library Assistant's position.[68] Eleven persons subsequently have occupied these two positions.[69]

9. *Copy Service* — A copy service was put into operation September 24, 1965, as a result of a 1965 General Assembly appropriation that had been requested by the Librarian to enable the Court to acquire a modern dry-copy machine.[70] This service enables persons throughout the state to obtain copies of Library material easily and quickly. During 1966, the first full calendar year of the service's operation, fees totaling $524.80 were received for 2,624 copies that were made pursuant to 241 requests from persons in 34 North Carolina towns.[71] Records for the 1967-1968 fiscal year show an increase in copy requests to 356 for the year, an increase in copies made to 4,619, and an increase in receipts to $923.80.[72] The steady increase

[67] The Library *Catalogue* issued in 1914 states that it was "Prepared and Arranged by R. H. Bradley, Librarian, Assisted by Hubert L. Shaw." R. BRADLEY, *supra* note 22, at 1. That indicates that the Library staff in 1914, as on July 1, 1964, when this writer took office, consisted of a Librarian and an Assistant Librarian. The first secretary served September 11, 1964, to February 10, 1967, and she now is Mrs. David Mauk Conley. [1964] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 14-15; [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 13. Her successors as secretary have been Mrs. Gayle Hackett Pshyk, February 27, 1967, through October 31, 1967; Mrs. Shirley Jones Jenkins, December 18, 1967, through June 30, 1968; and Mrs. Rebecca Talley Brisson, beginning August 5, 1968. *See* [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 13-14.

[68] *See* [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 14.

[69] They are Linwood Earl Benson, June 9, 1967, through September 8, 1967; Sidney Kermit Martin, September 18, 1967, through March 8, 1968; Mrs. Helen Bell Wilson, September 21, 1967, through January 17, 1968; Dennis Luther Bruce, January 30, 1968, through January 27, 1969; Rodney Dickinson Boyette, June 4, 1968, through August 30, 1968; Lewis Patrick Warren, Jr., June 4, 1968, through August 30, 1968; Robert Scott Green, part time September 9, 1968, through September 20, 1968; Arthur Marvin Ingram, Jr., part time beginning September 9, 1968; Thomas Sims Erwin, part time September 30, 1968, through January 24, 1969; Richard Alan Whitfield, part time January 27, 1969, through May 20, 1969; and Mrs. Claris Smith Jones, beginning January 28, 1969. *See* [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 14-15. Other Library Assistants who have worked in the Library in recent years are William Judson Ready, early July through August 21, 1964; and Martin Nesbitt Erwin, July 1, 1965, through August 31, 1965. *See* [1964] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 13-14; [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 11-12. Miss Bessie Mae (Betsy) Dowtin began work May 29, 1969, as a summertime Library Aide.

[70] [1965] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 18-20.

[71] [1966] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 11-12.

[72] [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 26.

in the number of copy requests and fees received by the Library resulted in the installation of a copy machine in the main office of the Library on April 22, 1968,[73] and records for the 1968-1969 fiscal year show an increase in copy requests to 563 for the year, an increase in copies made to 6,184, and an increase in receipts to $1,236.80. The Librarian is authorized to furnish both certified and uncertified copies,[74] and most copies are mailed or delivered within one hour after the request for them is received.

10. *Card Catalog* — Although the need for a card catalog has been felt for many years, the Library probably never has had a complete and accurate card catalog of its holdings. Upon the recommendation of the Librarian, the Supreme Court on March 1, 1967, "authorized and directed" him "to begin and continue work toward the preparation of a correct card catalog of the Supreme Court Library as funds for that purpose from time to time are made available," and the Court authorized the expenditure of $625 for a card catalog cabinet and $200 for an initial purchase of catalog cards. A 30-drawer, 36,000-card capacity cabinet subsequently was purchased and a standard procedure was adopted whereby catalog cards for each new title received by the Library are ordered from the Library of Congress.[75]

11. *New Legislation* — The 1967 General Assembly enacted legislation effective July 1, 1967, rewriting the laws relating to the organization of the Supreme Court and the Supreme Court Library and creating a Court of Appeals.[76] The most important respects in which that law relates to the Library and the most important related developments subsequent to the passage of that legislation are as follows:

a. *Function* — The new law states the Library's function as follows:

> The primary function of the Supreme Court library is to serve the appellate division of the General Court of Justice, but it may render service to the trial divisions of the General Court of Justice, to State agencies, and to the general public, under such regulations as the librarian, subject to the approval of the library committee, may promulgate.[77]

This statutory provision is particularly significant because it is

[73] *Id.* at 6-7.

[74] N.C. GEN. STAT. § 7A-13(f) (Supp. 1967).

[75] *Id.* at 1-2.

[76] N.C. Laws 1967, ch. 108.

[77] N.C. GEN. STAT. § 7A-13(b) (Supp. 1967).

the first legislative statement of the function of the Supreme Court Library and it serves to help resolve the "two contrary philosophies" on that subject.[78]

b. *Library Committee* — The new law eliminated the provision for trustees of the Library[79] and provided for a Library Committee "to be composed of two justices of the Supreme Court appointed by the Chief Justice, and one judge of the Court of Appeals appointed by the Chief Judge."[80] July 26, 1967, Chief Justice R. Hunt Parker of the Supreme Court appointed Associate Justices Susie Sharp and I. Beverly Lake to the Library Committee,[81] and August 16, 1967, Chief Judge Raymond B. Mallard of the Court of Appeals appointed Judge David M. Britt to the Library Committee.[82] Justice Sharp is chairman of that committee.

c. *Rules* — The new law repealed the statutes under which the Library had been operating, including authorization for the Supreme Court to prescribe Library rules and regulations,[83] and it gave to the Librarian the authority to make appropriate rules and regulations, subject to the approval of the Library Committee.[84] The Supreme Court repealed Supreme Court Rule 41 effective December 7, 1967,[85] and the first comprehensive rules for the Library became effective December 20, 1967, when North Carolina Supreme Court Library Rules were adopted.

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[78] The "private library of the Court" philosophy has prevailed since at least 1883 when N.C. Laws 1883, ch. 100 removed the Governor as a trustee of the Library and gave "charge of the court library" to "the justices of the supreme court and their respective successors in office." The "state law library" philosophy is that the Library "has the duty of recognizing and meeting the needs of not only the members of the Court but also all State and local government officials and employees as well as members of the Bar and citizens throughout the State who desire the services of a complete, up-to-date, and adequately and competently staffed law library." *See* [1964] N.C. SUP. CT. MARSHAL-LIBRARIAN ANN. REP. 21-23.

[79] One of the laws it repealed provided that "[t]he justices of the Supreme Court shall be, ex officio, the trustees of the Supreme Court library" with "general charge and control of the library." N.C. GEN. STAT. § 7-31 (1953).

[80] N.C. GEN. STAT. § 7A-13(d) (Supp. 1967).

[81] Memorandum from Parker, C.J. to Justice Sharp and Justice Lake, July 26, 1967, on file in North Carolina Supreme Court Library and in [Spring 1967] N.C. SUP. CT. MINUTE DOCKET 181-A.

[82] Memorandum from Mallard, Chief Judge, Court of Appeals, to Judge David M. Britt, August 16, 1967, on file in North Carolina Supreme Court Library and in [Spring 1967] N.C. SUP. CT. MINUTE DOCKET 182.

[83] Those statutes were N.C. GEN. STAT. §§ 7-30, 7-31, 7-32, and 7-33 (1953).

[84] N.C. GEN. STAT. §§ 7A-13(b) and 7A-13(d) (Supp. 1967).

[85] Annot., N.C. SUP. CT. R. 41, 4A N.C. GEN. STAT. (Supp. 1967).

d. *Seal of Office* — The new law authorized the Librarian to adopt a seal of office,[86] and effective July 1, 1967, he adopted a seal that he had designed and that was drawn by commercial artists of Ferree Studios. A metal seal substantially similar to the drawing was procured for use in impressing official documents, and it makes an impression two and one-eighth inches in diameter. In addition to the symbolic torch of truth in the center, evenly-balanced scales of justice, and opened book of law with the letters "N" on the left page and "C" on the right page as abbreviations of "North Carolina," the seal contains an English inscription, three dates, and three Latin words. The inscription around the upper border is "SEAL OF THE LIBRARIAN OF THE SUPREME COURT LIBRARY"; the inscription around the lower border is "STATE OF NORTH CAROLINA"; the date to the left of the flame is 1812, when the first legislation providing for the Library was enacted; the date to the right of the flame is 1871, when the Supreme Court Library and the State Library formally were separated; and the date superimposed upon the torch handle beneath the book is 1967, when the new legislation relative to the Library was enacted and the seal was adopted. The Latin words are *BIBLIOTHECA,* meaning "library" and being on a scroll beneath the torch and scales; *LEX* meaning "law" and being between the suspension cords to the left pan of the scales; and *IUS,* meaning "right" or "justice" and being between the suspension cords to the right pan of the scales.[87]

12. *Federal Documents Agreement* — October 15, 1968, the Supreme Court Librarian and the State Librarian on behalf of their respective libraries entered into an agreement whereby the State Library, being an official "Depository Library" for United States Government publications, regularly acquires many of those publications that contain law or law-related material and places those publications in the Supreme Court Library for use under the same rules that apply to all other items in the Supreme Court Library.[88] Some similar material had been added to the Supreme Court Library collection irregularly in prior years, but this agreement that was initiated by the Librarian of the Supreme Court Library provides for the Library hereafter regularly to acquire without cost the increasingly important printed laws, reports, decisions, opinions, rules, and regulations of Federal courts, legislative bodies, executive departments, regulatory commissions, and administrative agencies.

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[86] N.C. GEN. STAT. § 7A-13(e) (Supp. 1967).

[87] *See* [1967-1968] N.C. SUP. CT. MARSHAL AND LIBRARIAN ANN. REP. 5.

[88] Letter from Raymond M. Taylor to Philip S. Ogilvie, November 1, 1968, and letter from Philip S. Ogilvie to Raymond M. Taylor, November 6, 1968, both on file in the North Carolina Supreme Court Library.

13. *Exchange Agreements* — Since July 1, 1964, the Supreme Court Library has initiated, formalized, or obtained confirmation of agreements with appropriate agencies of other states for the exchange of session laws of 49 states,[89] court reports of 42 states,[90] and codes of 22 states.[91] Materials from states that are not parties to exchange agreements are acquired by purchase.

14. *Citators* — Although the Library's collection of citators long was limited to units for North Carolina and the National Reporter System, special volumes for periodicals and popular-name references have been added and units for the other 49 states were acquired in June, 1969.

15. *Special Projects* — In its effort to get the Library collection better organized, to have accurate records of Library holdings, to make the best possible use of all book storage space and other Library facilities, and to maintain all Library material and equipment in the best possible condition, the Library staff since July 1, 1964, always has been engaged in one or more special projects designed to help meet those objectives.[92] Among those projects not already mentioned have been or are inventorying and reorganizing the entire Library collection; setting up a complete and accurate system of records; preparing complete collections of North Carolina and United States session laws, codes, and court reports; withdrawing surplus items; rebinding, repairing, or replacing materials in bad condition; and improving the physical facilities by cleaning, painting, and installing improved lighting.

Present Staff and Hours

In addition to the Librarian, the Assistant Librarian, the Secretary, and the Library Assistants, the Library sometimes is staffed by the seven Research Assistants to the Justices of the Supreme

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[89] Session laws exchanges are with all of the other states of the United States.

[90] Court reports exchanges are with all of the other states of the United States except Alaska, California, Kentucky, Missouri, North Dakota, Texas, and Washington. *See* [1966] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 6.

[91] Code exchanges are with Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Maine, Maryland, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wyoming. [1964] N.C. Sup. Ct. Marshal-Librarian Ann. Rep. 16.

[92] *See, e.g.*, [1967-1968] N.C. Sup. Ct. Marshal and Librarian Ann. Rep. 9-12.

Court.[93] The Research Assistants, who are recent law school graduates serving one-year clerkships with the Court, rotate with the permanent Library staff in keeping the Library open on Saturday mornings from 9:00 o'clock until 12:00 o'clock noon,[94] except that the Library Committee customarily authorizes that the Library be closed on Saturdays during a portion of the summer. Library hours Monday through Friday are from 9:00 o'clock in the morning until 5:00 o'clock in the afternoon.[95] Use after hours is as provided by North Carolina Supreme Court Library Rules.[96]

Past and Future

In his *Fourth Institute* Lord Coke wrote, "[L]et us now peruse our ancient authors, for out of the old fields must come the new corne."[97]

For almost 157 years the judges, legislators, executive officials, and lawyers of North Carolina have been able to peruse the ancient authors in the law collection that has grown into the present Supreme Court Library. Such opportunity for perusal and rewarding research has made clearer the understanding, greater the enlightenment, and wiser the decisions of those who through the years have interpreted and administered the old laws and made the new ones for our State.

If they remain true to past tradition, meet present challenge, and adequately prepare for future need, those in charge of the Supreme Court Library now and in coming years will continue with increasing perseverance the essential work of collecting, preserving, and making conveniently available for efficient use those valuable records of law, ancient and modern, so necessary to our society's ongoing quest for perfect justice.

Names and Periods of Service of the Librarians of the North Carolina Supreme Court Library

Robert Henry Bradley	February 9, 1883 — May 17, 1918
Marshall DeLancey Haywood	May 21, 1918 — November 15, 1930
John Alexander Livingstone	November 15, 1930 — May 26, 1937
Dillard Scott Gardner	June 30, 1937 — April 15, 1964
Raymond Mason Taylor	July 1, 1964 —

[93] The Research Assistants for 1968-1969 have been as follows: Thomas Willis Haywood Alexander; Pender Roberts McElroy; John Cabriel Breckenridge Regan, III; Robert Livingston Thompson; Broxie Jay Nelson; George Verner Hanna, III; and William Preston Few.

[94] N.C. Sup. Ct. Library R. 3 (1967).

[95] *Id.*

[96] N.C. Sup. Ct. Library R. 5 (1967).

[97] E. Coke, The Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of Courts 109 (1797).

Printed by order of the Supreme Court in Conference, March 12, 1969.

NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13 of the General Statutes of North Carolina, the following rules for the North Carolina Supreme Court Library have been approved by the Library Committee and are hereby promulgated:

RULES AND REGULATIONS SUPREME COURT LIBRARY STATE OF NORTH CAROLINA

The following rules and regulations promulgated pursuant to Section 7A-13 of the General Statutes of North Carolina shall apply to the use of the Supreme Court Library:

GENERAL PROVISIONS

1. **Short Title.** — The following rules and regulations shall be known and may be cited as North Carolina Supreme Court Library Rules.

2. **Definitions.** — Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(a) "Assistant Librarian" means the Assistant Librarian of the Supreme Court Library.

(b) "Librarian" means the Librarian of the Supreme Court Library.

(c) "Library" means the North Carolina Supreme Court Library.

(d) "Library Committee" means that committee appointed and acting pursuant to Section 7A-13 of the General Statutes of North Carolina.

(e) "Library material" means any book, paper, document, map, magazine, pamphlet, newspaper, manuscript, film, periodical, or other item or material, regardless of physical form or characteristics, that is a part of the collection or holdings of the Library.

(f) "Official Register" means that list of persons and positions that is denominated "Official Register" and that appears in that volume of the Session Laws of North Carolina last published prior to the application of any Rule containing that term.

(g) "Rules" means any rules or regulations contained in the North Carolina Supreme Court Library Rules.

(h) "Staff" means any assistants or other persons or employees appointed by or working under the supervision of the Librarian of the Supreme Court Library.

HOURS AND USE OF LIBRARY

3. **Hours.** — Except when the Library Committee authorizes that it be closed, the Library shall be open for public use Monday through Friday of each week from nine o'clock each morning until five o'clock each afternoon and Saturday from nine o'clock in the morning until twelve o'clock noon.

4. **Use During Regular Hours.** — Any person who conducts himself in a quiet, orderly, and lawful manner and who abides by the Rules and the reasonable requests of the staff may visit the Library and reasonably use its material to such extent, in such manner, and for such duration as in the discretion of the Librarian or Assistant Librarian reasonably does not or will not interfere with the performance of the Library's primary function of serving the Appellate Division of the General Court of Justice.

5. **Use After Hours.** — Only the following persons may enter the Library or use the material or facilities of the Library when the Library is not open for public use as provided for by Rule 3:

(a) Members and employees of the Supreme Court and the Court of Appeals.

(b) Members of the North Carolina State Bar, Inc. who have offices in the Justice Building.

(c) Any person who has a valid Library use permit issued under the hand and seal of the Librarian. The Librarian in his discretion may issue Library use permits upon written application in the form prescribed by the Librarian. Each respective Library use permit shall be valid for the period determined by the Librarian in his discretion, but in no event shall a permit be valid for more than two years from the date of its issuance. The Librarian in his discretion may revoke any Library use permit at any time.

6. **Entrance and Exits.** — All visitors and users of the Library shall enter and leave the Library through an elevator except in emergency situations and times when an elevator is not in operation.

7. **Conduct.** — Smoking, consumption of food or beverages other than from water fountains in the Library, loud talking, boisterous

or disorderly conduct, and the use of dictating equipment shall not be permitted in the Library.

USE OF MATERIAL

8. **Clearing of Tables.** — At the end of each day the staff shall clear all tables and reshelve all unshelved books in the reading area of the Library; however, provided that no books shall be left on tables for more than two consecutive nights, the staff may leave material on tables overnight when the person using the material leaves on it a signed and dated request that it not be reshelved.

9. **Abuse of Material.** — No person shall damage or abuse any Library material or equipment in any respect. Marking, writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, or breaking such material or equipment, or folding pages, closing a book with a writing instrument or other object within it, tearing out or removing any page or pocket part without authority, or stacking other books or heavy objects on an open book are included within this prohibition.

10. **Replacement of Lost Materials.** — Any person who unintentionally or inadvertently shall lose or misplace any Library material and for that reason fail to return it within the time that it is due to be returned shall, within thirty (30) days from such due date, make such replacement as will be acceptable to the Librarian in his discretion, or pay to the Library the fair value of the material as determined by the Librarian.

SERVICES

11. **Copy Service, Fees, and Certification.** — The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(a) All copies requested by members and employees of the Supreme Court and the Court of Appeals shall be furnished without charge.

(b) Provided that the number of copies requested at any one time does not exceed ten (10) pages, or with the permission of the Librarian or the Assistant Librarian regardless of the number of copies requested, the Library shall furnish without charge such copies as personally are requested by persons holding positions listed in the Official Register and that such persons state are to be used in the discharge of their official duties; however, when the request

is for more than ten (10) pages at any one time, or total requests from the same person in any single month exceed fifty (50) pages, the Librarian or Assistant Librarian may require the approval of the Library Committee before making such copies without charge, such approval then to be given only for good cause shown and upon the written and signed application of the person requesting the copies.

(c) Except as provided for in Sections (a) and (b) of this Rule, the Library shall charge and collect a fee of twenty cents ($.20) per page for each copy that it makes.

(d) The Librarian shall charge and collect a fee of one dollar ($1.00) for each individual case, statute, or other distinct item that he certifies pursuant to Section 7A-13(f) of the General Statutes of North Carolina, except that certificates requested by persons holding positions listed in the Official Register shall be provided without charge. Preparation of copies to be certified and the charges therefor, if any, shall be as provided by Sections (a), (b) and (c) of this Rule.

(e) Fees for making or certifying copies shall be paid on or before delivery, except that copies requested by members of the North Carolina State Bar, Inc. may be made and delivered upon the condition that full payment will be made within forty-eight (48) hours after the delivery of the copies.

12. **Research Service.** — No member of the Library staff shall do law research for or give legal advice or counsel to any person except as requested by a member of the Supreme Court or the Court of Appeals for his own use, or as authorized by the Librarian.

BORROWING AND REMOVING MATERIAL

13. **Who May Borrow Material.** — The following persons only may borrow and remove material from the Library:

(a) Members and employees of the Supreme Court and the Court of Appeals, in person or upon his or her signed memorandum.

(b) The Attorney General and members of his staff who are members of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum.

(c) The Governor and members of the Council of State, in person or upon his or her signed memorandum.

(d) The President of the Senate, the Speaker of the House of Representatives, and the respective chairmen of the committees of the General Assembly, in person or upon his or her signed memorandum.

(e) The heads or duly constituted representatives of established agencies or institutions that offer reciprocal services to the Library and that are engaged in what the Librarian in his discretion deems to be worthy educational, historical, library, archival, or bibliographical activity for which they have a legitimate need to borrow the material requested.

(f) The Secretary of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum, as long as his or her office is in the Justice Building.

14. **Return of Borrowed Material.** — Material borrowed from the Library shall be returned to the Library within the time provided below:

(a) Members of the Supreme Court and the Court of Appeals shall return borrowed material as early as possible, but in no event shall any item be retained for more than one week from the time of borrowing.

(b) Borrowers who are not members of the Supreme Court or the Court of Appeals shall return borrowed material before the closing of the Library on the day that the item is borrowed except when upon the borrower's written request stating good reason the Librarian or the Assistant Librarian in his or her respective discretion authorizes that any specific item be retained by the borrower until a later time as set by the Librarian or the Assistant Librarian.

15. **Receipts for Borrowed Material.** — Each person who borrows material from the Library shall give a receipt therefor on a form prescribed for that purpose by the Librarian and available in the Library.

16. **Borrowing Proscriptions and Limitations.** — The Librarian in his discretion may limit or proscribe the borrowing of old books, rare books, digests, indexes, general reference materials, looseleaf services, encyclopedias, advance sheets, and other materials that because of their particular value, nature, or frequent use should remain in the Library at all times or have only limited circulation.

17. **Removal from the Justice Building.** — No borrower, except a Judge of the Court of Appeals upon his written request, may remove any Library material from the Justice Building except when each of the following conditions exists:

(a) It is not reasonably possible for the person desiring to use the material to do so within the Justice Building.

(b) It is impracticable to copy the material by use of the facilities available in the Justice Building, or such copies reasonably

would not serve the purpose of the person desiring to borrow the material.

(c) Material that is identical or substantially the same may not be borrowed and removed from the North Carolina State Library or any other public library in Raleigh.

(d) The material is not out of print and it reasonably could be replaced.

(e) The Library has more than one copy of the material.

18. **Transportation of Material.** — Library materials may not be sent through State Interoffice Mail or transported by or through any other person, agency, or means that the Librarian in his discretion deems unsafe.

INTERNAL RULES

19. **Policies and Procedures.** — The Librarian shall be responsible for the general administration of the Library, and he shall execute the policies established by the Library Committee.

PENALTY

20. **Contempt of Court.** — Any person who intentionally and wilfully violates any North Carolina Supreme Court Library Rule shall, upon formal complaint filed in the Supreme Court by the Librarian, be subject to being adjudged in contempt of the Supreme Court.

RECORDS AND ANNUAL REPORT

21. **Records and Annual Report.** — The Librarian shall keep Library records in a form acceptable to the Library Committee, and on or before September 1 of each year he shall make to the Supreme Court a summary report of Library activities for the fiscal year that ended on the preceding June 30.

This the 20th day of December, 1967.

RAYMOND M. TAYLOR
Librarian

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADVERSE POSSESSION

§ 1. Actual, Hostile and Continuous Possession

Adverse possession defined. *S. v. Brooks*, 175.

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§ 2. Hostile and Permissive Use

Requirement of hostile possession to ripen title by adverse possession. *S. v. Brooks*, 175.

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To mature title under a junior grant when a portion of the boundary of the grant laps on a superior title, the owner of the junior grant must show adverse and exclusive possession of the lappage or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. *Price v. Tomrich Corp.*, 385.

§ 6. Tacking Possession

Beneficiary under a will is entitled to tack her adverse possession of lappage to such possession by the testator as she is able to establish. *Price v. Tomrich Corp.*, 385.

§ 17. Color of Title

Color of title defined. *Price v. Tomrich Corp.*, 385.

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Where description in a valid deed embraces land not owned by the grantor, the deed constitutes color of title to that portion which grantor does not own. *Ibid.*

§ 23. Burden of Proof

Party claiming title by adverse possession has burden of proof on that issue. *S. v. Brooks*, 175.

§ 24. Competency and Relevancy of Evidence

Party having burden of proof of adverse possession must locate land claimed by fitting description contained in paper writing offered as evidence of title to land's surface. *S. v. Brooks*, 175.

Person claiming title by adverse possession may introduce evidence that he listed and paid taxes on the land. *Ibid.*

ADVERSE POSSESSION — Continued

Evidence that those claiming property by thirty years adverse possession has sold property adjacent to the property claimed is not evidence of adverse possession of the *locus in quo*. *Ibid.*

§ 25. Sufficiency of Evidence

Defendant's evidence held insufficient to show 30 years adverse possession of marshlands allegedly owned by the State. *S. v. Brooks*, 175.

One cannot gain title by adverse possession to unenclosed land by using it for grazing where others made similar use of the land during statutory period. *Ibid.*

Testimony that the lines on the ground are as shown by a map introduced into evidence is insufficient to show adverse possession for thirty years. *Ibid.*

In action in trespass to try title wherein plaintiff and defendant dispute a lappage of 2.82 acres and defendant has the superior record title to the disputed lappage but is not in possession, plaintiff's evidence is insufficient to show continuous possession of the lappage for more than seven years under color of title. *Price v. Tomrich Corp.*, 385.

APPEAL AND ERROR

§ 2. Appellate Jurisdiction in General

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§ 3. Review of Constitutional Questions

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Theory on which case was tried must be theory on appeal. *S. v. Brooks*, 175.

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The Supreme Court will take notice ex mero motu of defect or fatal error appearing on the face of the record proper. *S. v. Conrad*, 342.

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An appeal may be taken from any order or judgment of a juvenile court to the Court of Appeals, such appeals being on the record on questions of law or legal inference. *In re Burrus*, 517.

§ 9. Moot Questions

When, pending an appeal to the Supreme Court, a development occurs by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed. *Parent-Teacher Assoc. v. Bd. of Education*, 675.

In action to enjoin county board of education from permitting technical institute to use former school building for adult vocational education, appeal from decision of Court of Appeals is dismissed as moot where activities of technical institute at school building in question have ceased since decision of Court of Appeals. *Ibid.*

APPEAL AND ERROR—Continued

§ 19. Appeals in Forma Pauperis

Appeals in forma pauperis in juvenile proceedings tried in the district court are governed by the statute applicable to civil actions. *In re Burrus*, 517.

In this juvenile delinquency proceeding, the district court did not err in declining to issue an order providing for an appeal in forma pauperis where the required affidavit and certificate of counsel were not filed in compliance with G.S. 1-288. *Ibid.*

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Necessity for objections, exceptions and assignments of error. *S. v. Brooks*, 175.

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Where there is error on the face of the record, an appeal presents the matter for review. *In re Burrus*, 517.

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ARREST AND BAIL

§ 3. Arrest Without Warrant

Arrest without warrant for misdemeanor not committed in presence of arresting officer is illegal. *S. v. Moore*, 141.

§ 8. Wrongful Arrest

Defendants were not prejudiced by refusal of trial judge to allow defendants' counsel to question police officer as to identity of informer who gave information leading to defendant's arrest where illegality of arrest has been established. *S. v. Moore*, 141.

ATTORNEY AND CLIENT

§ 3. Scope and Duration of Attorney's Authority

Client's right to be represented by an attorney cannot be taken away from him upon a factual dispute. *Hagins v. Redevelopment Comm.*, 90.

AUTOMOBILES

§ 8. Attention to Road, Look-Out and Due Care

Operator of a motor vehicle is under duty to keep his vehicle under control and to keep a reasonably careful lookout, and he is held to the duty of seeing what he ought to have seen. *Bowen v. Gardner*, 363.

§ 40. Pedestrians

Pedestrian in an unmarked crosswalk may assume that motorist will yield right-of-way to him. *Bowen v. Gardner*, 363.

AUTOMOBILES—Continued

§ 62. Motorcycles

Evidence held sufficient for jury on issue of defendant's negligence in failing to keep a proper lookout in striking pedestrian with motorcycle in unmarked crosswalk at intersection. *Bowen v. Gardner*, 363.

§ 83. Nonsuit for Pedestrian's Contributory Negligence

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§ 105. Sufficiency of Evidence on Issue of Respondeat Superior

Proof of motorcycle registration in name of father is prima facie evidence of ownership by him and agency in son who was driving. *Bowen v. Gardner*, 363.

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Statute requiring motorcycle operator to wear protective helmet held constitutional. *S. v. Anderson*, 168.

BILLS AND NOTES

§ 7. Indorsement

An indorsement of a negotiable note has two independent aspects or functions: (1) it negotiates the paper, as contrasted with a mere assignment of it, so as to make the taker a "holder" and, if the other requisites for such status are present, a "holder in due course;" (2) it is, itself, a contract separate and apart from the contract, or contracts, of prior parties so transferred to the new holder. *Yates v. Brown*, 634.

§ 9. Indorsers

The fact that the consideration paid by an indorsee for the transfer of notes was approximately 50 percent of the face value of the notes does not preclude the indorsee from recovering the full face value of one of the notes, where the indorsers undertook a contract of general indorsement. *Yates v. Brown*, 634.

In action by indorsee of negotiable note to recover from the indorsers upon an alleged contract of indorsement contained on the back of the note and in a contemporaneously executed document entitled "Assignment and Transfer", the writing on the back of the note and in the document, when construed together in the light of circumstances surrounding the execution thereof, is held to constitute a qualified indorsement. *Ibid.*

§ 16. Actions on Notes; Questions of Law

Where there was no dispute as to the contents or genuineness of the writing on the back of a negotiable note, it was a question of law for the court whether the writing constituted a qualified or unqualified indorsement. *Yates v. Brown*, 634.

BILLS AND NOTES—Continued

§ 20. Presumptions and Burden of Proof

Where the contract of indorsement of a negotiable note was prepared by plaintiff's attorney, any ambiguity in the contract must be resolved, if reasonably possible, by construction favorable to the defendants; and the attorney must be assumed to have drafted the contract with the provisions of the Negotiable Instruments Law in mind. *Yates v. Brown*, 634.

BOUNDARIES

§ 2. Courses and Distances and Calls to Monuments

Established line of another tract is a fixed monument. *Cutts v. Casey*, 599.

Actual distance between fixed monuments will control over conflicting distance called for in deed. *Ibid.*

§ 15. Verdict and Judgment

In action in trespass to try title involving boundary dispute, court's conclusion that defendants are owners of lands described in answer are not supported by the findings where court failed to make findings specifically locating the disputed boundary lines. *Cutts v. Casey*, 599.

BURGLARY AND UNLAWFUL BREAKINGS

§ 6. Instructions

Refusal of the court to give special instructions as to abandoned property was proper. *S. v. Parrish*, 69.

COLLEGES AND UNIVERSITIES

Since issuance of tax exempt revenue bonds by the State Education Assistance Authority for purpose of financing loans to college students does not pledge credit of the State, plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds and has no standing to seek injunction restraining actions of the Authority. *Nicholson v. Education Assistance Authority*, 439.

Injunction will not issue to restrain expenditure of State funds by Education Assistance Authority where the Supreme Court has no assurance that the funds were not expended prior to the hearing and decision of the case on appeal. *Ibid.*

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy

A criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme. *S. v. Horton*, 651.

One person cannot conspire with himself. *Ibid.*

There can be no conspiracy unless there is a union of wills. *Ibid.*

If three or more persons conspire to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of the two. *Ibid.*

Since the commission of an overt act is not an element of criminal conspiracy in this jurisdiction, an attempted withdrawal by one of the conspirators prior to an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy. *Ibid.*

It is not necessary that the purpose of the conspiracy be accomplished in order for a verdict of guilty to stand. *Ibid.*

CONSPIRACY — Continued

Offense of conspiracy continues until the conspiracy is consummated or abandoned. *S. v. Conrad*, 342.

§ 4. Warrant and Indictment

Trial court did not err in denying defendant's motion for bill of particulars setting forth names of "diverse others" referred to in conspiracy indictment. *S. v. Conrad*, 342.

§ 5. Relevancy and Competency of Evidence

Acts performed and declarations made before the conspiracy was formed or after it terminated are admissible only against the person who committed the acts or made the declarations. *S. v. Conrad*, 342.

Acts and declarations of each party to a conspiracy in furtherance of its objectives are admissible against other members. *Ibid.*

In joint trial of three defendants for conspiracy to commit murder, the "right to confrontation rule" enunciated in *Bruton v. United States* is not violated by admission of evidence of the acts or declarations of one defendant in furtherance of the conspiracy against other defendants who were present and participating at the time. *Ibid.*

§ 6. Sufficiency of Evidence

Evidence held sufficient for jury as to defendants' guilt of conspiracy to commit murder. *S. v. Conrad*, 342.

Because of the nature of the offense of criminal conspiracy, courts have allowed wide latitude in the order in which pertinent facts are offered in evidence, and a verdict rested thereon will not be disturbed if at the close of the evidence every constituent of the offense charged has been proved. *Ibid.*

In a prosecution charging femme defendant with unlawful conspiracy with two other persons to murder her husband, the State's evidence as to the existence of the conspiracy was sufficient to withstand defendant's motions for nonsuit, notwithstanding that the co-conspirators, who were witnesses for the State, testified that they never intended to kill defendant's husband but only intended to trick defendant into giving them money. *S. v. Horton*, 651.

A criminal conspiracy may be established by circumstantial evidence. *Ibid.*

The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. *Ibid.*

CONTEMPT OF COURT

§ 2. Nature and Elements of Criminal Contempt

Criminal contempt defined. *Blue Jeans Corp. v. Clothing Workers*, 504.

§ 3. Civil Contempt

A contempt proceeding is criminal in nature and may be resorted to in civil or criminal actions. *Blue Jeans Corp. v. Clothing Workers*, 504.

§ 5. Orders to Show Cause

In contempt proceeding against striking workers for the violation of restraining order against unlawful picketing, the court properly followed procedure for indirect contempt, G.S. 5-7, since the contemptuous acts were committed outside the actual or constructive presence of the court. *Blue Jeans Corp. v. Clothing Workers*, 503.

CONTEMPT OF COURT — Continued

§ 6. Hearings on Orders to Show Cause

Striking workers are not entitled to a trial by jury in criminal contempt proceeding, since criminal contempt is a petty offense and the constitutional right to jury trial does not extend to petty offenses. *Blue Jeans Corp. v. Clothing Workers*, 504.

§ 8. Appeal and Review

Contemnors are entitled to appeal from a judgment for contempt not committed in the presence of the court. *Blue Jeans Corp. v. Clothing Workers*, 504.

CONTRACTS

§ 12. Construction of Contracts

Two sheets attached together as part of a single communication must be considered as one document. *Wiles v. Mullinax*, 473.

All contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken. *Yates v. Brown*, 634.

Where there was no dispute as to the contents or genuineness of the writing on the back of a negotiable note, it was a question of law for the court whether the writing constituted a qualified or unqualified indorsement. *Ibid.*

COUNTIES

§ 5. County Zoning

The General Assembly may delegate to the counties powers of zoning. *Jackson v. Bd. of Adjustment*, 155.

County zoning ordinance may not delegate powers to the county board of adjustment. *Ibid.*

Provision of county zoning ordinance requiring board of adjustment to deny permit to a trailer home in an A-1 agricultural district unless it finds that the permit would not adversely affect the public interest is invalid, but the granting of a special exception in this case is held valid under other and lawful provisions of the ordinance. *Ibid.*

COURTS

§ 15. Criminal Jurisdiction of Juvenile Courts

Juvenile court has no jurisdiction of capital felony committed by offender who is 14 years of age or older. *S. v. Rogers*, 411.

A juvenile has no constitutional right to a jury trial or a public trial in a juvenile court proceeding on the issue of his delinquency. *In re Burrus*, 517.

Juvenile proceedings are not "criminal prosecutions," nor is a finding of delinquency in a juvenile proceeding synonymous with "conviction of a crime." *Ibid.*

The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. *Ibid.*

Notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare and the notice must set forth the alleged misconduct with particularity. *Ibid.*

In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the

COURTS—Continued

child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. *Ibid.*

Juvenile proceedings to determine delinquency must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. *Ibid.*

Provision of G.S. 110-21 subjecting to supervision by the district court any child less than sixteen years of age who is delinquent or who violates any State law is not unconstitutional for vagueness. *Ibid.*

Where juveniles were disciplined pursuant to G.S. 110-21 for violations of State law, it is unnecessary upon appeal to determine whether further provisions of the statute are void for vagueness in failing to define the terms "unruly," "wayward," "misdirected," "disobedient," or "beyond the control of their parents." *Ibid.*

The juvenile statutes are not unconstitutional in that a juvenile may be committed "during minority" for a violation of State law, which may be a longer period of time than the criminal law visits upon an adult for the violation of the same statute. *Ibid.*

An appeal may be taken from any order or judgment of a juvenile court to the Court of Appeals, such appeals being on the record on questions of law or legal inference. *Ibid.*

Statutes dealing with appointment of counsel to represent an indigent criminal defendant upon appeal and permitting them to appeal in forma pauperis have no application to appeals from juvenile proceedings in the district court, such appeals being governed by statute applicable to civil actions. *Ibid.*

When the juvenile court finds that a child is delinquent, neglected or in need of more suitable guidance, the court may use any one of the alternative dispositions set forth in G.S. 110-29 but is not empowered to use two or more at the same time. *Ibid.*

Where the juvenile court placed each child on probation subject to the conditions named in the order, the court exhausted its immediate authority, and further provision of the order in each case which adjudged that the juvenile be committed to the custody of the county welfare department to be placed in a State institution for delinquents is unauthorized and must be deleted. *Ibid.*

Probation of a juvenile may be revoked at any time the court finds the conditions of probation have been breached, and the court may then commit the juvenile or make such other disposition as it might have made at the time the child was placed on probation. *Ibid.*

CONSTITUTIONAL LAW

§ 1. Supremacy of Federal Constitution

The U. S. Supreme Court will not encroach upon the power of the States to make their own rules of evidence as long as they serve a legitimate purpose not prohibited by the U. S. Constitution. *S. v. Bumper*, 670.

§ 4. Persons Entitled to Raise Constitutional Questions

Constitutionality of a criminal statute may be challenged in an action to enjoin its enforcement where personal or property rights are affected. *Kresge Co. v. Tomlinson*, 1.

Only one who is in immediate danger of sustaining direct injury from legislative action may assail the validity of such action. *Nicholson v. Education Assistance Authority*, 439.

CONSTITUTIONAL LAW—Continued

Taxpayer as such does not have standing to attack the constitutionality of any and all legislation. *Ibid.*

Plaintiff's allegations that he is a stockholder in a corporation which pays taxes within the state does not give him standing to attack the constitutionality of legislation. *Ibid.*

§ 6. Legislative Powers

Supreme Court and the General Assembly are coordinate branches of the State government, and neither is the superior of the other. *Nicholson v. Education Assistance Authority*, 439.

§ 7. Delegation of Powers by the General Assembly

Statutes delegating to Commissioner of Insurance authority to fix fire insurance rates comply with constitutional requirement that they prescribe sufficiently clear standards to control Commissioner's discretion. *In re Filing by Fire Ins. Rating Bureau*, 15.

Only the legislative branch of the government can authorize the power of eminent domain. *S. v. Club Properties*, 328.

§ 8. Delegation of Authority to Municipal Corporations

The Legislature may delegate to a municipality the authority to enact ordinances in the exercise of the police power. *Raleigh v. R. R. Co.*, 454.

Delegation of zoning power to municipal corporation is an exception to the rule that legislative powers may not be delegated. *Jackson v. Bd. of Adjustment*, 155.

§ 10. Judicial Powers

Authority of the Supreme Court to declare an Act of the Legislature unconstitutional arises from its duty to determine the respective rights and liabilities of litigants. *Nicholson v. Education Assistance Authority*, 439.

The Constitution controls over a statute. *Ibid.*

The Supreme Court is not bound by stipulations that certain constitutional questions must be determined in a particular action. *Ibid.*

§ 11. Police Power

Exercise of the police power of the State rests in the General Assembly. *Kresge Co. v. Tomlinson*, 1.

The Legislature is under no compulsion to exercise the police power to its fullest extent. *Utilities Comm. v. Electric Membership Corp.*, 250.

In the exercise of the police power the Legislature may enact laws for protection of the public health, safety, morals and general welfare. *Raleigh v. R. R. Co.*, 454; *R. R. Co. v. Winston-Salem*, 465.

Municipal ordinances enacted in exercise of the police power are subject to the same constitutional limitations as are police powers exercised by the State. *Raleigh v. R. R. Co.*, 454.

In reviewing an exercise of the police power, it is the sole duty of the courts to ascertain whether the act violates any constitutional limitations. *Ibid; R. R. Co. v. Winston-Salem*, 465.

§ 13. Safety and Health

Statute requiring motorcycle operator to wear protective helmet held constitutional. *S. v. Anderson*, 168.

Allocation of costs is a special factor to be considered by the courts in

CONSTITUTIONAL LAW—Continued

determining the validity of a municipal ordinance requiring a railroad to reconstruct an overpass. *Raleigh v. R. R. Co.*, 454.

A municipality has the power, in the exercise of its police power to promote public safety and convenience, to allocate to the railroad some portion of the cost of the installation and maintenance of automatic signal devices at grade crossings of its tracks with city streets. *R. R. Co. v. Winston-Salem*, 465.

§ 14. Morals and Public Welfare

Municipal Sunday observance ordinance does not violate N. C. Constitution nor due process clause of U. S. Constitution. *Kresge Co. v. Tomlinson*, 1.

§ 20. Equal Protection

Trial court did not err in denial of defendant's motion to quash bill of indictment on ground that death penalty is used in a discriminatory manner against Negroes. *S. v. Rogers*, 411.

§ 21. Right to Security in Person and Property

It is one of the incidents of the cherished right of private property that ordinarily an individual may expend his property in fighting a lost cause or for any legal purpose whatever. *Hagins v. Redevelopment Comm.*, 90.

The State and Federal Constitutions guarantee that in ordinary circumstances a home may not be entered by law officers except under authority of a search warrant. *S. v. Robbins*, 537.

No constitutional right of defendant was violated when police officer required him to surrender for examination and analysis the pants worn by him at the time of his arrest. *S. v. Rogers*, 411.

§ 22. Religious Liberty

The First Amendment, as made applicable to the states by the Fourteenth, commands that a state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. *Kresge Co. v. Tomlinson*, 1.

Municipal Sunday observance ordinance does not violate "establishment clause" of the First Amendment. *Ibid.*

§ 23. Due Process; Vested Rights

Railway company's constitutional right to substantive due process is not violated by allocation of a portion of the cost of installation and maintenance of automatic signal devices at grade crossings of its tracks with city streets unless the portion of the costs allocated to it is so unreasonable as to constitute an arbitrary taking of the railway's property. *R. R. Co. v. Winston-Salem*, 465.

Railroad's right to due process was not violated by municipal ordinance requiring it to pay 63% of cost of installing automatic signal devices at two grade crossings and all of the annual cost of maintenance thereof. *Ibid.*

§ 24. Requisites of Due Process

Client's right to be represented by an attorney cannot be taken away from him upon a factual dispute. *Hagins v. Redevelopment Comm.*, 90.

The right to recover damages for injury to one's property is no less a property right than the right to sell or use the property which was damaged. *Ibid.*

CONSTITUTIONAL LAW—Continued

§ 29. Indictment and Trial by Duly Constituted Jury

Striking workers are not entitled to a trial by jury in criminal contempt proceeding, since criminal contempt is a petty offense and the constitutional right to jury trial does not extend to petty offenses. *Blue Jeans Corp. v. Clothing Workers*, 504.

A juvenile has no constitutional right to a jury trial in a juvenile court proceeding on the issue of his delinquency. *In re Burrus*, 517.

Right to a public trial in criminal prosecutions accorded by the Sixth Amendment to the U. S. Constitution is now applicable in both state and federal courts. *Ibid.*

The use of a jury box containing only the names of property owners is not *per se* discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. *S. v. Rogers*, 411.

In prosecution for first degree murder, the Constitution of the U. S., as interpreted in *Witherspoon v. Illinois*, is not violated by allowance of State's challenges for cause of prospective jurors who made it clear on voir dire examination that, before hearing any of the evidence, each of them had already made up his mind that he would not return a verdict pursuant to which defendant might lawfully be executed, whatever the evidence. *S. v. Atkinson*, 288.

The State, as well as the defendant, is entitled to a fair and impartial jury. *Ibid.*

Trial court may excuse prospective jurors without challenge by either party and as a result of information voluntarily disclosed by the prospective juror without questioning. *Ibid.*

Defendant was not deprived of a jury drawn from a cross section of the community when the trial court, in its discretion and on its own motion, excused three prospective jurors who refused to take the customary oath for jurors. *Ibid.*

Irregularity in forming a jury is waived by silence of the party at the time of the court's action. *Ibid.*

A defendant complaining of group discrimination in the selection of the jury has the burden of proving that the jury selected did not represent a fair cross section of the community. *Ibid.*

Decision of *U. S. v. Jackson* does not forbid the courts of this State to impose the death sentence pursuant to a verdict of the jury in accordance with G.S. 14-17. *Ibid.*

Former G.S. 15-162.1, which allowed defendant to plead guilty to first degree murder and receive a life sentence, did not discourage defendant from exercising his constitutional right to jury trial where defendant entered a plea of not guilty and was tried by jury. *Ibid.*

Imposition of the death penalty for first degree murder is not unconstitutional per se. *Ibid.*

Decision of *Witherspoon v. Illinois* does not apply where jury recommends life imprisonment. *S. v. Williams*, 77.

Defendant is not denied right to impartial jury on issue of guilt by exclusion of jurors having scruples against capital punishment. *Ibid.*

Statement in the record that the State inquired of each prospective juror in this rape prosecution as to whether he believed in capital punishment is insufficient to show that prospective jurors opposed to capital punishment were challenged for cause. *S. v. Rogers*, 411.

CONSTITUTIONAL LAW—Continued

§ 30. Due Process in Trial

A juvenile has no constitutional right to a public trial in a juvenile court proceeding on the issue of his delinquency. *In re Burrus*, 517.

A trial judge is not required to aid a defendant in the presentation of his defense. *S. v. Morris*, 50.

Judged by the totality of the circumstances, the conduct of identification procedures at a police lineup may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process, thus rendering inadmissible evidence that a witness identified the accused at the lineup or any in-court identification by witnesses who viewed the lineup unless the State shows on *voir dire* that the in-court identification is of independent origin and not the result of the illegal out-of-court confrontation. *S. v. Rogers*, 411.

In rape prosecution, lineup confrontation at which defendant was only party who had a belt hanging around his neck was not unnecessarily suggestive so as to violate due process. *Ibid.*

Defendant was denied his constitutional right to a speedy trial, entitling him to a dismissal of the prosecution, where there was a four-year delay between the issuance of a warrant charging defendant with a felony and the return of the indictment, and where the record shows the delay was the deliberate choice of the solicitor and that the defendant was possibly prejudiced thereby. *S. v. Johnson*, 264.

The accused has the burden to show that the delay of his trial was due to the neglect of the prosecution. *Ibid.*

The constitutional guarantee of a speedy trial imposes the only limitation upon purposeful and oppressive delays between the date of a felonious offense and the commencement of the prosecution, and this guarantee cannot be impinged by legislative limitation. *Ibid.*

The constitutional guarantee to a speedy trial does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. *Ibid.*

§ 31. Right of Confrontation and Access to Evidence

Admission in joint trial of nontestifying defendant's extrajudicial confession implicating a codefendant violates the codefendant's right of confrontation. *S. v. Parrish*, 69; *S. v. Williams*, 77.

In joint trial of three defendants for conspiracy to commit murder, the right to confrontation rule of *Bruton v. United States* is not violated by admission of evidence of acts or declarations of one defendant in furtherance of the conspiracy for consideration against other defendants. *S. v. Conrad*, 342.

The right to confront affirms the common law rule that in criminal trials by jury the witness must be present and subject to cross-examination under oath. *S. v. Bumper*, 670.

The rule allowing the trial judge to exercise his discretion in limiting cross-examination for the purpose of impeachment when it becomes repetitious or argumentative does not violate provisions of the State or U. S. Constitutions. *Ibid.*

The State's privilege against disclosure of an informant's identity must give way where the disclosure of the informant's identity or the contents of his communication is relevant or helpful to the defense of the accused or is essential to fair determination of a cause. *S. v. Moore*, 141.

Defendants were not prejudiced by refusal of trial judge to allow defend-

CONSTITUTIONAL LAW—Continued

ants' counsel to question police officers as to identity of informer who gave officer information leading to defendants' arrest. *Ibid.*

The right of confrontation guarantees to every defendant the right to face his accuser and to be present in person at every stage of the trial. *S. v. Moore*, 198.

§ 32. Right to Counsel

By virtue of the Sixth and Fourteenth Amendments, a defendant who is charged with a misdemeanor amounting to a serious offense has a constitutional right to the assistance of counsel during his trial; that part of G.S. 15-4.1 which conflicts with this decision is unconstitutional. *S. v. Morris*, 50.

A serious offense is one for which the punishment exceeds six months' imprisonment and $500 fine. *Ibid.*

With respect to every defendant charged with a felony and not represented by counsel, the judge of the superior court is required to (1) advise defendant that he is entitled to counsel, (2) ascertain if defendant is indigent and unable to employ counsel, and (3) appoint counsel for each defendant found to be indigent unless the right to counsel is intelligently and understandingly waived. *Ibid.*

Where a defendant is aware of his constitutional right to counsel, failure of officers to so advise him is harmless. *Ibid.*

U. S. Supreme Court decisions relating to right of accused to be represented by counsel at lineup are inapplicable to case in which lineup occurred prior to June 12, 1967. *S. v. Rogers*, 411.

§ 33. Self-incrimination

No constitutional right of defendant was violated when police officer required him to surrender for examination and analysis the pants worn by him at the time of his arrest. *S. v. Rogers*, 411.

§ 36. Cruel and Unusual Punishment

Punishment which does not exceed the limits fixed by statute cannot be classified as cruel and unusual in a constitutional sense unless the punishment provisions of the statute itself are unconstitutional. *S. v. Rogers*, 411.

What constitutes cruel and unusual punishment is question of law for the court and is not subject to proof by expert opinion evidence. *Ibid.*

Imposition of death penalty for crime of rape is not unconstitutional per se. *Ibid.*

In rape prosecution, trial court did not err in refusing to allow witness to give his expert opinion that the death penalty constitutes cruel and unusual punishment. *Ibid.*

Upon appeal from inferior court for trial de novo in the superior court, superior court may impose punishment in excess of that imposed in the inferior court. *S. v. Morris*, 50.

§ 37. Waiver of Constitutional Guaranties

Waiver of counsel may not be presumed from a silent record. *S. v. Morris*, 50.

Even in a capital case the constitutional right of an accused to be confronted by the witnesses against him is a personal privilege which he may waive. *S. v. Moore*, 198.

An accused cannot waive his right to be present at every stage of his trial upon an indictment charging him with a capital felony. *Ibid.*

CRIMINAL LAW

§ 4. Crimes, Misdemeanors and Penalties

A serious offense is one for which the authorized punishment exceeds six months imprisonment and a $500 fine. *Blue Jeans Corp. v. Clothing Workers*, 504.

§ 5. Mental Capacity

The test of insanity as a defense to a crime is the capacity of defendant to distinguish between right and wrong at the time of and in respect to the matter under investigation. *S. v. Atkinson*, 288.

Evidence tending to show the mental condition of accused both before and after commission of the act is competent. *Ibid.*

Defendant has the burden of establishing defense of insanity to the satisfaction of the jury. *Ibid.*

In first degree murder prosecution, the court properly allowed psychiatrist to testify he was of the opinion that defendant knew right from wrong on the date of the alleged crime. *Ibid.*

Low mentality is no defense to a criminal charge, test of mental responsibility being whether defendant has the ability to distinguish between right and wrong. *S. v. Rogers*, 411.

Trial court did not err in denial of motion to quash indictment on ground that defendant was only 14 years of age at time of alleged rape and had an I.Q. of only 63. *Ibid.*

Insanity is incapacity, from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto; in contrast, one who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong. *S. v. Mercer*, 108.

A jury finding that defendant intentionally shot the deceased and thereby proximately caused his death negates and refutes any contention that defendant was then unconscious; notwithstanding such a finding by the jury, the defendant is exempt from criminal responsibility if he satisfies the jury he was insane when he inflicted the fatal injury. *Ibid.*

Unconsciousness is never an affirmative defense. *Ibid.*

Person who is unconscious when he commits a criminal act generally cannot be held responsible therefor. *Ibid.*

Unconsciousness and insanity are separate grounds for exemption from criminal responsibility. *Ibid.*

§ 8. Limitations

There is no statute of limitations for felonies. *S. v. Johnson*, 264.

§ 10. Accessories Before the Fact

Elements of the offense of accessory before the fact. *S. v. Benton*, 378.

Indictment is insufficient to charge defendant as accessory before the fact of murder of her husband where it alleges defendant counseled and procured Raymond Epley to "kill and murder Raymond Epley" and that Raymond Epley consequently murdered defendant's husband. *Ibid.*

In order to convict defendant as an accessory before the fact to the murder of her husband, the State must satisfy the jury from the evidence beyond a reasonable doubt that the principal felon named in the indictment murdered defendant's husband, and trial court erred in giving jury instructions which implied or assumed that the crime had been committed by the principal felon. *Ibid.*

CRIMINAL LAW—Continued

Although under G.S. 14-5 an accessory before the fact can be indicted and tried independently of the principal felon, the guilt of the principal must in all cases be alleged and proved to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt. *Ibid.*

§ 13. Jurisdiction

Bill of indictment is insufficient to confer jurisdiction unless it alleges all essential elements of the offense. *S. v. Benton*, 378.

Superior court has jurisdiction to try 14-year-old defendant charged with capital felony of rape. *S. v. Rogers*, 411.

§ 15. Venue

Trial court did not err in denial of defendant's motion for change of venue on the ground of unfavorable pre-trial publicity. *S. v. Conrad*, 342.

§ 24. Plea of Not Guilty

Defendant's plea of not guilty puts in issue every material element of the charge against him. *S. v. Perry*, 565.

§ 26. Plea of Former Jeopardy

Defendant awarded new trial by Supreme Court after receiving sentence of life imprisonment upon conviction of rape may be tried again for his life at his new trial. *S. v. Wright*, 242.

§ 32. Burden of Proof and Presumptions

Unless otherwise provided by statute, infants of the age of 14 and over are not entitled to any presumption of incapacity to commit crime. *S. v. Rogers*, 411.

§ 33. Facts in Issue and Relevant to Issues

The amount of punishment is totally irrelevant to the issue of a defendant's guilt. *S. v. Rhodes*, 584.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Evidence that defendant was AWOL held not prejudicial in this case. *S. v. Williams*, 77.

In prosecution charging defendant with homicide of his wife, evidence that defendant had intentionally inflicted injuries on his wife during the three years prior to her death is admissible. *S. v. Moore*, 198.

In homicide prosecution, court properly allowed pathologist to testify that victim had been raped and to use photographs to illustrate his testimony in order to establish motive, premeditation, deliberation and malice on the part of defendant. *S. v. Atkinson*, 288.

Evidence relevant to the question of defendant's identity as the perpetrator of the offense with which he is charged is not rendered incompetent by the mere fact that it discloses the commission by him of some other criminal offense. *S. v. Perry*, 565.

§ 42. Articles and Clothing Connected with the Crime

In homicide prosecution, court properly admitted articles of bloodstained clothing and a bloodstained washcloth found on the body of deceased. *S. v. Atkinson*, 288.

CRIMINAL LAW—Continued

In homicide prosecution, court properly admitted a shovel used by defendant to dig the grave where the body was found. *Ibid.*

In rape prosecution, articles of clothing identified as worn by victim at time of the crime and articles of clothing worn by defendant at time of his arrest are properly admitted into evidence. *S. v. Rogers*, 411.

In this homicide prosecution, two bullets taken from the victim's body were properly identified and were therefore admissible in evidence. *S. v. Ross*, 550.

In a prosecution for kidnapping and rape, trial court properly admitted a bag and its contents that included a deck of cards bearing the name of defendant. *S. v. Perry*, 565.

§ 43. Photographs

In trial of defendant for three homicides, four photographs depicting substantially the same scene which were identified as accurate representations of the clothed dead body of one victim at the crime scene and blood where another victim was found when officers arrived are competent for illustrative purposes, and whether all or a less number should have been admitted was within the discretion of the trial judge. *S. v. Mercer*, 108.

In a homicide prosecution, three photographs of the deceased's body at the funeral home with projecting probes indicating the point of entry, the course, and the point of exit of the bullet that caused his death are inflammatory and have no probative value in respect of any issue for determination by the jury where the evidence is uncontradicted as to the cause of death and all the evidence tended to show deceased was lying on a bed when shot. *Ibid.*

Fact that a colored photograph depicts a horrible, gruesome and revolting scene indicating a vicious, calculated act of cruelty, malice or lust does not render the photograph incompetent. *S. v. Atkinson*, 288.

Photograph of the body of deceased is not rendered inadmissible by the fact it was taken after the body had been moved from the place originally found to the morgue or other place for examination. *Ibid.*

In prosecution for first degree murder of a child, the court properly admitted photographs used by witnesses of the State to illustrate testimony concerning location and appearance of place where child's body was found buried and the condition of the body. *Ibid.*

It is not necessary that the photograph be taken by the witness if the witness testifies that it correctly represents what he observed. *Ibid.*

§ 50. Expert and Opinion Testimony

In rape prosecution, trial court did not err in refusing to allow witness to give his expert opinion that death penalty constitutes cruel and unusual punishment. *S. v. Rogers*, 411.

§ 51. Qualification of Experts

In prosecution for kidnapping and rape, admission of doctor's opinion testimony was harmless error, notwithstanding there was no specific finding by the court that the witness was an expert. *S. v. Perry*, 565.

§ 53. Medical Expert Testimony

In homicide prosecution, court properly allowed psychiatrist to give opinion that defendant knew right from wrong on date of the alleged crime. *S. v. Atkinson*, 288.

CRIMINAL LAW—Continued

§ 66. Evidence of Identity by Sight

In a prosecution for rape, testimony of the prosecutrix that she identified the defendant in a police identification lineup is admissible to corroborate her other testimony that she had identified the defendant prior to the lineup. *S. v. Primes*, 61.

In rape prosecution, lineup confrontation at which defendant was only party who had a belt hanging around his neck was not unnecessarily suggestive so as to violate due process. *S. v. Rogers*, 411.

U. S. Supreme Court decisions relating to right of accused to be represented by counsel at lineup are inapplicable to case in which lineup occurred prior to June 12, 1967. *Ibid.*

Evidence that defendant was released from prison on the day before the commission of the offense charged is admissible to establish the identity of defendant as the perpetrator of the offense. *S. v. Perry*, 565.

In prosecution for kidnapping and rape, State was not limited to prosecutrix' in-court identification of defendant as her assailant, but State could introduce other evidence relevant to the identification. *Ibid.*

In-court identification of defendants was not rendered incompetent by fact that defendants were not represented by counsel when robbery victim recognized defendants and identified them as his assailants as they entered the county jail in custody of police officers some four hours after the robbery. *S. v. Gatling*, 625.

§ 73. Hearsay Testimony

In a homicide prosecution, testimony of defendant, who was a policeman by occupation, that he carried a pistol at the time of the homicide because he was instructed at the Institute of Government with respect to the right of off-duty peace officers to be armed, held properly excluded as hearsay. *S. v. Walters*, 615.

Testimony by deputy sheriff as to statements of jailer over the telephone that there was trouble at defendant's home and that defendant's brothers were worried *is held* properly admitted on *voir dire* hearing in the absence of the jury, since the testimony was in explanation of why the officer went to defendant's home. *S. v. Robbins*, 537.

Testimony by police officer as to a conversation he overheard between defendant and his niece in which defendant admitted his guilt of murdering his wife is held not in violation of the hearsay rule. *Ibid.*

§ 75. Tests of Voluntariness and Admissibility of Confessions

Confession obtained from person in custody as result of illegal arrest is not *ipso facto* inadmissible. *S. v. Moore*, 141.

A confession does not become inadmissible solely upon the showing that defendant was wounded, in pain and in police custody when he confessed. *S. v. Williford*, 575.

Miranda rules are inapplicable where conversation between defendant and police officer took place in defendant's home and defendant was not in custody. *S. v. Morris*, 50.

Miranda standards do not govern admissibility of defendant's confession in retrial conducted subsequent to 13 June 1966 where defendant was originally tried prior to 13 June 1966. *S. v. Swann*, 644.

Determination by jury prior to 13 June 1966 that defendant was unable to plead and stand trial did not constitute a "trial" as used in decisions re-

CRIMINAL LAW—Continued

lating to applicability of *Miranda* to confessions offered in trials and retrials begun after 13 June 1966. *Ibid.*

Miranda standards apply to confessions obtained prior to 13 June 1966 when offered at original trial of a defendant commenced after that date or any trial subsequent thereto, notwithstanding law enforcement officers complied with constitutional standards applicable when the confession was obtained. *Ibid.*

§ 76. Determination and Effect of Admissibility of Confession

Admission in joint trial of nontestifying defendant's extrajudicial confession implicating codefendant violates the codefendant's right of confrontation. *S. v. Parrish*, 69; *S. v. Williams*, 77.

In this armed robbery prosecution, the trial court did not err in failing to strike testimony of defendant's confession admitted after a voir dire hearing when a police officer thereafter testified before the jury that defendant told him, before he allegedly made the confession to another officer, that "I am not going to tell you a damn thing." *S. v. Williford*, 575.

Findings of fact by the trial court were not sufficient to support court's conclusion that incriminating statement made by defendant to police officer while receiving hospital treatment for gunshot wounds was voluntarily and understandingly made. *Ibid.*

When a purported confession of a defendant is offered into evidence and defendant objects, the trial judge, in the absence of the jury, should hear evidence of both the State and the defendant upon the question of the voluntariness of defendant's statements. *S. v. Moore*, 141.

Where State and defendants offer conflicting evidence at voir dire hearing to determine admissibility of confessions, failure of trial court to make findings of fact to support conclusion that confessions were voluntary is prejudicial error. *Ibid.*

Where Supreme Court passed upon admissibility of confession in former appeal of same case, reconsideration by Court of admissibility of such statement at defendant's retrial is precluded by doctrine of law of the case. *S. v. Wright*, 242.

Findings supported by competent evidence held sufficient to support court's conclusion that confession was voluntarily made. *Ibid.*

In joint trial of three defendants for conspiracy to commit murder, the right to confrontation rule of *Bruton v. United States* is not violated by admission of evidence of acts or declarations of one defendant in furtherance of the conspiracy for consideration against other defendants. *S. v. Conrad*, 342.

§ 77. Admissions and Declarations

Admissions of fact by a defendant pertinent to the issue which tend to prove his guilt of the offense charged are competent against him. *S. v. Robbins*, 537.

§ 84. Evidence Obtained by Unlawful Means

Deputy sheriff's entry into defendant's home without a warrant was lawful, and consequently his testimony relating to the crime scene inside the home was properly admitted into evidence, where the officer entered the dwelling at the request of defendant's brothers. *S. v. Robbins*, 537.

In rape prosecution, pants taken from defendant after his arrest were properly admitted into evidence. *S. v. Rogers*, 411.

CRIMINAL LAW—Continued

§ 88. Cross-examination

The defendant is entitled to a full and fair cross-examination upon the subject of the witness' examination-in-chief, and this is an absolute right rather than a privilege. *S. v. Bumper*, 670.

Method and duration of cross-examination for the purpose of impeachment rest largely in the discretion of the trial court which may properly exclude such cross-examination when it becomes merely repetitious or argumentative. *Ibid.*

The trial court did not commit prejudicial error in its rulings on defendant's objection to questions which solicitor asked defendant on cross-examination, where the questions involved collateral matters and defendant's negative answers were conclusive. *S. v. Ross*, 550.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

If a party interrogates a witness about a fact which would be favorable to the examiner if true, and receives a reply which is merely negative in its effect on examiner's case, the examiner may not by extrinsic evidence prove that the first witness had earlier stated that the fact was true as desired by the enquirer. *S. v. Moore*, 198.

§ 90. Rule That Party May Not Discredit Own Witness

A party may not impeach or discredit the character of his own witness. *S. v. Horton*, 651.

If the witness for the State testified to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness. *Ibid.*

§ 91. Time of Trial and Continuance

Possibility of unavoidable delay is inherent in every criminal prosecution. *S. v. Johnson*, 264.

§ 99. Conduct of Court and Expression of Opinion on Evidence During Trial

Comment by trial judge in ruling on solicitor's objection to defense counsel's questions concerning attempt of a key State's witness to commit suicide that he did not see the relevancy but did not see the harm is held not to constitute prejudicial error where the court required the witness to answer. *S. v. Conrad*, 342.

Where solicitor stated that "defendant's mother said that she didn't remember whether she was charged with killing her first husband or not," comment by court that "I remember distinctly that she said it," although inaccurate, did not constitute expression of opinion as to the credibility of the witness. *S. v. Atkinson*, 288.

A trial judge is not required to aid defendant in the presentation of his defense. *S. v. Morris*, 50.

The trial court may propound competent questions to a witness in order to develop some relevant fact which had been overlooked. *S. v. Robbins*, 537.

Trial court did not err in asking deputy sheriff leading questions on a voir dire hearing in the absence of the jury. *Ibid.*

§ 103. Function of Court and Jury

What is evidence is a question of law for the court; what the evidence proves or fails to prove is a question of fact for the jury. *S. v. Walters*, 615.

CRIMINAL LAW—Continued

The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt and is, therefore, no concern of the jurors'. *S. v. Rhodes*, 584.

§ 104. Consideration of Evidence on Motion to Nonsuit

On motion for compulsory nonsuit made at the close of all the evidence, the evidence must be considered in the light most favorable to the State. *S. v. Primes*, 61.

In considering the motion for a compulsory nonsuit, the court is not concerned with the weight of the testimony, or with its truth or falsity. *Ibid.*

§ 105. Functions of Motion to Nonsuit

There is no difference between a motion to dismiss the action and a motion for judgment as in case of nonsuit. *S. v. Cooper*, 283.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

When the substantive evidence offered by the State is conflicting — some tending to inculpate and some tending to exculpate the defendant — it is sufficient to overrule a motion for nonsuit. *S. v. Horton*, 651.

Nonsuit is correctly denied where State offers evidence of corpus delicti in addition to defendant's confession. *S. v. Moore*, 141.

§ 107. Nonsuit for Variance

A fatal variance between indictment and proof is presented by a motion to dismiss. *S. v. Cooper*, 283.

§ 110. Effect of Judgment of Nonsuit

A judgment entered in accordance with the allowance of defendant's motion to dismiss will have the force and effect of a verdict of not guilty as to the criminal offense charged in the indictment. *S. v. Cooper*, 283.

§ 111. Form and Sufficiency of Instructions

Trial judge in noncapital cases should not inform the jurors as to the punishment. *S. v. Rhodes*, 584.

Although trial judge erred in telling the jury the punishment for assault with intent to commit rape, defendant in rape prosecution was not prejudiced by the disclosure where all the evidence tended to show an accomplished rape and there was no evidence to support a verdict of guilty of the lesser offense. *Ibid.*

The statement in *S. v. Garner*, 129 N.C. 536, that a jury in a noncapital case is entitled to be informed as to the punishment prescribed for the offense or offenses with which a defendant is charged is expressly disapproved. *Ibid.*

§ 112. Instructions on Burden of Proof and Presumptions

Court did not err in failing to instruct on rule of circumstantial evidence where State's evidence consisted mainly of direct evidence. *S. v. Wright*, 242.

§ 113. Statement of Evidence and Application of Law Thereto

In joint trial of two defendants, a charge susceptible to the construction that should the jury find beyond a reasonable doubt that either defendant committed the crime it should convict both defendants is held prejudicial error. *S. v. Williford*, 575; *S. v. Parrish*, 69.

CRIMINAL LAW—Continued

Where defendant's evidence discloses facts sufficient to constitute a defense to the crime, the court must instruct the jury as to the legal principles applicable thereto. *S. v. Mercer*, 108.

Where the trial court correctly defines a word in its charge to the jury, the court is not required to repeat the definition each time the word is repeated in the charge. *S. v. Robbins*, 537.

§ 115. Instructions on Lesser Degrees of Crime

Necessity for instructing jury as to lesser degree of crime charged arises only when there is evidence that such lesser crime was committed. *S. v. Williams*, 77.

Evidence of defendant's guilt of lesser degree of crime charged requires submission to jury of the issue of defendant's guilt of the lesser offense. *S. v. Moore*, 198.

§ 120. Instruction on Right of Jury to Recommend Life Imprisonment or Mercy

Except in capital cases, the presiding judge fixes the punishment for a convicted defendant within the limitations provided by the applicable statute. *S. v. Rhodes*, 584.

§ 122. Additional Instructions After Initial Retirement of Jury

The statement in *S. v. Garner*, 129 N.C. 536, that a jury in a noncapital case is entitled to be informed as to the punishment prescribed for the offense or offenses with which a defendant is charged is expressly disapproved. *S. v. Rhodes*, 584.

§ 123. Form and Sufficiency of Issues

Where evidence against each of several defendants is not identical, trial court should submit question of guilt or innocence of each separately. *S. v. Parrish*, 69.

§ 124. Sufficiency of Verdict

Recommendations of leniency when made by the jury of its own volition are no part of the verdict and may be disregarded. *S. v. Rhodes*, 584.

§ 127. Arrest of Judgment

Judgment must be arrested where no crime is charged in bill of indictment. *S. v. Benton*, 378.

The evidence cannot supply a fatal defect or omission in a bill of indictment. *Ibid.*

Allegations in the warrant on which defendant was originally arrested cannot be used to supply a deficiency in the bill of indictment. *Ibid.*

The legal effect of arresting the judgment because of a fatally defective indictment is to vacate the verdict and sentence of imprisonment, and the State may proceed against defendant upon a sufficient bill of indictment. *Ibid.*

§ 135. Judgment and Sentence in Capital Cases

Sentence of death cannot be carried out if jury that imposed it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty. *S. v. Williams*, 77.

Decision of *Witherspoon v. Illinois* does not apply where jury recommends life imprisonment. *Ibid.*

CRIMINAL LAW—Continued

In prosecution for first-degree murder, Constitution of U. S., as interpreted in *Witherspoon v. Illinois*, is not violated by allowance of State's challenges for cause of prospective jurors who made it clear on voir dire examination that, before hearing any of the evidence, each had already made up his mind he would not return a verdict pursuant to which defendant might lawfully be executed, whatever the evidence. *S. v. Atkinson*, 288.

Decision of *U. S. v. Jackson* does not forbid courts of this State to impose sentence of death pursuant to a verdict under G.S. 14-17. *Ibid.*

Former G.S. 15-162.1, which allowed defendant to plead guilty to first degree murder and receive a life sentence, did not discourage defendant from exercising his constitutional right to a jury trial where defendant entered a plea of not guilty and was tried by a jury. *Ibid.*

Imposition of the death penalty for first degree murder is not unconstitutional per se. *Ibid.*

Verdict of jury imposing death sentence must be unanimous. *Ibid.*

It is for the Legislature, not the courts, to determine whether provision imposing death penalty for first-degree murder is or is not a wise policy for this State. *Ibid.*

Trial court did not err in the denial of defendant's motion to quash the bill of indictment on the ground the death penalty is used in a discriminatory manner against Negroes. *S. v. Rogers*, 411.

In rape prosecution, trial court did not err in refusing to allow witness to give his expert opinion that death penalty constitutes cruel and unusual punishment. *Ibid.*

Imposition of death penalty upon conviction of crime of rape is not unconstitutional per se. *Ibid.*

Statement in record that State inquired of each prospective juror as to whether he believed in capital punishment is insufficient to show that prospective jurors opposed to capital punishment were challenged for cause. *Ibid.*

Defendant awarded new trial by Supreme Court after receiving sentence of life imprisonment upon conviction of rape may be tried again for his life at his new trial. *S. v. Wright*, 242.

Except in capital cases, the presiding judge fixes the punishment for a convicted defendant within the limitations provided by the applicable statute. *S. v. Rhodes*, 584.

§ 138. Severity of Sentence

Upon appeal from inferior court for trial de novo in the superior court, superior court may impose punishment in excess of that imposed in the inferior court. *S. v. Morris*, 50.

Defendant who has served one-fourth of his sentence is eligible for parole. *S. v. Johnson*, 264.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court

In capital cases, the Supreme Court will review the record and take cognizance of prejudicial error ex mero motu. *S. v. Atkinson*, 288.

The Supreme Court will take notice ex mero motu of a defect or fatal error which appears upon the face of the record proper in matters of importance or to prevent injustice. *S. v. Conrad*, 342.

Supreme Court reviews decision of Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. *S. v. Parrish*, 69.

CRIMINAL LAW—Continued

Supreme Court will not pass upon constitutional questions not timely raised in trial court or passed upon in the Court of Appeals. *Ibid.*

Although no question as to error in the charge was presented to the Court of Appeals, the Supreme Court, in the exercise of its supervisory powers, will consider the charge when necessary to determine the significance of the jury's verdict. *S. v. Jones*, 432.

§ 152. Appeals in Forma Pauperis

Statutes dealing with appointment of counsel to represent indigent criminal defendants upon appeal and permitting them to appeal in forma pauperis have no application to appeals from juvenile proceedings in the district court. *In re Burrus*, 517.

§ 153. Jurisdiction of Lower Court Pending Appeal

After an appeal is taken, the court from which it is taken has no authority with reference to the appellate procedure except that specifically conferred upon it by statute. *S. v. Atkinson*, 288.

§ 154. Case on Appeal

Only the judge who tries the case can extend the time for serving case on appeal, and, having granted one extension, he may not grant another after expiration of the term at which judgment was entered. *S. v. Atkinson*, 288.

Purported extensions of time to serve case on appeal by the trial judge after the term has ended and purported extension of time granted by another judge were nullities. *Ibid.*

Additional extensions of time than that allowed by G.S. 1-282 may be obtained only by petition for certiorari directed to the court to which the appeal has been taken. *Ibid.*

Where statement of case on appeal from judgment imposing the death sentence was not served within the time allowed by valid order, the Supreme Court upon its own motion treats the appeal as a petition for certiorari and allows same. *Ibid.*

It is the duty of the appellant to see that the record is properly made up and transmitted to the appellate court. *Ibid.*

§ 159. Form and Requisites of Transcript

Appellant need not set forth in his case on appeal the evidence in its entirety. *S. v. Atkinson*, 288.

§ 161. Necessity for, Form and Requisites of Exceptions and Assignments of Error

An appeal is itself an exception to the judgment and brings up for review all matters appearing on the face of the record proper. *S. v. Atkinson*, 288.

Only assignments of error based on exceptions duly taken are considered on appeal. *S. v. Rogers*, 411.

§ 162. Objections, Exceptions and Motions to Strike

Objection must be made to an improper question without waiting for an answer and if the objection is not made in apt time, a motion to strike is addressed to the trial court's discretion. *S. v. Perry*, 565.

CRIMINAL LAW—Continued

§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit

Sufficiency of State's evidence in criminal case is reviewable on appeal without regard to whether motion for nonsuit was made in trial court. *S. v. Conrad*, 342.

§ 165. Exceptions and Assignments of Error to Remarks of Court

Comment by trial judge in ruling on solicitor's objection to defense counsel's questions concerning attempt of a key State's witness to commit suicide that he did not see the relevancy but did not see the harm is held not to constitute prejudicial error where the court required the witness to answer. *S. v. Conrad*, 342.

§ 168. Harmless and Prejudicial Error in Instructions

Where the court charges correctly at one point and incorrectly at another, a new trial is necessary. *S. v. Parrish*, 69.

New trial must result when ambiguity in the charge affords opportunity for the jury to act upon a permissible but incorrect interpretation. *Ibid.*

Isolated portions of the charge will not be held prejudicial when the charge as a whole is correct. *S. v. Gatling*, 625.

Technical errors in the charge which could not have affected the result will not be held prejudicial. *Ibid.*

When information as to punishment in noncapital cases is inadvertently given to the jury, the error will be evaluated like any other. *S. v. Rhodes*, 584.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Admission of technically incompetent evidence will not result in new trial where defendant was not prejudiced thereby. *S. v. Williams*, 77.

Admission of testimony over objection is ordinarily rendered harmless when defendant introduces similar testimony. *S. v. Robbins*, 537.

In rape prosecution, objection to testimony as to identification of shoes allegedly worn by defendant on night of crime is waived where testimony of same import is thereafter admitted without objection. *S. v. Rogers*, 411.

§ 170. Harmless and Prejudicial Error in Remarks of Court

Any reference by the judge or prosecuting attorney to the possibility of a parole is prejudicial error. *S. v. Rhodes*, 584.

Trial court did not err in asking deputy sheriff leading questions on a voir dire hearing in the absence of the jury. *S. v. Robbins*, 537.

§ 176. Review of Judgment on Motion to Nonsuit

Where defendant offered evidence after his motion for nonsuit at the close of the State's evidence, the court on appeal must act in the light of all the evidence. *S. v. Robbins*, 537.

§ 178. Law of the Case

Where Supreme Court passed upon admissibility of confession in former appeal of same case, reconsideration by Court of admissibility of such statement at defendant's retrial is precluded by doctrine of law of the case. *S. v. Wright*, 242.

DAMAGES

§ 5. Damages for Injury to Real Property

The right to recover damages for injury to property is a property right. *Hagins v. Redevelopment Comm.*, 90.

§ 13. Competency of Evidence on Compensatory Damages

Where parties stipulate part of damages recoverable, if any, neither workmen's compensation award by Industrial Commission in another proceeding, nor portions of defendants' further answer with reference thereto, are admissible in evidence. *Wiles v. Mullinax*, 473.

DECLARATORY JUDGMENT ACT

§ 1. Nature of Remedy

Declaratory Judgment Act furnishes proper method for determining controversy relative to construction and validity of a statute. *Raleigh v. R. R. Co.*, 454.

Parties cannot confer jurisdiction upon a court in declaratory judgment proceeding. *Ibid.*

No justiciable controversy is presented where parties have submitted to court for determination the validity of a proposed ordinance which would require defendant railroad to bear entire expense of reconstructing an overpass. *Ibid.*

§ 2. Proceedings

If complaint sets forth a genuine controversy justiciable under Declaratory Judgment Act, it is not demurrable. *Machine Co. v. Newman*, 189.

DESCENT AND DISTRIBUTION

§ 1. Nature and Titles by Descent

Right to take property by descent is mere privilege and not natural or inherent right. *Vinson v. Chappell*, 234.

Legislature has power to determine who shall take property by descent. *Ibid.*

An estate must be distributed among heirs and distributees according to the law as it exists at the time of the death of the ancestor. *Ibid.*

§ 9. Collateral Heirs of the Blood of the Ancestor

Second cousins are related in the sixth degree of kinship. *S. v. Allred*, 554.

DISORDERLY CONDUCT

§ 1. Nature and Elements of the Offense

In this juvenile court proceeding to determine delinquency for alleged violation of State law, the statute prohibiting disorderly conduct is not unconstitutional for vagueness. *In re Burrus*, 517.

DIVORCE AND ALIMONY

§ 5. Recrimination

Defense of recrimination is recognized in this State, and burden of establishing such affirmative defense is on person pleading it. *Hicks v. Hicks*, 370.

DIVORCE AND ALIMONY—Continued

G.S. 50-10 renders husband incompetent to testify as to adultery of wife to establish defense of recrimination in bar of wife's cross-claim for alimony without divorce. *Ibid.*

§ 14. Adultery

In husband's action for absolute divorce on ground of statutory separation, G.S. 50-10 renders husband incompetent to testify as to adultery of wife to refute wife's allegation of willful abandonment and to establish defense of recrimination in her cross-action for alimony without divorce. *Hicks v. Hicks*, 370.

§ 16. Alimony Without Divorce

An action for alimony without divorce under former G.S. 50-16 is a divorce action within the purview of that portion of G.S. 50-10 which controverts all material facts in every divorce action. *Hicks v. Hicks*, 370.

Provision of G.S. 50-10 which prohibits husband or wife from testifying to prove adultery is applicable to actions for alimony without divorce. *Ibid.*

In husband's action for absolute divorce on ground of statutory separation, G.S. 50-10 renders husband incompetent to testify as to adultery of wife to refute wife's allegation of wilful abandonment and to establish defense of recrimination in her cross-action for alimony without divorce. *Ibid.*

ELECTIONS

§ 1. Time of Holding Election

The sales-tax election to be held in each county on 4 November 1969 is not a general election within the meaning of N. C. Constitution, Art. XIII, § 2; consequently, the constitutional amendments proposed by the 1969 General Assembly should not be submitted to the voters at this election. *Advisory Opinion in re Sales-tax Election of 1969*, 283.

ELECTRICITY

§ 2. Control and Regulation of Service to Customers

Unless compelled by some cogent reason, one seeking electric service should not be denied the right to choose between vendors. *Utilities Comm. v. Electric Membership Corp.*, 250.

The Utilities Commission is a creature of the Legislature and has no authority to restrict competition between suppliers of electricity except insofar as that authority has been conferred upon it by statutes. *Ibid.*

"Premises", as that word is defined in G.S. 62-110.2(a)(1), embraces the manufacturing plant of an electric consumer and not the tract upon which it is located. *Ibid.*

Where location of manufacturer's plant building was outside a municipality and was not wholly within 300 feet of any line of any electric supplier, and was not partially within 300 feet of the lines of two or more electric suppliers, manufacturer initially requiring electric service after April 20, 1965 had the right to choose public utility, rather than electric membership corporation, as its supplier of electricity, and the Utilities Commission is not authorized to forbid the public utility to serve the plant merely because the electric membership corporation desires to perform the service and can reach the plant by relatively short extension of its lines across a highway while the public utility must build approximately four miles of line, substantially duplicating membership corporation's line, in order to reach the plant. G.S. 62-110.2(b)(5). *Ibid.*

EMINENT DOMAIN

§ 1. Nature and Extent of Power

The right of eminent domain is not conferred by constitutions but is inherent in sovereignty, although its exercise is limited by the constitutional requirements of due process and payment of just compensation for property condemned. *S. v. Club Properties*, 328.

A statute which merely sets forth a mode of procedure will not impliedly grant the power of eminent domain. *Ibid.*

Where a partial benefit at least accrues to the State, it may properly exercise its power of eminent domain for the benefit and use of the United States except in connection with uses which are exclusively national in character. *Ibid.*

§ 3. "Public Purpose"

Condemnation by the State of Outer Banks property for conveyance to the U. S. for a national seashore park is a condemnation for a public purpose. *S. v. Club Properties*, 328.

Where a partial benefit at least accrues to the State, it may properly exercise its power of eminent domain for the benefit and use of the United States except in connection with uses which are exclusively national in character. *Ibid.*

§ 4. Delegation of Power

The Department of Administration, as land acquisition agent for the State and its agencies, can only effect the condemnations which the legislature authorizes and, in the absence of specific legislative authority, has no power to condemn Outer Banks property for conveyance to the U. S. for a national seashore park. *S. v. Club Properties*, 328.

Statutes conferring the power of eminent domain should be strictly construed. *Ibid.*

§ 7. Proceedings to Take Land and Assess Compensation

Allegations by the condemnor that it has complied with statutory procedural requirements are a prerequisite in any action to condemn land. *S. v. Club Properties*, 328.

When the condemnor seeks to follow the procedure permitted by G.S. Ch. 40, his petition must contain a description of the property actually in litigation and not merely a description of the entire tract. *Hughes v. Highway Comm.*, 121.

§ 13. Actions by Owner for Compensation or Damages

Landowner's special proceeding, which was instituted against Highway Commission and municipality for compensation for land allegedly taken for highway purposes, does not constitute lis pendens under G.S. 40-26 so that persons acquiring title while the action was pending take title subject to the proceeding and the consent judgment entered therein. *Hughes v. Highway Comm.*, 121.

The method prescribed by G.S. Ch. 40 for arriving at compensation for condemnation of land for highway purposes is open to the landowner as well as the Highway Commission, although the landowner may not maintain a proceeding under this chapter unless there has been a taking under the power of eminent domain. *Ibid.*

ESCAPE

§ 1. Elements and Prosecutions for Escape

Document committing defendant to prison fully complied with statute and was admissible in evidence to show lawfulness of defendant's confinement. *S. v. Cooper*, 283.

In escape prosecution, there is a fatal variance between pleadings and proof where the indictment charged that defendant failed to return on a work-release pass and the evidence was that defendant was granted a week-end leave to visit his home and family. *S. v. Cooper*, 283.

ESTOPPEL

§ 3. Estoppel by Record

On appeal, parties may not take position contrary to that taken in their pleadings. *Hughes v. Highway Comm.*, 121.

EVIDENCE

§ 3. Facts Within Common Knowledge

It is a matter of common knowledge that a locomotive headlight casts an intense but narrow beam far ahead in order that the train crew may spot defects in the rails or obstructions on the roadbed. *Jernigan v. R. R. Co.*, 277.

§ 5. Burden of Proof

Plaintiff must allege and prove all essential elements of his cause of action, even though stated in negative form. *Wiles v. Mullinax*, 473.

§ 9. Burden of Proof on Defenses and Counterclaims

Affirmative defenses are those which, in their nature, admit the matters so alleged by the plaintiff but assert other matters which, if true, will defeat plaintiff's right to recover. *Wiles v. Mullinax*, 473.

§ 12. Communications Between Husband and Wife

In husband's action for absolute divorce on ground of statutory separation, G.S. 50-10 renders husband incompetent to testify as to adultery of wife to refute wife's allegation of wilful abandonment and to establish defense of recrimination in her cross-action for alimony without divorce. *Hicks v. Hicks*, 370.

§ 22. Evidence at Former Proceeding

Trial court erred in admission of findings of fact in opinion and award of Industrial Commission in another proceeding where defendants were not parties to the proceeding before the Commission. *Wiles v. Mullinax*, 473.

§ 48. Competency and Qualification of Experts

In the absence of a request by appellant for a finding by the trial court as to the qualifications of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. *S. v. Perry*, 565.

GRAND JURY

§ 1. Selection and Qualification

The use of a jury box containing only the names of property owners is not *per se* discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. *S. v. Rogers*, 411.

The fact that the county commissioners used only the names on the tax records in making up the jury list and jury box from which the grand and petit juries were chosen and did not also use "a list of names of persons who do not appear on the tax lists" as directed by G.S. 9-1 does not show racial discrimination in the selection of prospective jurors. *Ibid.*

§ 3. Challenge to Composition of Grand Jury

Failure of county commissioners to include as source material for the jury list not only the tax records but also "a list of names of persons who do not appear upon the tax lists" as authorized by G.S. 9-1 does not void a bill of indictment returned by a grand jury drawn from a jury box so composed. *S. v. Rogers*, 411.

Trial court did not err in denial of motion to quash indictment on ground that Negroes were systematically excluded from grand jury where only evidence in support of the motion was a transcript of testimony presented upon the same motion in another case. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 4. What Constitutes a State Highway

Cost allocation formula for grade crossing safety devices and limitation on percentage of such costs to be borne by railway in G.S. 136-20 does not apply where the streets involved are not part of the State highway system. *R. R. Co. v. Winston-Salem*, 465.

Evidence held sufficient to support findings that streets in question are not link or part of State highway system. *Ibid.*

§ 10. Obstruction of Public Roads

In juvenile proceeding to determine delinquency for alleged violations of State law, statute prohibiting the wilful standing, sitting or lying upon the highway so as to impede traffic is not unconstitutional for vagueness. *In re Burrus*, 517.

HOMICIDE

§ 2. Parties and Offenses

In order to convict defendant as accessory before the fact to murder of her husband, State must satisfy jury from the evidence beyond a reasonable doubt that the principal felon named in the indictment committed the murder. *S. v. Benton*, 378.

§ 4. Murder in the First Degree

Murder in the first degree is the unlawful killing of a human being with malice, premeditation and deliberation. G.S. 14-17. *S. v. Moore*, 198; *S. v. Robbins*, 537.

A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. *S. v. Robbins*, 537.

Malice exists as a matter of law whenever there has been an unlawful

HOMICIDE—Continued

and intentional homicide without excuse or mitigating circumstances. *S. v. Moore*, 198.

No fixed length of time is required for the mental processes of premeditation and deliberation. *S. v. Walters*, 615.

§ 5. Murder in the Second Degree

Specific intent to kill is not an element of second-degree murder. *S. v. Mercer*, 108.

§ 6. Manslaughter

One who handles a firearm in a reckless manner and thereby unintentionally causes death of another is guilty of involuntary manslaughter. *S. v. Moore*, 198.

§ 7.5. Unconsciousness

Insanity is incapacity, from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto; in contrast, one who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong. *S. v. Mercer*, 108.

Unconsciousness is never an affirmative defense. *Ibid.*

Person who is unconscious when he commits a criminal act generally cannot be held responsible therefor. *Ibid.*

In homicide prosecution, it is error for the court to restrict consideration of defendant's evidence of unconsciousness to the element of premeditation and deliberation in first-degree murder. *Ibid.*

Unconsciousness and insanity are separate grounds for exemption from criminal responsibility. *Ibid.*

A jury finding that defendant intentionally shot the deceased and thereby proximately caused his death negates and refutes any contention that defendant was then unconscious; notwithstanding such a finding by the jury, the defendant is exempt from criminal responsibility if he satisfies the jury he was insane when he inflicted the fatal injury. *Ibid.*

§ 11. Accidental Death

Accidental killing is not an affirmative defense. *S. v. Mercer*, 108; *S. v. Moore*, 198.

§ 12. Indictment

Indictment is insufficient to charge defendant as accessory before the fact to the murder of her husband where it alleged that defendant counseled and procured Raymond Epley to "kill and murder Raymond Epley" and that Raymond Epley consequently murdered defendant's husband. *S. v. Benton*, 378.

§ 14. Presumptions and Burden of Proof

State always has the burden to prove an unlawful killing. *S. v. Moore*, 198.

When State satisfies jury from the evidence that defendant intentionally shot deceased and thereby caused his death, presumptions arise that the killing was (1) unlawful and (2) with malice, constituting second-degree murder. *S. v. Mercer*, 108.

§ 15. Relevancy and Competency of Evidence

In prosecution charging defendant with first degree murder of his wife, evidence of defendant's prior assault on his wife is admissible. *S. v. Moore*, 198.

HOMICIDE—Continued

Testimony of defendant, who was a policeman by occupation, that he carried a pistol at the time of the homicide because he was instructed at the Institute of Government with respect to the right of off-duty peace officers to be armed was properly excluded as hearsay. *S. v. Walters*, 615.

§ 17. Evidence of Threats, Motive and Malice

Evidence that just a few minutes before his wife was shot defendant had announced his intention to kill her tends to show premeditation and deliberation as well as malice. *S. v. Moore*, 198.

§ 18. Evidence of Premeditation and Deliberation

Premeditation and deliberation may be proved by circumstantial evidence. *S. v. Walters*, 615.

In determining whether a killing was with premeditation and deliberation, the circumstances to be considered include: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; and (4) the dealing of lethal blows after deceased has been felled and rendered helpless. *Ibid.*

§ 20. Demonstrative Evidence; Photographs and Physical Objects

In a consolidated trial of defendant for three homicides, four photographs depicting substantially the same scene which were identified as accurate representations of the clothed dead body of one victim at the crime scene and blood where another victim was found when officers arrived are competent for illustrative purposes, and whether all or a less number should have been admitted was within the discretion of the trial judge. *S. v. Mercer*, 108.

Three photographs of the deceased's body at the funeral home with projecting probes indicating the point of entry, the course, and the point of exit of the bullet that caused his death are inflammatory and have no probative value in respect to any issue for determination by the jury where the evidence is uncontradicted as to the cause of death and all the evidence tended to show deceased was lying on a bed when shot. *Ibid.*

Court properly admitted photographs used by witnesses for the State to illustrate testimony concerning location and appearance of the place where victim's body was found buried and the condition of the body. *S. v. Atkinson*, 288.

A photograph of the body of the deceased is not rendered inadmissible by the fact that it was taken after the body had been moved from the place where originally found to the morgue or other place for examination. *Ibid.*

In homicide prosecution, bullets taken from defendant's body were properly identified and were therefore admissible in evidence. *S. v. Ross*, 550.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence *is held* sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the first degree of his wife. *S. v. Moore*, 198.

In order to convict defendant as an accessory before the fact to the murder of her husband, it is incumbent upon the State in defendant's trial to satisfy the jury from the evidence beyond a reasonable doubt that the principal felon named in the indictment murdered defendant's husband. *S. v. Benton*, 378.

On motion to nonsuit in a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in the light

HOMICIDE—Continued

most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. *S. v. Walters*, 615.

In prosecution for first-degree murder, there was substantial evidence of premeditation and deliberation on part of defendant to withstand motion for nonsuit. *Ibid; S. v. Robbins*, 537.

§ 23. Instructions

In prosecution of defendant as accessory before the fact to murder of her husband, trial court erred in giving jury instructions which implied or assumed that the crime had been committed by the principal felon named in the indictment. *S. v. Benton*, 378.

§ 24. Instructions on Presumptions and Burden of Proof

Defendant has burden of proving self-defense or mitigation to satisfaction of jury, not by the greater weight of the evidence or beyond a reasonable doubt. *S. v. Freeman*, 662.

Defendant was not prejudiced by trial court's erroneous instruction that burden on defendant to prove to satisfaction of jury circumstances which would reduce second-degree murder to manslaughter or establish self-defense required a higher degree of proof than proof by the greater weight of the evidence, where jury returned a verdict of first-degree murder and the evidence did not entitle defendant to instructions upon mitigation or self-defense. *Ibid.*

§ 25. Instructions on First-Degree Murder

Where the trial court in first-degree murder prosecution correctly defines the term "malice", the court is not required to repeat the definition whenever the term is repeated in the charge. *S. v. Robbins*, 537.

§ 27. Instructions on Manslaughter

Where defendant's evidence raises an issue of his guilt of involuntary manslaughter, failure of the court to submit this issue to jury is prejudicial error. *S. v. Moore*, 198.

Where jury was properly instructed as to first-degree murder and second-degree murder and found defendant guilty of first-degree murder, error in charge on manslaughter was harmless. *S. v. Freeman*, 662.

§ 28. Instructions on Defenses

Where defendant testified he was completely unconscious of what transpired when deceased was shot, defendant is entitled to an instruction that jury should return a verdict of not guilty if in fact defendant was unconscious of what transpired when the crime occurred. *S. v. Mercer*, 108.

It is error for court to instruct upon principles relating to legal insanity where there is no evidence that defendant was legally insane. *Ibid.*

Defendant has burden of proving self-defense or mitigation to satisfaction of jury, not by the greater weight of the evidence or beyond a reasonable doubt. *S. v. Freeman*, 662.

Defendant was not prejudiced by trial court's erroneous instruction that burden on defendant to prove to satisfaction of jury circumstances which would reduce second-degree murder to manslaughter or establish self-defense required a higher degree of proof than proof by the greater weight of the evi-

HOMICIDE—Continued

dence, where jury returned a verdict of first-degree murder and the evidence did not entitle defendant to instructions upon mitigation or self-defense. *Ibid.*

§ 29. Instructions on Right of Jury to Recommend Life Imprisonment

In prosecution for first degree murder, trial court must instruct the jury that it might, in its unbridled discretion, render verdict of guilty with recommendation that punishment be life imprisonment which would then be binding upon the court in the matter of sentencing. *S. v. Atkinson*, 288.

§ 30. Submission of Lesser Degrees of Crime

In prosecution for first-degree murder, evidence neither required nor permitted the court to charge the jury that it might return a verdict of involuntary manslaughter. *S. v. Ross*, 550.

Defendant's evidence did not entitle him to instruction on involuntary manslaughter where it shows that defendant was the aggressor and that he intentionally discharged his pistol when it was pointed in deceased's direction. *S. v. Freeman*, 662.

§ 31. Verdict and Sentence

Decision of *U. S. v. Jackson* does not forbid court of this State to impose sentence of death pursuant to a verdict under G.S. 14-17. *S. v. Atkinson*, 288.

Former G.S. 15-162.1, which allowed defendant to plead guilty to first degree murder and receive a life sentence, did not discourage defendant from exercising his constitutional right to a jury trial where defendant entered a plea of not guilty and was tried by a jury. *Ibid.*

Imposition of the death penalty for first degree murder is not unconstitutional per se. *Ibid.*

Verdict of jury imposing death sentence must be unanimous. *Ibid.*

It is for the Legislature, not the courts, to determine whether provision imposing death penalty for first-degree murder is or is not a wise policy for this State. *Ibid.*

INDEMNITY

§ 3. Actions

For one defendant to establish right to indemnity from a second defendant, he must allege and prove (1) that the second defendant is liable to plaintiff and (2) that the first defendant's liability is derivative. *Anderson v. Robinson*, 132.

INDICTMENT AND WARRANT

§ 2. Return by Duly Constituted Grand Jury

Failure of county commissioners to include as source material for jury list "a list of the names of persons who do not appear upon the tax lists" as authorized by G.S. 9-1 does not void a bill of indictment returned by a grand jury drawn from jury box so composed. *S. v. Rogers*, 411.

§ 9. Charge of Crime

Charge in bill of indictment must be complete in itself. *S. v. Benton*, 378.

In an indictment containing several counts, each count must be complete within itself. *S. v. Jones*, 432.

The evidence cannot supply a fatal defect or omission in a bill of indictment. *S. v. Benton*, 378.

INDICTMENT AND WARRANT — Continued

§ 11. Identification of Victim

Indictment is insufficient to charge defendant as accessory before the fact to the murder of her husband where it alleges that defendant counseled and procured Raymond Epley to "kill and murder Raymond Epley" and that Raymond Epley consequently murdered defendant's husband. *S. v. Benton*, 378.

§ 13. Bill of Particulars

Trial court did not err in denying defendant's motion for bill of particulars setting forth names of "diverse others" referred to in conspiracy indictment. *S. v. Conrad*, 342.

§ 14. Grounds and Procedure on Motions to Quash

Trial court did not err in denial of defendant's motion to quash bill of indictment on ground that death penalty is used in a discriminatory manner against Negroes. *S. v. Rogers*, 411.

Trial court did not err in denial of defendant's motion to quash indictment on ground that he was only 14 years of age at the time of the alleged rape and had an I.Q. of only 63. *Ibid.*

Defendant's motion to quash the indictment on the ground that Negroes are systematically excluded from the administration of the court system is properly denied. *Ibid.*

INFANTS

§ 5. Appointment of Next Friend

There is no substantial difference between a guardian ad litem and a next friend. *Hagins v. Redevelopment Comm.*, 90.

§ 10. Commitment of Minors for Delinquency

A juvenile has no constitutional right to a jury trial or a public trial in a juvenile court proceeding on the issue of his delinquency. *In re Burrus*, 517.

Juvenile proceedings are not "criminal prosecutions," nor is a finding of delinquency in a juvenile proceeding synonymous with "conviction of a crime." *Ibid.*

The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. *Ibid.*

In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. *Ibid.*

Notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare and the notice must set forth the alleged misconduct with particularity. *Ibid.*

Where juveniles were disciplined pursuant to G.S. 110-21 for violations of State law, it is unnecessary upon appeal to determine whether further provisions of the statute are void for vagueness in failing to define the terms "unruly," "wayward," "misdirected," "disobedient," or "beyond the control of their parents." *Ibid.*

The juvenile statutes are not unconstitutional in that a juvenile may be committed "during minority" for a violation of State law, which may be a longer period of time than the criminal law visits upon an adult for violation of the same statute, since the protective custody of children under juvenile

INFANTS—Continued

laws cannot be equated with the trial and punishment of adults under the criminal statutes. *Ibid.*

Juvenile proceedings to determine delinquency must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. *Ibid.*

When the juvenile court finds that a child is delinquent, neglected or in need of more suitable guidance, the court may use any one of the alternative dispositions set forth in G.S. 110-29 but is not empowered to use two or more at the same time. *Ibid.*

Where the juvenile court placed each child on probation subject to the conditions named in the order, the court exhausted its immediate authority, and further provision of the order in each case which adjudged that the juvenile be committed to the custody of the county welfare department to be placed in a State institution for delinquents is unauthorized and must be deleted. *Ibid.*

When a juvenile is placed on probation, the judge determines the duration and conditions thereof, and may modify same at any time. *Ibid.*

Probation of a juvenile may be revoked at any time the court finds the conditions of probation have been breached, and the court may then commit the juvenile or make such other disposition as it might have made at the time the child was placed on probation. *Ibid.*

Statutes dealing with appointment of counsel to represent indigent criminal defendants upon appeal and permitting them to appeal in forma pauperis have no application to appeals from juvenile proceedings in the district court, such appeals being governed by statutes applicable to civil actions. *Ibid.*

INJUNCTIONS

§ 1. Nature and Grounds

An injunction will not issue to prevent that which has already been done. *Nicholson v. Education Assistance Authority*, 439.

§ 3. Mandatory Judgments

Neither mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary duty. *Electric Co. v. Turner*, 493.

§ 5. To Restrain Enactment or Enforcement of Ordinance

Constitutionality of a criminal ordinance may be challenged in action to enjoin its enforcement where rights of property or persons are involved. *Kresge Co. v. Tomlinson*, 1.

Retailers had no standing to attack provision of Sunday observance ordinance requiring grocery stores to cease operations between 10 a.m. and 12 noon on Sunday. *Ibid.*

§ 7. To Restrain Occupancy or Use of Land

Where the proposed use of land is unlawful, the owner of adjoining or nearby lands who will sustain special damage from the proposed use through a reduction in the value of his own property does have a standing to maintain an action to prevent such use. *Jackson v. Bd. of Adjustment*, 155.

§ 11. Injunctions Against Public Boards or Agencies

Where issuance of tax exempt revenue bonds by the State Education Assistance Authority for purpose of financing loans to college students does not

INJUNCTIONS — Continued

pledge the credit of the State, plaintiff can suffer no injury from the issuance of the bonds and is not entitled to injunctive relief. *Nicholson v. Education Assistance Authority*, 439.

Where expenditure of tax funds, even if unlawful, was an accomplished fact prior to the institution of plaintiff's action, plaintiff is not entitled to injunctive relief. *Ibid.*

Evidence held insufficient to warrant court in restraining administrative decision by State officials to call for new bids for television equipment. *Electric Co. v. Turner*, 493.

Action for mandatory injunction requiring defendants, officials of the State, to award contract for television equipment to plaintiff as lowest original bidder, is held to constitute action against the State which must be dismissed, the State not having consented to the suit. *Ibid.*

INSANE PERSONS

§ 2. Appointment of Guardian or Trustee

An adult plaintiff who is not an idiot or lunatic must be *non compos mentis* before the court has jurisdiction to appoint a next friend for him. *Hagins v. Redevelopment Comm.*, 90.

Incompetency to administer one's property depends upon the general frame and habit of mind and not upon specific actions such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. *Ibid.*

When a party's lack of mental capacity is asserted and denied — and the party has not previously been adjudicated incompetent to manage his affairs — he is entitled to notice and an opportunity to be heard before the judge can appoint either a next friend or a guardian *ad litem* for him. *Ibid.*

Where plaintiff has had neither notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue, order of trial court appointing an attorney as her next friend is void, and the attorney's settlements of her actions against a redevelopment commission for the destruction of property are not binding upon her, notwithstanding they were approved by the court. *Ibid.*

INSURANCE

§ 2. Brokers and Agents

Defendant insurance agents would not be liable in this action for damages allegedly sustained as result of their negligent failure to procure for plaintiff a renewal or rewriting of workmen's compensation insurance if they issued a binder for such coverage on behalf of either of two insurance companies, and if they had authority from either company to insure such binder for it. *Wiles v. Mullinax*, 473.

Testimony by insurance agent as to extent of his authority to bind an insurance company for a particular risk is competent upon that question, though not conclusive. *Ibid.*

Testimony by insurance agent that he had issued binder for a particular risk on behalf of an insurance company would be sufficient evidence to support a finding that he has such authority generally. *Ibid.*

Limitation placed by insurance company on authority of insurance agents to bind a risk which had been rejected by another insurer would deprive the agents of authority to issue such binder on behalf of the insurer after the agents were notified that another insurer refused to issue the proposed policy. *Ibid.*

INSURANCE—Continued

In action for damages from negligent failure of insurance agent to procure for plaintiff a renewal or rewriting of workmen's compensation insurance, trial court erred in admission of opinion and award of Industrial Commission finding that plaintiff has no such insurance on the date in question. *Ibid.*

§ 4. Binders

Construction of alleged insurance binders and their legal effect are questions for the court. *Wiles v. Mullinax*, 473.

In order for a binder to constitute a valid contract of insurance, agent who issues it must have actual authority from insurance company to issue binder on its behalf, and a limitation upon the authority of agent to issue such a binder, imposed by the insurance company and communicated to the agent, is effective though the limitation was not known to prospective insured. *Ibid.*

Testimony by an insurance agent as to the extent of his authority to bind an insurance company for a particular risk is competent upon that question, though not conclusive. *Ibid.*

An application form issued by an insurance company for use by its agents and acknowledged by defendant insurance agent to have been in his office at the time an alleged insurance binder was issued by the agent on behalf of the insurance company is competent upon the question of the authority of the agent to issue such a binder. *Ibid.*

Document setting forth terms of former workmen's compensation insurance policy issued to plaintiff by one company and document attached thereto purportedly binding a second company to provide like coverage for plaintiff upon expiration of the old policy *are held* sufficient, when construed together, to constitute a binder for the second company to provide such coverage effective upon expiration of the old policy. *Ibid.*

§ 116. Fire Insurance Rates

There is no presumption that a rate filing by the Rating Bureau is correct and proper. *In re Filing by Fire Ins. Rating Bureau*, 15.

Statutes delegating to Commissioner of Insurance authority to fix fire insurance rates comply with constitutional requirement that they prescribe clear standards to control Commissioner's discretion. *Ibid.*

Commissioner is not limited to consideration of experience of fire insurance business for period of not less than five years preceding period of investigation, but may also consider experience of still earlier years. *Ibid.*

Fire insurance rates fixed by Commissioner are presumed correct and proper. *Ibid.*

Opinion evidence as to the projection of the present and past cost trend, as a matter of law, is relevant to determination by Commissioner of probable loss experience of companies during life of policies to be issued in near future. *Ibid.*

At fire insurance rate rehearing, Commissioner erred in refusing to permit Rating Bureau to introduce evidence of changes in cost level originating subsequent to the rate filing. *Ibid.*

Determination by insurance companies of propriety of expenditures for operating costs is not binding upon the Commissioner in a rate making procedure. *Ibid.*

Commissioner must make specific findings of fact as to the percentage of earned premiums which constitute a reasonable profit. *Ibid.*

INSURANCE — Continued

Commissioner need not approve or disapprove a filing by the Rating Bureau in its entirety. *Ibid.*

A projection by the Commissioner of Insurance of past experience and present conditions into the future is presumed to be correct and proper if supported by substantial evidence, G.S. 58-9.3, and if he has taken into account all of the relevant facts which he is directed by the statute to consider. G.S. 58-131.2. *Ibid.*

JUDGES

§ 1. Regular Judges

Superior court judges are elected by the people of the State. *S. v. Rogers*, 411.

JUDGMENTS

§ 2. Time and Place of Rendition

Where trial judge announced at the conclusion of the evidence that he was going to find for plaintiff, and parties stipulated that the judgment could be signed at the next criminal session of another county, trial court had authority to change his decision and sign judgment in favor of defendant at the next criminal session of the stipulated county. *Cutts v. Casey*, 599.

§ 6. Modification and Correction of Judgments in Trial Court

During the term at which he enters judgments of nonsuit in plaintiff's actions, trial judge has the authority, upon his own motion and without giving notice, to vacate the nonsuits and to restore the cases to the docket; but in the absence of official notice that the cases have been reinstated, plaintiff is not charged with knowledge of any further proceedings in the cases. *Hagins v. Redevelopment Comm.*, 90.

§ 36. Parties Concluded

In action for damages resulting from negligent failure of defendant insurance agent to procure for plaintiff a renewal of workmen's compensation insurance, trial court erred in admission of findings in an opinion and award of Industrial Commission where defendants were not parties to that proceeding. *Wiles v. Mullinax*, 473.

§ 37. Matters Concluded in General

Determination by Commissioner of Insurance as to what percentage of earned premiums constitutes a fair and reasonable profit for a fire insurance company is not res judicata. *In re Filing by Fire Ins. Rating Bureau*, 15.

JURY

§ 3. Competency and Qualification of Jurors

Jurors are not necessarily biased in favor of conviction simply because they do not have scruples against capital punishment. *S. v. Williams*, 77.

Absent discrimination by race or other identifiable class, State may prescribe such qualifications for jurors as it deems proper. *S. v. Rogers*, 411.

§ 5. Selection of Jurors; Personal Disqualifications

The use of a jury box containing only the names of property owners is not *per se* discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. *S. v. Rogers*, 411.

§ 6. Examination of Jurors

It is not error to ask a prospective juror whether he believes in capital punishment. *S. v. Rogers*, 411.

JURY—Continued

§ 7. Challenges

Sentence of death cannot be carried out if jury which imposed it was chosen by excluding veniremen for cause simply because they voiced general objection to death penalty. *S. v. Williams*, 77.

Defendant is not denied right to impartial jury on issue of guilt by exclusion of jurors having scruples against capital punishment. *Ibid.*

Decision of *Witherspoon v. Illinois* does not apply where jury recommends life imprisonment. *Ibid.*

Statement in the record to the effect that all 50 prospective jurors questioned on voir dire were asked questions concerning capital punishment similar to those appearing in the record which were asked three prospective jurors is held not to disclose any violation of defendant's constitutional rights. *S. v. Atkinson*, 288.

Statement in record that State inquired of each prospective juror whether he believed in capital punishment is insufficient to show that prospective jurors opposed to capital punishment were challenged for cause. *S. v. Rogers*, 411.

In order to preserve an exception to the court's denial of a challenge for cause, defendant must (1) exhaust his peremptory challenges and (2) thereafter assert his right to challenge peremptorily an additional juror. *S. v. Allred*, 554.

In selecting the jury in a civil or criminal action, the court or any party to the action has the right to make inquiry as to the fitness and competency of any person to serve as a juror. *Ibid.*

A juror who is related to the defendant by blood or marriage within the ninth degree of kinship is properly rejected when challenged by the State for cause on that ground. *Ibid.*

While relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for challenge for cause, where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. *Ibid.*

Ordinarily, there would be no substantial basis for challenge for cause of a prospective juror related within the ninth degree to a State's witness if the testimony of the witness will be directed to proof of some formal matter or to some minor facet of the case. *Ibid.*

In this first-degree murder prosecution, trial court erred in disallowing defendant's challenge for cause of a prospective juror who stated upon voir dire examination that he and two of the State's witnesses were second cousins and that he had known them for 15 to 20 years. *Ibid.*

Defendant in a capital case has the right to challenge 14 jurors peremptorily without cause. *Ibid.*

Where trial court in a capital case erroneously disallowed defendant's challenge for cause of a prospective juror, and defendant exercised 14 peremptory challenges, including one for the juror for whom the challenge for cause was erroneously disallowed, trial court's refusal to allow defendant to challenge an additional juror on ground defendant has exhausted his peremptory challenges, held a denial of defendant's right under G.S. 9-21 to challenge 14 jurors peremptorily without cause. *Ibid.*

KIDNAPPING

§ 1. Elements of the Offense and Prosecutions

An instruction that the jury is to return a verdict of guilty of kidnapping if they should find "from the evidence beyond a reasonable doubt that this defendant did by the use of force, by the threat of force sufficient to cause the prosecuting witness to leave the place where she had a right to be and was and goes to some other place under the control and direction of defendant without any lawful authority," *held* without error. *S. v. Perry*, 565.

An instruction that kidnapping is the taking and carrying away of a human being by physical force or by constructive force unlawfully and without lawful authority, *held* sufficient. *Ibid.*

Evidence held sufficient for jury in kidnapping prosecution. *S. v. Williams*, 77.

LARCENY

§ 4. Warrant and Indictment

Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200. *S. v. Jones*, 432.

§ 8. Instructions

In larceny prosecution, refusal of court to give special instruction with respect to abandoned property was proper. *S. v. Parrish*, 69.

§ 9. Verdict, Judgment and Sentence

In a prosecution upon indictment alleging the larceny of personal property of a value in excess of $200, a felony, verdict of "guilty as charged in the bill of indictment" must be considered as a verdict of guilty of larceny of personal property of a value of $200 or less, a misdemeanor, where trial court failed to charge that the burden was on the State to satisfy the jury beyond a reasonable doubt that the value of the stolen property was more than $200; hence, judgment of three years' imprisonment imposed upon the jury's verdict is in excess of the legal maximum and is vacated and the cause remanded for pronouncement of judgment as for misdemeanor-larceny. *S. v. Jones*, 432.

LIMITATIONS OF ACTIONS

§ 2. Applicability to Sovereign

Statute of limitations runs against the sovereign where it is expressly named therein. *Pipeline Co. v. Clayton*, 215.

LIS PENDENS

The law as to lis pendens, G.S. 1-116 et seq., provides a definite method for giving constructive notice so that a search of known records will convert it into actual notice, and since application of this rule may work hardships in many instances, a strict compliance with its provisions is required. *Hughes v. Highway Comm.*, 121.

The rigor of the lis pendens rule has been softened by the equitable requirement that the means of information should be accessible to those who are careful enough to search for it, and it follows that this equitable require-

LIS PENDENS — Continued

ment would apply with equal force when a party is charged with notice by means other than lis pendens. *Ibid.*

Landowner's special proceeding, which was instituted against Highway Commission and municipality for compensation for land allegedly taken for highway purposes, does not constitute lis pendens under G.S. 40-26 so that persons acquiring title while the action was pending take title subject to the proceeding and the consent judgment entered therein. *Ibid.*

MANDAMUS

§ 2. Discretionary Duty

Neither mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary duty. *Electric Co. v. Turner*, 493.

§ 4. Administrative Bodies

Action to require defendants, officials of the State, to award contract to plaintiffs as lowest original bidder is held to constitute an action against the State which must be dismissed, the State not having consented to the suit. *Electric Co. v. Turner*, 493.

MASTER AND SERVANT

§ 89. Common-law Right of Action Against Third Person Tortfeasor

Where an employee subject to the Workmen's Compensation Act is injured or killed as a result of the negligence of a third party, recovery for injury or death in a tort action against the third party must be distributed by the Industrial Commission according to the order of priority set out in G.S. 97-10.2(f)(1). *Byers v. Highway Comm.*, 229.

Superior Court erred in setting aside order of Industrial Commission directing that entire amount recovered in wrongful death action brought by the personal representative of a deceased employee be paid to the employer in satisfaction of its subrogation rights under G.S. Ch. 97. *Ibid.*

§ 96. Review in Superior Court and Court of Appeals

On appeal from Industrial Commission, superior court has no authority to make independent findings of fact. *Byers v. Highway Comm.*, 230.

In case the findings of the Industrial Commission are insufficient upon which to determine the rights of the parties, the court may remand the proceeding to the Commission for additional findings; in no event may the court make findings of its own. *Ibid.*

MUNICIPAL CORPORATIONS

§ 8. Validity and Attack on Ordinances

Courts will not inquire into motives of city council in enacting an ordinance valid of its face. *Kresge Co. v. Tomlinson*, 1.

§ 29. Nature and Extent of Municipal Police Power

Delegation to municipal corporation of the power to legislate concerning local problems is an exception to the general rule that legislative powers may not be delegated. *Jackson v. Bd. of Adjustment*, 155.

Municipal ordinances enacted in the exercise of the police power are sub-

MUNICIPAL CORPORATIONS—Continued

ject to the same constitutional limitations as are the police powers exercised directly by the State. *Raleigh v. R. R. Co.*, 454.

Police powers of a municipality are to be discharged through provisions of ordinances. *Ibid.*

§ 30. Zoning Ordinances

If purported zoning ordinance amendment permitting a use of property forbidden by the original ordinance is itself invalid, the prohibition upon the use remains in effect. *Jackson v. Bd. of Adjustment*, 155.

Where the proposed use of land is unlawful, the owner of adjoining or nearby lands who will sustain special damage from the proposed use through a reduction in the value of his own property does have a standing to maintain an action to prevent such use. *Ibid.*

§ 32. Regulations Relating to Public Morals

City of Raleigh Sunday observance ordinance does not violate the "establishment clause" of the First Amendment. *Kresge Co. v. Tomlinson*, 1.

§ 33. Regulation and Authority Over Streets

G.S. 136-20 and G.S. 62-237 do not establish a State policy with respect to the allocation of costs of grade crossing safety devices and other grade crossing improvements which is binding upon the governing body of a municipality in administering city streets. *R. R. Co. v. Winston-Salem*, 465.

§ 35. Regulation of Grade Crossings

Where a municipality, pursuant to its police power, seeks to compel a railroad to reconstruct a trestle at its full or partial expense, the allocation of the cost is a part of its legislative function. *City of Raleigh v. R. R. Co.*, 454.

Allocation of costs is a special factor to be considered by the courts in determining the validity of municipal ordinance requiring a railroad to reconstruct an overpass. *Ibid.*

A municipality has the power, in the exercise of its police power to promote public safety and convenience, to allocate to the railroad some portion of the cost of the installation and maintenance of automatic signal devices at grade crossings of its tracks with city streets. *R. R. Co. v. Winston-Salem*, 465.

Railway company's right to due process is not violated by allocation of a portion of the cost of installation and maintenance of automatic signal devices at grade crossings of its tracks with city streets unless that portion is so unreasonable as to constitute an arbitrary taking, and municipal ordinance requiring it to pay 63% of cost of installation and all of the annual cost of maintenance held constitutional. *Ibid.*

G.S. 136-20 and G.S. 62-237 do not establish a State policy with respect to the allocation of costs of grade crossing safety devices and other grade crossing improvements which is binding upon the governing body of a municipality in administering city streets. *Ibid.*

§ 39. Levy of Taxes

Legislation authorizing consolidation of four separate municipalities into the new municipality of Eden is not rendered invalid by fact that property within both the new municipality and unaffected sewerage district is subject to taxation by both authorities while property in the new municipality but outside of the sewerage district is subject only to city tax levies. *Dyer v. City of Leaksville*, 41.

NEGLIGENCE

§ 10. Concurring and Intervening Negligence

Allegation by plaintiff that defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader and is not admitted by demurrer. *Anderson v. Robinson*, 132.

§ 11. Primary and Secondary Liability

Rules for determining primary and secondary liability. *Anderson v. Robinson*, 132.

§ 25. Pleading as Between Defendants

In action for personal injuries based on active negligence of automobile driver, defendant driver may not maintain cross action against dealer who sold him the automobile for breach of warranty that automobile was free from mechanical defects. *Anderson v. Robinson*, 132.

§ 26. Presumptions and Burden of Proof

Plaintiff has the burden of showing defendant's negligence. *Jernigan v. R. R. Co.*, 277.

§ 35. Nonsuit for Contributory Negligence

Nonsuit is proper if plaintiff's own evidence so clearly establishes his contributory negligence as one of the proximate causes of his injury that no other reasonable inference may be drawn from that evidence. *Jernigan v. R. R. Co.*, 277.

Nonsuit for contributory negligence should be denied when opposing inferences are permissible from plaintiff's evidence. *Bowen v. Gardner*, 363.

NOTICE

§ 1. Necessity of Notice

The rule that parties to an action are fixed with notice of all motions or orders made during the term of court at which the cause is regularly calendared for trial unless actual notice is required by the constitution or statute must bend to embrace common sense and fundamental fairness. *Hagins v. Redevelopment Comm.*, 90.

Notwithstanding the silence of a statute, notice of motion is required where a party has a right to resist the relief sought by the motion and principles of natural justice demand that his rights be not affected without an opportunity to be heard. *Ibid.*

§ 2. Sufficiency and Requisites of Notice

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired had he made effort to learn the truth of the matters affecting his interest. *Hughes v. Highway Comm.*, 121.

Means of information to put a party on notice should be accessible to those who are careful enough to search for it. *Ibid.*

NUISANCE

§ 6. Parties

Where the proposed use of land is unlawful, the owner of adjoining or nearby lands who will sustain special damage from the proposed use through a reduction in the value of his own property does have a standing to maintain an action to prevent such use. *Jackson v. Bd. of Adjustment*, 155.

PLEADINGS

§ 14. Cross Action Against Co-Defendant

In action for personal injuries based on active negligence of automobile driver, defendant driver may not maintain cross action against dealer who sold him the automobile for breach of warranty that automobile was free from mechanical defects. *Anderson v. Robinson*, 132.

For one defendant to establish right to idemnity from second defendant he must allege and prove (1) that the second defendant is liable to plaintiff and (2) that the first defendant's liability to plaintiff is derivative. *Ibid.*

§ 19. Effect of Demurrer

A demurrer tests the sufficiency of the pleadings. *Machine Co. v. Newman*, 189.

When pleadings are challenged by demurrer, they are to be liberally construed with a view to substantial justice between the parties. *Ibid.*

Allegation by plaintiffs that defendants jointly and concurrently caused her injuries is a conclusion of the pleader and is not admitted by demurrer. *Anderson v. Robinson*, 132.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

Testimony by insurance agent as to extent of his authority to bind an insurance company for a particular risk is competent upon that question, though not conclusive. *Wiles v. Mullinax*, 473.

Limitation placed by insurance company upon authority of insurance agent to issue a binder for a particular risk is effective though the limitation was not known to the prospective insured. *Ibid.*

Testimony by insurance agent that he had issued binders for a particular risk on behalf of an insurance company would be sufficient evidence to support a finding that he had such authority generally. *Ibid.*

An application form issued by an insurance company for use by its agents and acknowledged by defendant insurance agent to have been in his office at the time an alleged insurance binder was issued by the agent on behalf of the insurance company is competent upon the question of the authority of the agent to issue such a binder. *Ibid.*

PROPERTY

§ 2. Title and Right to Possession of Personalty

A cause of action to quiet title to personal property may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law. *Machine Co. v. Newman*, 189.

§ 4. Criminal Prosecution for Wilful or Malicious Destruction of Property

Indictment under G.S. 14-49 should contain identifying description of the property which defendant damaged or attempted to damage by use of explosives. *S. v. Conrad*, 342.

Offense created by G.S. 14-94 and 14-94.1 is malicious injury or damage to real or personal property by use of high explosives, G.S. 14-94.1 providing additional punishment if the property is occupied. *Ibid.*

If the real or personal property is occupied at the time of the explosion,

PROPERTY — Continued

the indictment should be drawn under G.S. 14-94.1 and describe the occupied property and any other property injured or attempted to be injured by explosives. *Ibid.*

In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied building and malicious damage to an automobile, where evidence discloses but one explosion and jury returns verdict finding defendant guilty of maliciously damaging an occupied building, further verdict of guilty of malicious damage to an automobile will be treated as surplusage. *Ibid.*

QUIETING TITLE

§ 1. Nature and Grounds of Remedy

Cause of action exists in this State to quiet title to personal property. *Machine Co. v. Newman*, 189.

§ 2. Actions to Remove Cloud on Title

Complaint properly stated a cause of action to quiet title to shares of corporate stock. *Machine Co. v. Newman*, 189.

RAILROADS

§ 2. Maintenance of Tracks, Overpasses and Underpasses

Where trains cross a highway or street at grade, the crossing is hazardous to persons and property. *R. R. Co. v. Winston-Salem*, 465.

Automatic signaling devices at grade crossings benefit railroad by reducing its risk of liability and risk of damage to its own equipment. *Ibid.*

Municipal ordinances requiring a railroad company to pay 63% of the cost of installing automatic signal devices at two grade crossings and all of the annual cost of maintenance thereof held constitutional. *Ibid.*

G.S. 136-20 and G.S. 62-237 do not establish a State policy with respect to the allocation of costs of grade crossing safety devices which is binding upon the governing body of a municipality. *Ibid.*

Allocation of costs is a special factor to be considered by the courts in determining the validity of a municipal ordinance requiring a railroad to reconstruct an overpass. *Raleigh v. R. R. Co.*, 454.

Where a municipality, pursuant to its police power, seeks to compel a railroad to reconstruct a trestle at its full or partial expense, the allocation of the cost is a part of its legislative function. *Ibid.*

§ 5. Crossing Accidents

The law casts upon the operator of a motor vehicle a continuing duty to look and listen before entering upon a railroad crossing. *Jernigan v. R. R. Co.*, 277.

In action to recover for injuries received when plaintiff motorist collided at nighttime with a train engine standing on railroad crossing, plaintiff's evidence does not disclose contributory negligence as a matter of law. *Ibid.*

§ 6. Warning Devices; Flagmen

Plaintiff has a right to place some reliance on railroad's custom to have a flagman at a crossing. *Jerngian v. R. R. Co.*, 277.

RAPE

§ 1. Elements of the Offense

Rape is the carnal knowledge of a female person by force and against her will. *S. v. Primes*, 61.

The force necessary to constitute rape need not be actual physical force; fear, fright or coercion may take the place of force. *Ibid.*

While consent by the female is a complete defense to the charge of rape, consent which is induced by fear of violence is void and is no legal consent. *Ibid.*

§ 5. Sufficiency of Evidence

Evidence held sufficient for jury in rape prosecution. *S. v. Wright*, 242; *S. v. Williams*, 77; *S. v. Primes*, 61.

§ 6. Instructions and Submission of Lesser Degrees of the Offense

In rape prosecution, court did not err in failing to submit issue of assault with intent to commit rape. *S. v. Williams*, 77.

Where all the evidence tends to show an accomplished rape, and neither the State nor defendant offers any evidence to support a verdict of assault with intent to commit rape, the trial court is not required to submit to the jury the issue of guilt of the lesser offense. *S. v. Rhodes*, 584.

Although it was error for the trial judge in a prosecution for rape to tell the jury, in answer to their inquiry, the punishment for assault with intent to commit rape, the defendant was not prejudiced by the disclosure where all the evidence tended to show an accomplished rape and to prove defendant's guilt beyond a reasonable doubt and where neither the State nor defendant offered any evidence to support a guilty verdict of the lesser and included offense. *Ibid.*

In a prosecution for rape, the trial court in its charge correctly defined the offense of rape and instructed the jury as to its elements, and the verdicts which the jury might render upon the indictment. *S. v. Perry*, 565.

§ 7. Verdict and Judgment

Imposition of death penalty upon conviction of rape is not unconstitutional per se. *S. v. Rogers*, 411.

REGISTRATION

§ 3. Registration as Notice

Purchaser of land is charged with notice of the contents of the deeds in his grantor's chain of title. *Hughes v. Highway Comm.*, 121.

§ 5. Parties Protected by Registration

Examiner of real estate is entitled to rely with safety upon an examination of the records. *Hughes v. Highway Comm.*, 121.

SCHOOLS

§ 15. Interrupting or Disturbing Public School

G.S. 14-273, prohibiting the wilful interruption or disturbance of a school or injury to school property, is not unconstitutional for vagueness. *In re Burrus*, 517.

SEARCHES AND SEIZURES

§ 1. Generally; Search Without Warrant

The question of constitutional immunity to illegal searches and seizures does not arise where police officers were invited into defendant's home by defendant and his wife and no search was conducted. *S. v. Morris*, 50.

Deputy sheriff's entry into defendant's home without a warrant was lawful, and consequently his testimony relating to the crime scene inside the home was properly admitted into evidence, where the officer entered the dwelling at the request of defendant's brothers. *S. v. Robbins*, 537.

The reasonableness of a search without a warrant must be determined from the facts and circumstances of each individual case. *Ibid.*

SOLICITORS

Solicitor has the duty to see that a defendant is speedily brought to trial. *S. v. Johnson*, 264.

Solicitors are elected by voters of the solicitorial district. *S. v. Rogers*, 411.

STATE

§ 4. Actions Against the State

Action to require defendants, officials of the State, to award contract to plaintiffs as lowest original bidder is held to constitute an action against the State which must be dismissed, the State not having consented to the suit. *Electric Co. v. Turner*, 493.

§ 7. Filing of Claim and Procedure Under Tort Claims Act

Claimant must set forth name of alleged negligent State employee and act of negligence relied upon. *Crawford v. Board of Education*, 354.

Industrial Commission has jurisdiction to hear claim under Tort Claims Act, notwithstanding affidavit failed to name the allegedly negligent bus driver, where claimant was permitted to amend affidavit to name employee and defense counsel stipulated that the named person was a State employee and that he was not taken by surprise. *Ibid.*

In tort claim proceeding, defendant waived objection to conduct of second hearing by different hearing officer than one who conducted the original hearing. *Ibid.*

§ 8. Contributory Negligence

Case law concerning a minor's capability for negligence applies to claims under State Tort Claims Act. *Crawford v. Board of Education*, 354.

STATUTES

§ 1. Enactment

Ratification certificates signed by President of the Senate and Speaker of the House are conclusive proof that a non-revenue statute was properly enacted. *Dyer v. City of Leaksville*, 41.

The House and Senate journals, not the certificates of ratification signed by the presiding officers, are the exclusive sources of proof as to whether a revenue bill was properly enacted. *Ibid.*

§ 4. Construction in Regard to Constitutionality

Act of Legislature is presumed constitutional. *Vinson v. Chappell*, 234; *S. v. Anderson*, 168.

STATUTES — Continued

The Constitution controls over a statute. *Nicholson v. Education Assistance Authority*, 439.

If the valid provisions of a statute or ordinance are separable from invalid provisions therein, so that if the invalid provisions be stricken the remainder can stand alone, the valid portions will be given full effect if that was the legislative intent. *Jackson v. Bd. of Adjustment*, 155.

Constitutional requirements are met when the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly. *In re Burrus*, 517.

§ 5. General Rules of Construction

A statute must be construed in the light of the purpose to be accomplished. *In re Filing by Fire Ins. Rating Bureau*, 15.

Statutory interpretation by court will prevail over interpretation by administrative agency. *Pipeline Co. v. Clayton*, 215.

All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair or reasonable intendment. *Jackson v. Bd. of Adjustment*, 155.

When a statute or ordinance prescribes two or more prerequisites to official action, the presumption is that none of them is a mere repetition of the others. *Ibid.*

Although statutes dealing with the same subject matter must be construed *in pari materia* and harmonized to give effect to each, yet when the section dealing with a specific matter is clear and understandable on its face, it requires no construction. *Utilities Comm. v. Electric Membership Corp.*, 250.

Section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application, and especially so where the specific provision is the later enactment. *Ibid.*

SUNDAYS AND HOLIDAYS

Sunday observance law of the City of Raleigh does not violate "establishment clause" of the First Amendment. *Kresge Co. v. Tomlinson*, 1.

TAXATION

§ 2. Uniform Rule and Discrimination

Legislation authorizing consolidation of four separate municipalities into the new municipality of Eden is not rendered invalid by fact that property within both the new municipality and unaffected sewerage district is subject to taxation by both authorities while property in the new municipality but outside of the sewerage district is subject only to city tax levies. *Dyer v. City of Leaksville*, 41.

§ 9. Taxes Constituting Burden on Interstate Commerce

Sales tax on interstate transaction violates commerce clause of Federal Constitution; use tax does not discriminate against interstate commerce. *Pipeline Co. v. Clayton*, 215.

§ 15. Sales, Use and Transfer Tax

Sales and use taxes defined and distinguished. *Pipeline Co. v. Clayton*, 215.

Net effect of including interstate transportation charges in use tax base

TAXATION — Continued

and excluding intrastate transportation charges from sales tax base is to equalize the burden of tax on property sold locally and property purchased out of State. *Ibid.*

Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. *Ibid.*

§ 23. Construction of Taxing Statutes

Where the meaning of a tax statute is doubtful, it should be construed against the state and in favor of the taxpayer unless a contrary legislative intent appears. *Pipeline Co. v. Clayton*, 215.

§ 31. Liability for Sales and Use Taxes

Regardless of the time and place of passing title, the taxable event for assessment of the use tax occurs when possession of the property is transferred to the purchaser within the taxing state for storage, use or consumption. *Pipeline Co. v. Clayton*, 215.

Statute providing for inclusion in use tax base of transportation charges paid by purchaser for transporting tangible personal property from point of purchase outside of N. C. to point of use within State when purchaser takes title to the property at the point of origin outside the State held constitutional. *Ibid.*

Prior to July 1, 1967 cash discounts allowed purchaser for payment within a specified time were not properly included in use tax base. *Ibid.*

Statute of limitations bars action by Commissioner of Revenue for underpayment of use taxes which accrued more than three years prior to date that notice of assessment for underpayment was furnished to taxpayer. *Ibid.*

TORTS

§ 2. Joint Tortfeasor

Allegation by plaintiff that defendants jointly and concurrently proximately caused her injuries is a conclusion of the pleader and is not admitted by demurrer. *Anderson v. Robinson*, 132.

§ 3. Rights Inter Se of Defendants Joined by Plaintiffs

In action for personal injuries based on active negligence of automobile driver, defendant driver may not maintain cross action against dealer who sold him the automobile for breach of warranty that automobile was free from mechanical defects. *Anderson v. Robinson*, 132.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

In action in trespass to try title involving boundary dispute, court's conclusion that defendants are owners of lands described in answer is not supported by the findings where court failed to make findings specifically locating the disputed boundary lines. *Cutts v. Casey*, 599.

TRIAL

§ 6. Stipulations

Where amount of damages recoverable, if any, was stipulated, evidence which tended to show amount is incompetent. *Wiles v. Mullinax*, 473.

TRIAL—Continued

§ 21. Consideration of Evidence on Motion to Nonsuit

Consideration of evidence upon motion to nonsuit. *Bowen v. Gardner*, 363; *Price v. Tomrich Corp.*, 385.

§ 30. Effect of Nonsuit and of Refusal to Nonsuit

During the term at which he enters judgments of nonsuit in plaintiff's actions, trial judge has the authority, upon his own motion and without giving notice, to vacate the nonsuits and to restore the cases to the docket; but in the absence of official notice that the cases have been reinstated, plaintiff is not charged with knowledge of any further proceedings in the cases. *Hagins v. Redevelopment Comm.*, 90.

§ 31. Directed Verdict

State is not entitled to directed verdict on issue of obstructing navigable stream. *S. v. Brooks*, 175.

§ 35. Instructions on Burden of Proof

In action for damages resulting from negligent failure of defendant insurance agent to procure for plaintiff a renewal of workmen's compensation insurance, trial court improperly placed upon defendants burden of proving performance of their undertaking. *Wiles v. Mullinax*, 473.

Instruction erroneously placing burden of proof of issue upon defendant is not cured by earlier instruction correctly placing the burden of that issue upon plaintiff. *Ibid.*

§ 58. Findings and Judgment of the Court

When jury trial is waived, judge must give his decision in writing, stating findings of fact and conclusions of law separately. *Cutts v. Casey*, 599.

TRUSTS

§ 4. Charitable Trusts

An absolute restraint against alienation in a gift to a charitable trust is not void. *Trust Co. v. Construction Co.*, 399.

Trial court properly exercised its equitable jurisdiction to permit the sale of trust property on the ground that changed conditions unforeseen by the trustor threatened the purposes of the trust, even though trust indenture prohibited absolutely alienation of the property. *Ibid.*

§ 10. Duration and Termination of Trusts

A restraint on alienation is against public policy and void as to private trusts. *Trust Co. v. Construction Co.*, 399.

UNIFORM COMMERCIAL CODE

§ 3. Application

A contract of indorsement signed and delivered prior to the adoption of the UCC is not affected by changes made by the Code in Negotiable Instruments Law. *Yates v. Brown*, 634.

UTILITIES COMMISSION

§ 4. Jurisdiction of Commission Over Electric Companies

The Utilities Commission is a creature of the Legislature and has no authority to restrict competition between suppliers of electricity except insofar

UTILITIES COMMISSION — Continued

as that authority has been conferred upon it by statutes. *Utilities Comm. v. Electric Membership Corp.*, 250.

Where location of manufacturer's plant building was outside a municipality and was not wholly within 300 feet of any line of any electric supplier, and was not partially within 300 feet of the lines of two or more electric suppliers, manufacturer initially requiring electric service after April 20, 1965 had the right to choose public utility, rather than electric membership corporation, as its supplier of electricity, and the Utilities Commission is not authorized to forbid the public utility to serve the plant merely because the electric membership corporation desires to perform the service and can reach the plant by relatively short extension of its lines across a highway while the public utility must build approximately four miles of line, substantially duplicating membership corporation's line, in order to reach the plant. *Ibid.*

WATERS AND WATERCOURSES

§ 6. Title and Rights in Navigable Waters

State is not entitled to directed verdict on issue of obstructing navigable stream. *S. v. Brooks*, 175.

§ 7. Marsh and Tide Lands

Defendant's evidence held insufficient to show 30 years adverse possession of marshlands allegedly owned by the State. *S. v. Brooks*, 175.

WILLS

§ 1. Nature of Testamentary Disposition of Property

Right to make a will is not inherent or constitutional right but is conferred by statute. *Vinson v. Chappell*, 234.

§ 30. Presumptions

In making a will a husband or wife is presumed to have knowledge of and to have considered statutory right of spouse to dissent from will. *Vinson v. Chappell*, 234.

§ 42. Restrictions on Alienation or Partition

A restraint on alienation is against public policy and void as to private trusts. *Trust Co. v. Construction Co.*, 399.

§ 61. Dissent of Spouse

Right of husband or wife to dissent from will of spouse is conferred by statute and may be exercised at time and in manner fixed by statute. *Vinson v. Chappell*, 234.

Statute providing that second or successive spouse who dissents from will of his deceased spouse shall take only one-half of amount provided by Intestate Succession Act for surviving spouse if testator has surviving him lineal descendants by a former marriage but no surviving lineal descendants by second or successive marriage held constitutional. *Ibid.*

Where testator leaves surviving him a wife and children, the wife has a right to dissent from testator's will if the aggregate value of the provisions under his will for her benefit, when added to the value of the property or interests in property passing in any manner outside the will to her as a result of his death, was less than her intestate share. G.S. 30-1. *Ibid.*

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